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CALIFORNIA REPORTER

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43 Cal.App.2d 471

SHIMIZU v. KURTZ.

KURTZ v. SHIMIZU et al.

BURKE v. KURTZ.

Civ. 2578.

District Court of Appeal, Fourth District, California.

March 14, 1941.

1. Automobiles 🔑149

Failure to have lights on automobile conform to requirements of the Vehicle Code was of itself negligence. Vehicle Code, §§ 621, 624, St.1935, pp. 202, 204.

2. Appeal and error 🔑1008(1)

Whether failure to have lights on automobile illuminated or to have them conform to requirements of Vehicle Code was a proximate cause of collision between automobile and overtaking truck was a question of fact for the trial judge. Vehicle Code, §§ 621, 624, St.1935, pp. 202, 204.

3. Automobiles 🔑244(38)

Evidence that driver of automobile had been stopped one-half mile north of point of accident by members of highway patrol and was informed that taillight did not conform to the law, that one of the officers advised driver to either fix the taillight or pull off the road, that headlights of overtaking truck were illuminated and in good order, and that truck driver did not see the automobile in time to avoid collision, supported finding that defective lights on automobile were proximate cause of collision. Vehicle Code, §§ 621, 624, St.1935, pp. 202, 204.

4. Appeal and error 🔑1008(1)

Whether driver of overtaking truck was contributorily negligent in failing to see automobile with defective lights in time to avoid collision was a question of fact for the trial judge.

5. Automobiles 🔑244(44)

Evidence that overtaking truck was being driven at about 43 miles per hour in right traffic lane, that its headlights were illuminated and in good order, and that lights of automobile were either not illuminated or defective, supported finding that truck driver was not contributorily negligent in failing to see automobile in sufficient time to avoid collision. Vehicle Code, §§ 621, 624, St.1935, pp. 202, 204.

6. Appeal and error 🔑1010(1)

Where finding of the trial judge on a question of fact is supported by evidence, the finding cannot be disturbed by the District Court of Appeal.

◆

Appeal from Superior Court, Kern County; Pat R. Parker, Judge.

Action by B. T. Shimizu against I. A. Kurtz and John Clark, for property damage and for loss of use of truck as result of collision with automobile, wherein defendants countered with a cross-complaint against plaintiff and Bill Burke, and Burke replied with a cross-complaint against I. A. Kurtz for personal injuries. Clark died before trial, and the action was abated as to him. From judgments in favor of Shimizu and Burke against Kurtz, Kurtz appeals.

Affirmed.

James R. McBride, of Lindsay, for appellant.

Cecil E. Edgar, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment for damages resulting from a collision between two motor vehicles at about eight o'clock on the evening of May 20, 1939, on Highway No. 99, in Kern county.

B. T. Shimizu was the owner of a Ford V8 truck which, with its load of vegetables, was being driven by Bill Burke southerly on Highway No. 99. About 17 miles south of Bakersfield it ran into the rear of a model T Ford, on which was mounted an orchard spraying rig which belonged to I. A. Kurtz and John Clark, and which was being driven southerly on the highway by Clark.

The action was started with the complaint filed by Shimizu against Clark and Kurtz to recover his property damage and for loss of the use of his truck. Clark and Kurtz countered with a cross-complaint against Shimizu and Burke, who was brought in as a cross-defendant. Burke replied with another cross-complaint for personal injuries. Clark died before the trial and the action was abated as to him. Shimizu recovered judgment against Kurtz for $507.13 and Burke recovered judgment against him for $25.

Kurtz argues that the findings of negligence on the part of Clark and of no contributory negligence on the part of Burke are contrary to the evidence.

At the point of the accident the highway has four lanes, two for northbound traffic and two for southbound traffic, separated by a level strip of land about 30 feet wide.

Two members of the California Highway Patrol stopped Clark when he was about one-half mile north of the point of the accident. They informed him that the taillight and the headlights on the model T Ford were rather dim; that the taillight did not conform to the law as it could not be seen from a distance of 500 feet to the rear. Secs. 621 and 624, Vehicle Code, St. 1935, pp. 202, 204. One of the officers advised Clark to either fix the taillight or pull off the road and go to bed. He did neither. He continued on his way.

Burke testified that he was driving his truck southerly at about 43 miles per hour in the right traffic lane; that its headlights were illuminated and in good order; that the model T Ford had no lights; that he did not see it until he was right on top of it; that he swerved his truck to his left but could not avoid hitting it.

[1-3] The argument that this evidence shows no negligence on the part of Clark is without merit. It is clear that the lights on the model T Ford were either not illuminated or that they did not conform to the requirements of the Vehicle Code, which of itself is negligence. The trial judge found this was the proximate cause of the accident. This was a question of fact for the trial judge. He having resolved that question in favor of Shimizu and Burke, and as the evidence supports the finding, it is final here.

[4-6] Kurtz also argues that Burke was guilty of contributory negligence in failing to see the model T Ford in sufficient time to have avoided the collision. This presents another question of fact addressed to the trial judge who found that there was no contributory negligence. There being evidence to support that finding we cannot disturb it here.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

43 Cal.App.2d 335

McCOLGAN v. SCOBLE et al.

Civ. 11401.

District Court of Appeal, First District,
Division 1, California.

March 6, 1941.

Rehearing Denied April 5, 1941.

Hearing Denied May 1, 1941

1. Execution ⚷69

Though it is better practice to secure substitution of judgment debtor's executor for judgment debtor in the action in which judgment was secured, failure to secure such substitution does not require reversal of order allowing execution against the estate, if proper service is otherwise had.

2. Execution ⚷73

Under statute authorizing enforcement of or execution on judgment after five years from date of its entry on "due notice to judgment debtor", service need not be on judgment debtor or his executor personally, but service on acting attorney may suffice as "personal service". Code Civ.Proc. §§ 685, 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Service".

3. Execution ⚷73

Service upon former attorney for judgment debtor, who was not attorney for judg-

ment debtor at time of service, is insufficient to authorize execution on judgment more than five years after entry of judgment. Code Civ.Proc. § 685.

4. Execution ⚷73

Service of notice of motion for execution more than five years after entry of judgment was sufficient as "personal service" when made upon attorney for executrix of judgment debtor rather than attorney who represented judgment debtor at time of original judgment. Code Civ.Proc. §§ 685, 1011.

5. Execution ⚷73

If attorneys for executrix were not employed to represent executrix in the matter of judgment against decedent, that was a matter of defense and must be affirmatively shown in order to invalidate service on such attorneys of notice of motion for execution more than five years after entry of judgment. Code Civ.Proc. §§ 685, 1011.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Appeal from Adelaide McColgan against Thomas Scoble and another, wherein judgment was rendered against Samuel Weinstein. From an order allowing execution to issue more than five years after date of entry of judgment, and permitting plaintiff to present claim based on the judgment to Ellen Weinstein, as executrix of the estate of Samuel Weinstein, deceased, the named executrix appeals.

Affirmed.

Stern & Grupp, of San Francisco, for appellant.

Robert Miller Green and J. Albert Hutchinson, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Appellant, as executrix of the last will and testament of Samuel Weinstein, deceased, appeals from an order of the trial court allowing an execution to issue after five years from the date of entry of the judgment, and permitting respondent to present her claim based on the judgment to the appellant, as executrix of Weinstein's estate. The sole contention of appellant is that notice of the motion was not served upon her as provided by section 685 of the Code of Civil Procedure.

So far as pertinent here, that section provides: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor * * *". In the instant case, the notice of motion was not served on the appellant, but was served on the firm of attorneys who were then acting as the attorneys for her as executrix of the estate of Samuel Weinstein, the judgment debtor. Appellant appeared specially to object to the jurisdiction of the court. Her objections were overruled.

[1] The record does not show that appellant has been substituted as a party defendant in the action in which the judgment was secured against Samuel Weinstein. Although it undoubtedly is better practice to secure the substitution, it has been expressly held that failure to secure such substitution, if proper service is otherwise had, does not require the reversal of the order. In Tolle v. Doak, 12 Cal.App.2d 195, 199, 55 P.2d 542, 544, the court stated: "Although there was no formal order of substitution, under the circumstances shown in this case, this should not require a reversal of the order. Mooney v. Superior Court, 183 Cal. 705, 192 P. 542."

[2] This leaves for determination the sole question as to whether service upon the attorney for the executrix of the estate of the deceased debtor is a valid service within the meaning of section 685 of the Code of Civil Procedure. There are three cases discussing the question of what constitutes a proper service within the meaning of that section since its amendment in 1933 when the requirement was added that the motion could be granted only after "due notice to the judgment debtor". The first of these cases is Tolle v. Doak, supra, relied upon by appellant. In that case as in this, the notice of motion was served on the attorney for the executor of the estate of the judgment debtor. There too, as in this case, the executor attempted to appear specially to object on the ground that due notice had not been given. The trial court, as in the instant case, made its order allowing the execution. So far, the two cases present identical factual situations. But in the Tolle case, after the court made its order, the executor moved to vacate it on the ground that the court was without jurisdiction for the reason that the executor had not been

substituted for the judgment debtor. The court held (Second Appellate District, Division One) that, by making such a motion, the executor made a general appearance and must be deemed to have waived any defect in the service of the notice of motion. This did not constitute a holding that service on the attorney for the executor was insufficient as a matter of law. In effect, all the court held was that, without deciding whether service on the attorney for the executor was valid, in the particular case, there was another reason—a subsequent general appearance—that conferred jurisdiction on the court. It is true that the court in the course of its opinion stated that "as the statute is silent as to the manner of giving the notice personal service is required". Appellant interprets this to mean that service must be had on the judgment debtor or executor personally, and that service on an acting attorney is not sufficient. That this is not the correct interpretation of the statement is demonstrated by a later decision by the same District and Division of the Appellate Court. Widener v. Hartnett, 30 Cal.App.2d 165, 85 P.2d 925. In that case it was held that service upon the attorney of the judgment debtor, who was still alive, was personal service within the meaning of section 685 as interpreted in Tolle v. Doak, supra. The court predicated its decision upon section 1011 of the Code of Civil Procedure which provides that personal service may be had "by delivery to the party or attorney on whom the service is required to be made".

[3] The third case discussing this problem is Smith v. Smith, Cal.App., 108 P.2d 47. This involved an appeal from an order denying defendant's motion to recall and quash a writ of execution. The motion had been made on the ground that in issuing the execution under section 685, supra, the court had not acquired jurisdiction of the judgment debtor. There the service had been made on the former attorney of the judgment debtor. The evidence was uncontradicted that such attorney had been discharged long before the motion was made under section 685, supra. The court held that the service was insufficient. It distinguished Widener v. Hartnett, supra, on the ground that in that case "no proof was made that the attorney served with notice was not the acting attorney of the defendant at the time of such service". 108 P.2d 48.

From these cases, it is apparent that the following rules have been established:

1. A formal substitution of the executor for the judgment debtor is not indispensable to the jurisdiction of the court to issue its order for execution under section 685 of the Code of Civil Procedure. Tolle v. Doak, supra.

2. Service upon the attorney for the judgment debtor is sufficient. Widener v. Hartnett, supra.

3. Service upon the former attorney for the judgment debtor, where there is a showing that he was not the attorney for the judgment debtor at the time of service, is insufficient. Smith v. Smith, supra.

[4, 5] Applying these rules to the facts here presented, we are of the opinion that service upon the attorney for the executrix of the judgment debtor was a proper service. On the oral argument it was argued on behalf of appellant that, in the absence of service directly upon the executrix, service should have been had on the attorney who had been attorney for the judgment debtor at the time the original judgment was secured. That argument is not convincing. Even if such attorney had been acting as the attorney for the judgment debtor up until the time of the latter's death, such employment ceased upon the death. The purpose of section 685 in requiring service of the notice of motion is fully served by permitting service on the attorney for the executrix. The argument that there was no showing made that the attorneys for the executrix were attorneys for her in the particular matter before the court, and, therefore, that there was no proper service is equally unconvincing. The answer to this contention is that there was no showing to the contrary. If the attorneys in fact were not employed for the purpose of representing the executrix in the judgment matter, that was a matter of defense. Smith v. Smith, supra.

The order appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

43 Cal.App.2d 463

ROBBINS v. LAMBERT.

Civ. 6528.

District Court of Appeal, Third District, California.

March 13, 1941.

Hearing Denied May 8, 1941.

1. Officers ⚷100(2)

A county officer appointed to fill a vacancy is not entitled to the benefit of an increased salary during the term to which his predecessor was elected. Const. art. 11, § 5, as enacted in 1924.

2. Officers ⚷100(2)

Where, at time of election of a township justice of the peace, the salary was $15 a month, and justice resigned after serving for a short time when the salary was increased to $65 a month, a successor subsequently appointed in place of justice who had resigned was not entitled to increased salary under constitutional provision that compensation of any county, township, or municipal officer shall not be increased after his election or during his term of office. Const. art. 11, § 5, as enacted in 1924.

◆

Appeal from Superior Court, Sierra County; J. O. Moncur, Judge.

Proceeding by C. W. Robbins against Margaret Elaine Lambert, etc., for a writ of mandate to compel the defendant to pay a warrant for increased salary due to petitioner. From a judgment dismissing the petition, petitioner appeals.

Judgment affirmed.

W. E. Davies, of Marysville, for appellant.

Alfred R. Lowey, of Loyalton, for respondent.

PULLEN, Presiding Justice.

The following evidence was presented to the court as an agreed statement of fact:

"* * * During the year 1938, one Carle D. Ross was duly elected to the office of Justice of the Peace of Downieville Township, Sierra County, California; thereafter he duly qualified, assumed and regularly filled that office, beginning January 1939, the term of said office being four years from January 1, 1939, or until the close of the year 1943. The salary of said Justice, from long prior to 1939 and at the time of his election, as provided by law, was fifteen dollars ($15.00) per month.

"June 29, 1939, the said Justice resigned, and the Board of Supervisors accepted the said resignation July 5, 1939.

"Under date of July 10, 1939, the Board of Supervisors of Sierra County, California, amended or attempted to amend salary Ordinance No. 145, Sierra County Ordinances, and Section 17 thereof, by fixing the salary of the Justice of Peace of Downieville Township at Sixty-five Dollars ($65.00) per month, an increase of Fifty Dollars per month, declaring that an emergency existed and that the increased salary be effective immediately, this Ordinance being known as Salary Ordinance 146.

"Later, but on the same day, the said Board of Supervisors appointed the petitioner herein, C. W. Robbins, as Justice of the Peace of Downieville Township, Sierra County, California, and said Justice thereafter qualified and was thereafter paid the increased salary until and including January 1940. Thereafter, and on March 1, 1940, F. H. Turner, Auditor of Sierra County, California, issued Salary Warrant No. 266 in the sum of Sixty-five Dollars in favor of the petitioner, C. W. Robbins, who did then present the same to the respondent herein, Margaret Elaine Lambert, as Treasurer of Sierra County, California, and demand payment, but the respondent refused to pay or allow said Warrant out of the Salary Fund or the Treasury or any other Fund of Sierra County. * * *"

To the petition for a writ of mandate to compel the County Treasurer to pay the warrant for the increased salary a demurrer was interposed and sustained without leave to amend, and the writ was discharged. This appeal is from the order of dismissal.

Section 5 of article XI provides that "The compensation of any county, township or municipal officer shall not be increased after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he was elected or appointed."

[1, 2] It has, in Larew v. Newman, 81 Cal. 588, 23 P. 227, and Storke v. Goux, 129 Cal. 526, 62 P. 68, been held that a county officer appointed to fill a vacancy is not entitled to the benefit of an increased salary during the term to which his pred-

ecessor was elected. A constitutional provision similar to that quoted above. Art. XI, sec. 9, repealed in 1933, was held in Cox v. Jerome, 31 Cal.App. 97, 159 P. 884, and Kilroy v. Whitmore, 115 Cal.App. 43, 300 P. 851, to apply to township justices.

Petitioner contends the Larew and the Storke cases, supra, can be distinguished from the present case in that the statute there applicable provided that its provisions increasing the compensation "shall not affect the present incumbents". We do not consider that statutory provision added anything to the rights of the parties, for the Constitution seemed to have already provided for that situation.

It is the settled law of this state that a county officer appointed to fill a vacancy is not entitled to the benefit of an increased salary during the term to which his predecessor was elected. Larew v. Newman, 81 Cal. 588, 23 P. 227; Storke v. Goux, 129 Cal. 526, 62 P. 68.

In Larew v. Newman, supra, W. D. Egenhoff had, in 1882, been elected superintendent of schools of Mariposa county. He duly qualified as such superintendent and held office until March 19, 1884, when he resigned. On the same day W. H. Larew was appointed by the supervisors of the county "to serve the unexpired term of W. D. Egenhoff, resigned". Under such appointment Larew held office for the balance of the term. He was paid a salary therefor at the rate of $350 a year but contended he should have been paid at the rate of $650 per annum, and by mandamus sought to compel the auditor to draw a warrant for the amount he claimed due him.

When Egenhoff took office the salary was fixed by statute at $350 per annum. Afterward, and before he resigned, a General County Government Act had gone into effect fixing various salaries, and that of superintendent of schools at $650 per year. The act recited that the salary provisions "shall not affect the present incumbents", and also that a vacancy in an office should be filled by the supervisors, "the appointee to hold office for the unexpired term". The court there held that Larew merely stood in the shoes of his predecessor in the office and gained no additional rights, and the increased salary did not commence until after the expiration of the term for which Egenhoff had been elected.

In Storke v. Goux, supra, upon the death of the district attorney of Santa Barbara county in February, 1898, the supervisors, in March of that year appointed C. A. Storke. During his predecessor's term of office the salary had been $125 a month. A few months before his death a new County Government Act had gone into effect which fixed the salary at $208.33 a month. Storke sought to collect the increased compensation and urged the court to overrule the case of Larew v. Newman, supra, but this the court refused to do and held that the salary which attached to an office at the beginning of an official term, must continue without increase during the entire term for which the officer was elected, notwithstanding the creation of a vacancy in the term which might be filled by the appointment of another.

In Holbrook v. Board of Directors of Imperial Irrigation District, 8 Cal.2d 158, 64 P.2d 430, 431, the court carefully differentiated the "term of office" and the "tenure of office" and pointed out that the "term of an office" related to the office and not to the incumbent, and that in a "term" of office there may be several "tenures" but the term remains the same.

Appellant seeks support in Rice v. National City, 132 Cal. 354, 64 P. 580. There, Smith had been elected to the office of City Marshal in April, 1896, for the term of two years, and having qualified, entered upon the duties of that office at a salary of $40 a month. His term of office expired April 20, 1898. In March 1898 a new salary ordinance was passed providing that the city marshal should receive $60 a year. On April 11, 1898, Smith was again elected but failed to qualify. A vacancy was thereby created but Smith held over until his successor was elected and qualified. In June, 1898, the city trustees adopted a new ordinance raising the salary of city marshal from $5 a month to $25 a month. Thereupon Smith became a candidate for the office and was appointed by the trustees to fill the office. Certain taxpayers brought an action to enjoin the payment of the increased salary but the court held that the incumbency and the salary were for a new term, which began before Smith took over the office.

We see nothing in that case which would help appellant here. In the instant case, while the tenure may have changed, the original term had not yet expired. The Rice case, supra, is made somewhat confusing by using the language "term" of office when it apparently meant the "tenure" of office.

In Kilroy v. Whitmore, 115 Cal.App. 43, 300 P. 851, it was again held in effect that whenever new legislation is enacted which will have the effect of increasing the compensation to be paid to an incumbent officer, such legislation is to be postponed in its effect until the commencement of the new term of office to which the successor of the incumbent may be elected or appointed.

The judgment and order are affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

CROW v. MADSEN et al.

Civ. 2599.

District Court of Appeal, Fourth District, California.

March 12, 1941.

Rehearing Granted March 29, 1941.

See 111 P.2d 663.

1. Pleading 🔑87

Ordinarily, "laches" is an affirmative defense to be set up by way of answer.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

2. Trusts 🔑365(2)

Where beneficiary under will, on the filing by executor of report that no property or estate had come into his possession, appeared and contested the report, and the demurrer was sustained to her contest and she appealed, and judgment was affirmed on ground that she had pursued the wrong remedy, and that she should assert any rights she might have in an equitable action to impose a trust on the property, and a remittitur was issued on April 29, 1939, and action to have a trust imposed on the property was commenced on May 17, 1939, and her counsel were sincere in believing that they were pursuing the proper remedy in contesting the account in the probate proceeding, plaintiff was not guilty of "laches".

3. Trusts 🔑365(2)

One named as beneficiary by testatrix had no interest in testatrix' property during testatrix' life which would give beneficiary any reason to investigate a deed and assignment to testatrix' son of her interest in her deceased husband's estate, allegedly obtained from testatrix by her son through fraud, and hence was not guilty of "laches" which would preclude her from bringing an equitable action after death of testatrix to have a trust imposed on the property in the hands of the son of testatrix.

4. Equity 🔑72(1)

One element of "laches" is injury or prejudice caused by delay.

5. Executors and administrators 🔑516(6)

In action by beneficiary to have a trust imposed on property in hands of executor, on ground that executor had procured from testatrix a deed and assignment of testatrix' interest in the estate of her deceased husband during her life through fraud, after it was held by the District Court of Appeal that beneficiary pursued the wrong remedy in contesting executor's account in which he reported that no property or estate of testatrix came into his possession, beneficiary was required to allege and prove extrinsic fraud in order to successfully attack probate decrees, as distinguished from intrinsic fraud.

6. Judgment 🔑443(2, 3)

Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for new and fair hearing.

7. Judgment 🔑443(1), 444

A court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.

8. Judgment 🔑443(1)

Fraud vitiates everything, and a judgment equally with a contract.

9. Judgment 🔑443(1)

A judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument, will be set aside, but in general a court will not go again into the merits of an action for the purpose of detecting and annulling fraud.

10. Judgment 🔑443(1)

Equity will not grant relief because of fraud directly involved in the merits of an action or in any matter on which the judgment or decree was rendered.

11. Judgment 🔑443(1)

Judgments and decrees may be successfully attacked in equity where deeds or conveyances were directly involved in those judgments or decrees and were directly passed on there.

12. Judgment 🔑443(1)

Where there exists between the parties a confidential relationship, such as parent and child, or husband and wife, there is a duty imposed to deal fairly, not fraudulently, to disclose the true facts and not to deceive, and a breach of such duty may constitute "extrinsic fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

13. Judgment 🔑443(1)

Where a fiduciary relationship exists, such as guardian and ward, administrator and heir, executor and legatee, trustee and beneficiary, or principal and agent, there is a duty imposed to deal fairly, not fraudulently, to disclose the true facts and not to deceive, and a breach of that duty may constitute "extrinsic fraud".

14. Judgment 🔑443(1)

When a person is appointed by the probate court as a guardian, an executor, an administrator, or a trustee, he is an "officer of court" and "agent of court", and there is a duty imposed to deal fairly, not fraudulently, with the court, to disclose the true facts and not to deceive the court, and a breach of that duty may constitute "extrinsic fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Agent of Court" and "Officer of Court".

15. Appeal and error 🔑917(1)
Pleading 🔑214(1)

A demurrer to the amended complaint as a whole admitted the truth of all facts alleged, and, in considering the sufficiency of the pleading, the District Court of Appeal was required to assume the truth of the allegations.

16. Trusts 🔑107

Where testatrix' son during her lifetime had been her confidential adviser and the trusted manager of her affairs, and son came out of transaction owning all of testatrix' property, the law presumed fraud, and the burden of disproving such presumption was on the son in action by beneficiary under testatrix' will for a decree declaring that the son held the property in trust for the beneficiaries under the will.

17. Trusts 🔑365(3)

Where testatrix' son was her confidential adviser and the trusted manager of all her affairs, the confidential relationship, the reliance on the duty imposed by that relationship on the son to deal fairly and honestly and to disclose the true facts of any transactions, was sufficient excuse for testatrix' failure to discover son's alleged fraud in obtaining all of testatrix' property during the little more than seven months that testatrix lived after signing deed.

18. Trusts 🔑371(2)

In action by beneficiary under will for a decree declaring that testatrix' son held property in trust for the beneficiaries under the will, on ground that son was guilty of some fraud, it was incumbent on beneficiary to allege facts sufficient to support a finding and judgment that decree of distribution of the estate of testatrix' husband, distributing all of the property of that estate to testatrix' son eleven days before testatrix' death, was obtained by extrinsic fraud.

19. Trusts 🔑103(2)

Where testatrix' son who was her confidential adviser and the trusted manager of her affairs, through alleged fraud obtained all of her property, he was guilty of "extrinsic fraud" and when, on her death, he violated his duty as an officer of court and agent of court by concealing the facts, he was also guilty of "extrinsic fraud", and beneficiary under testatrix' will could maintain an action seeking a decree declaring that testatrix' son held the property in trust for the beneficiaries under the will.

20. Trusts 🔑108

In action by beneficiary under will for a decree declaring that testatrix' son held property obtained from testatrix in trust for the beneficiaries under testatrix' will, on ground that son had fraudulently procured the property from testatrix, will executed by testatrix after son obtained the property was of evidentiary value to disclose that testatrix did not know that she had conveyed all of her property to her son.

21. Wills ⇨6

Ordinarily, a beneficial owner may dispose of his or her interest in property by will.

22. Wills ⇨733(1)

The interest of a legatee under a will vests on the death of the testatrix.

23. Wills ⇨733(6)

When testatrix' will was admitted to probate, beneficiary thereunder for the first time had an interest in testatrix' property so that beneficiary could assert her right to it.

24. Trusts ⇨347

Beneficiary under testatrix' will was so adversely affected by decree of distribution in the estate of testatrix' husband, wherein testatrix' son succeeded in obtaining all of his father's property by filing a deed and an assignment to him by testatrix of all her interest, by allegedly exercising fraud on testatrix, as to enable beneficiary to maintain action against testatrix' son for a decree declaring that he held the property in trust for the beneficiaries under testatrix' will.

25. Limitation of actions ⇨179(2)

Where plaintiff alleged in action for a decree declaring that defendant held property in trust for beneficiaries under will, on ground that he had fraudulently obtained the property from testatrix, that plaintiff did not discover the fraud until November 10, 1936, and complaint was filed on May 17, 1939, the action was not barred by three-year limitation. Code Civ.Proc. § 338, subds. 3, 4.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Helen Crow against Martin C. Madsen, executor of the estate of Hanne Madsen, deceased, and others, for a decree declaring that Martin C. Madsen held property in trust for the beneficiaries under the will of Hanne Madsen, deceased, and particularly to the extent of the bequest made to plaintiff, with accrued interest. From a decree in favor of the defendants, the plaintiff appeals.

Judgment reversed with directions.

Chester R. Andrews and John J. Gallagher, both of Fresno, for appellant.

H. E. Barbour and W. B. Backlund, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after a demurrer to the amended complaint had been sustained without leave to amend.

The demurrer was general and also special on various grounds of uncertainty. As only four grounds are argued here we will consider the others abandoned and will pay no attention to them.

The grounds which we must consider are (1) laches of the plaintiff; (2) that the complaint fails to state a cause of action because in attacking two decrees in probate plaintiff alleges only intrinsic fraud and not the extrinsic fraud necessary to maintain her action; (3) that the complaint fails to allege that plaintiff had any interest in the property in question at the time of the decree of distribution under which defendants claim; (4) that plaintiff's action is barred by the provisions of subdivisions 3 and 4 of section 338 of the Code of Civil Procedure.

While the transcript does not give the date of filing the original complaint, counsel for defendants state that it was filed on May 17, 1939. The amended complaint was filed on October 17, 1939.

It is alleged that Hanne Madsen died testate on November 10, 1936; that on January 8, 1937, her will was admitted to probate and Martin C. Madsen appointed executor. A copy of the will is attached to the pleading. Helen Madsen, since married and now Helen Crow, the widow of a deceased foster son of Hanne Madsen, was bequeathed $3,100, and the balance of her estate was bequeathed to Martin C. Madsen, son of deceased. The will was executed on April 27, 1936.

It is further alleged that on April 6, 1937, the executor returned and filed a purported inventory of the estate of Hanne Madsen, in which it was stated that "no property or estate of the above named decedent has come into the possession or knowledge of the executor"; that on January 17, 1938, the executor returned and filed a purported final account and report as executor, and petition for discharge, in which he again stated "that no money or property of any kind came into the hands of your petitioner as such executor".

It is further alleged that Martin C. Madsen wrongfully, and with the intent to convert the property of Hanne Madsen to his own use, did not report, inventory, nor account for real and personal property which was and is the property of the estate of the deceased; (follows descriptions of four parcels of real property and seven groups of personal property); that he is claiming the property as his own by virtue of a deed and assignment from Hanne Madsen to himself, dated March 26, 1936, and recorded on the same day; that he filed the purported deed and assignment in the estate of Hans Madsen, deceased, the deceased husband of Hanne Madsen, and on October 30, 1936, caused the property to be distributed to himself; that he has no right, title or interest in the property except as trustee for the beneficiaries of the will of Hanne Madsen, deceased; that Hanne Madsen never at any time discovered or knew that Martin C. Madsen had attempted to obtain title to her property through the deed and assignment and the decree of distribution in the estate of Hans Madsen, deceased; that plaintiff did not know or discover that Martin C. Madsen made any claim to the property until November 10, 1936, when one of her attorneys delivered the will of Hanne Madsen to one of defendants' attorneys; that plaintiff and her attorney, through the attorney for defendants, learned for the first time of the claims of Martin C. Madsen and of the purported deed and assignment from Hanne Madsen and the decree of distribution in the estate of Hans Madsen, deceased; that during the life-time of Hanne Madsen, plaintiff inquired of her concerning her dealings with Martin C. Madsen; that Hanne Madsen was in entire ignorance of the purported deed and assignment to Martin C. Madsen or that he made any claim to any of the property of Hanne Madsen; that Hanne Madsen assured plaintiff that she had conveyed no property to Martin C. Madsen; that as far as she knew he made no claim in or to any of that property.

Plaintiff incorporated by reference all of the allegations of the first cause of action into a second cause of action. It was further alleged that the purported deed and assignment was never executed as a deed and assignment; that it was never delivered to Martin C. Madsen; that it was without any consideration; that it was void for want of any intention on the part of Hanne Madsen to make a gift of the property to Martin C. Madsen or to convey title to him; that Hanne Madsen had no intention of conveying the property to him; that the decree of distribution constituted Martin C. Madsen trustee of the property of the estate of Hans Madsen, deceased.

The allegations of the first cause of action were incorporated by reference into a third cause of action. It was further alleged that Martin C. Madsen was the son of Hanne Madsen; that she entrusted all her business transactions to him; that after the death of Hans Madsen, Martin C. Madsen assumed charge and control of all the property formerly belonging to Hans Madsen; that he took charge of the household of Hanne Madsen; that Hanne Madsen reposed great confidence in him; that Martin C. Madsen obtained the signature of his mother to the deed and assignment by fraud and misrepresentations; that he stated and represented to her that in signing that instrument she was simply authorizing him to obtain money from the Hans Madsen estate so that he could operate the farms and care for Hanne Madsen and her household; that upon those representations Martin C. Madsen obtained the signature of Hanne Madsen to the deed and assignment and also to a document nominating Martin C. Madsen as administrator of the estate of Hans Madsen, deceased; that in signing these documents Hanne Madsen relied upon the representations of Martin C. Madsen and on her belief in his personal honesty and integrity and his relationship to her; that Martin C. Madsen knew that his representations to Hanne Madsen were false and fraudulent and that she would act in reliance on them and on his relationship to her of son and confidential adviser; that he intended she should so act; that as a result of her signing the purported deed and assignment and their use by Martin C. Madsen in securing the distribution of all of the property of the estate of Hans Madsen, deceased, to himself, Hanne Madsen was deprived of all of her property and left entirely dependent.

A decree was sought declaring that Martin C. Madsen held the described property in trust for the beneficiaries under the will of Hanne Madsen, deceased, and particularly to the extent of the bequest of $3,100 made to plaintiff with accrued interest.

[1, 2] Little need be said concerning the defense of laches. Ordinarily, but not always, it is an affirmative defense to be set up by way of answer. When Martin C. Madsen filed his report and final account in the estate of Hanne Madsen, deceased, plaintiff appeared and contested it. A demurrer was sustained to her contest and she appealed. The judgment was affirmed on the ground that she had pursued the wrong remedy; that she should assert any rights she might have in an equitable action to impose a trust on the property. In re Estate of Madsen, 31 Cal.App.2d 240, 87 P.2d 903. The remittitur was issued on April 29, 1939. This action was commenced on May 17, 1939. These facts disclose no laches as plaintiff's counsel were sincere in the belief that they were pursuing the proper remedy in contesting the account in the probate proceeding.

[3, 4] Nor does the complaint disclose any undue delay on the part of plaintiff in failing to discover the deed and assignment from Hanne Madsen to Martin C. Madsen, executed and recorded on March 26, 1936, and the decree of distribution made on October 30, 1936. Plaintiff had no interest in any of the property of the estate of Hans Madsen and there was no reason for her making any inquiry concerning it before the death of Hanne Madsen on November 10, 1936, leaving a will in which plaintiff was named as a beneficiary. That was the first time plaintiff had any interest in any of the property or any interest in either estate which would give her any reason to make any investigation. She promptly filed her contest to the report and final account of the executor and pursued her mistaken remedy to its legal end. She filed this action eighteen days after the issuance of the remittitur in the former appeal. Certainly there is no undue delay shown on her part. Further, one element of the plea of laches is injury or prejudice caused by the delay. McGibbon v. Schmidt, 172 Cal. 70, 155 P. 460; Title Ins., etc., Co. v. California Development Co., 171 Cal. 173, 152 P. 542. The allegations of the complaint fail to even suggest any damage or injury caused by any delay on the part of plaintiff.

[5] It is not questioned that plaintiff must allege and prove extrinsic fraud in order to successfully attack the two probate decrees. The question of whether the fraud alleged was extrinsic or intrinsic is an interesting one, probably because there seems to have been drawn no clear line of demarcation between the two kinds of fraud in the many California decisions dealing with those subjects.

[6-9] California courts have frequently quoted or cited with approval the following definitions of extrinsic and intrinsic fraud found in United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed. 93:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, —these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, Res Adjudicata, sect. 499; Pearce v. Olney, 20 Conn. 544; Wierich v. De Zoya, 7 Ill. 385 [2 Gilman] 385; Kent v. Ricards, 3 Md. Ch. 392 [396]; Smith v. Lowry, 1 Johns. (N.Y.) Ch. 320; De Louis v. Meek, 2 (Green) Iowa 55 [50 Am.Dec. 491].

"In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. Mr. Wells, in his very useful work on Res Adjudicata, says, sect. 499: 'Fraud vitiates every thing, and a judgment equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud.'"

[10] There are California cases holding that equity will not grant relief because of fraud directly involved in the merits of an action or in any matter on which the judgment or decree was rendered. See, Eisenmayer v. Thompson, 186 Cal. 538, 199 P. 798.

[11] On the other hand there are numerous cases in which judgments and decrees have been successfully attacked in equity where deeds or conveyances were directly involved in those judgments or decrees and were directly passed upon there.

The cases of McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; Gump v. Gump, 42 Cal.App.2d 64, 108 P.2d 21, and Harada v. Fitzpatrick, 33 Cal. App.2d 453, 91 P.2d 941 (hearing denied), are rather typical of cases in which well-recognized extrinsic fraud was found which justified action by a court of equity. The McGuinness and Gump cases involved divorce decrees where, after the rendition of interlocutory decrees, the parties resumed marital relations with the intention of continuing that relation, and one, without the knowledge of the other, obtained a final decree without disclosing the fact of the reconciliation to the court. The Harada case involved the modification of a divorce decree as the result of a conspiracy to defraud Mrs. Harada out of a leasehold estate in which she had invested not less than $15,000. The purpose of the modification of the decree and the effect it would have had on the leasehold were concealed from the court. In each case the fraud was held to be extrinsic and collateral to the issues tried in the divorce actions.

Wingerter v. Wingerter, 71 Cal. 105, 11 P. 853, is a case in which the plaintiff sought to obtain a decree in equity decreeing that certain property that had been distributed to defendant by a decree of distribution in the estate of John D. Wingerter, the father of plaintiff and brother of defendant, was held in trust by defendant for plaintiff by reason of fraud practiced on the plaintiff. John D. Wingerter died in 1867, in Los Angeles county, leaving plaintiff, his son, a resident of Missouri, as his only direct heir at law. Defendant, a brother of deceased, was appointed administrator of his estate. In 1881 defendant obtained from plaintiff a deed to the real property belonging to the estate, upon the representation that plaintiff's interest in the estate was worth little or nothing, and the promise to pay him $1,000. The acknowledgment on this deed was defective and defendant obtained a second deed later in the year and paid plaintiff the $1,000. The probate court distributed the real property to defendant in accordance with the grant in the deed. In this respect the facts in the instant case are parallel. Plaintiff was successful in the action, not because of any actual intention on the part of defendant to defraud plaintiff, but because the confidential relation of the parties required defendant to make a full, fair and complete disclosure of all material facts to plaintiff, which he failed to do.

The case of Wickersham v. Comerford, 96 Cal. 433, 31 P. 358, 360, involved a homestead set apart to a widow during probate. Deceased and defendant (his widow) had separated and entered into a contract dividing their property. She was never a member of his family after the separation. Plaintiff, a creditor of deceased, attacked the order setting apart the homestead by a suit in equity on the ground of the fraud of the widow. A demurrer to the complaint was sustained. In holding that the complaint stated a cause of action, it was said: "Counsel for respondents claim that the facts stated in the complaint do not constitute fraud of which plaintiff is entitled to complain. The complaint charges a willful suppression of a material truth and the suggestion of a falsehood by defendant, with intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and avers that such suppression and suggestion had the intended effect, to the injury of the plaintiff, who was one of such creditors. I think this constituted fraud."

In the case of Curtis v. Schell, 129 Cal. 208, 61 P. 951, 953, 79 Am.St.Rep. 107, defendant was the widow of Theodore L. Schell and executrix of his estate. Through the several years that the estate was kept open in probate she used all its income for the support of herself and her family. She supplemented this income by borrowing money from the plaintiff and others, executing mortgages on her interest in the property of the estate to secure these loans. About nineteen years after the death of her husband she secured an order giving her a family allowance of $150 per month, running back about sixteen years, the past due amounts aggregating about $30,000. She then secured an order to sell the mortgaged estate property to pay the family allowance and expenses of administration. If those obligations had been paid there would have remained in the estate only a fraction of the amount necessary to pay the indebtedness to plaintiff and others which the executrix had secured by the mortgages. These facts were not disclosed to the probate court. The trial court found that the suppression of these facts was not only a fraud on the holders of the mortgages but also upon the probate court. The Supreme Court held that the fraud "was extrinsic and collateral to the question examined on the application for the family allowance" and affirmed the judgment in plaintiff's favor.

The case of Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98, is persuasive. The plaintiffs were the children of Zaver Sohler and defendant, Lena Sohler, his widow and executrix of his estate. The other defendant, Paul Reuss, was the son of Lena Sohler and stepson of Zaver Sohler. Lena Sohler, in petitioning for distribution of the estate represented that Paul Reuss was the son of Zaver Sohler and one-eighth of the estate was wrongfully distributed to him. These facts were alleged in the complaint to which a demurrer was sustained. Plaintiffs appealed from the ensuing judgment. Defendants sought to sustain the judgment on the ground that the proceedings leading up to the decree and the decree itself were regular and therefore a bar to the action; that the fact that Paul Reuss was included in the distribution as a son of Zaver Sohler was based on perjured testimony and under the rule announced in United States v. Throckmorton, supra, and the California cases following it, such perjured testimony constituted only intrinsic fraud and furnished no ground for attacking the decree in equity. In a carefully considered opinion the Supreme Court disagreed with this reasoning most emphatically. It was pointed out that Lena Sohler was the mother of the plaintiffs, their natural guardian, also the executrix of the estate; that under this confidential relationship she owed her children the duty of protecting their rights and disclosing the true facts; that the breach of this duty constituted extrinsic fraud which was sufficient to sustain the action in equity. It could be argued almost as emphatically that as executrix she was an agent and officer of the probate court and as such under an equal duty to disclose the true facts to it; that the breach of this duty also constituted extrinsic fraud. Thus, the cases following United States v. Throckmorton can be harmonized with this case and many others even though that portion of the decree distributing one-eighth of the property of the estate to Paul Reuss must have been based on perjured testimony.

The plaintiffs in the case of Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184, were three of the children of James Campbell, deceased. Defendant Abigail Campbell Parker was his widow, mother of plaintiffs, and administratrix of his estate; and the other defendant, Alice K. Campbell, was a fourth child. The deceased left a will that attempted to create a void trust. Defendants conspired together to place the California property of the estate in a trust and thus defraud plaintiffs by preventing them from receiving, immediately on the close of the probate, their just and lawful portions of the assets of the estate. In furtherance of this conspiracy defendants concocted and carried through a fictitious probate sale of the property to Alice K. Campbell for $166,250. The administratrix secured a decree of distribution distributing the money she had purportedly, but not actually, received on this sale to trustees. She executed a deed to the property to Alice K. Campbell who in turn deeded it to the trustees. No money actually changed hands in any of these transactions. Plaintiffs brought an action in equity to subject their distributive shares of the property to a trust. Defendants defended under the decree confirming the sale, and the decree of distribution, which, with the proceedings leading up to them, were regular on their face. They argued that the fraud was intrinsic and not extrinsic. The Supreme Court disagreed with them. It pointed out the confidential relation existing between plaintiffs and their mother, her duty to deal fairly, not fraudulently, with them, and her duty to disclose to them and to the court the true facts concerning the fictitious sale. It was held that a breach of this duty to plaintiffs and the court constituted extrinsic fraud that would support plaintiffs' cause of action; that as these facts were alleged in the complaint it stated a cause of action; that the demurrer was wrongfully sustained.

It would extend this opinion to undue length to consider each case following the rules announced in the cases already considered. It should be sufficient to say that those rules find ample support in the following cases: Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 651, 221 P. 368; Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Apablasa v. de Sepulveda, 91 Cal. App. 232, 267 P. 105; Larrabee v. Tracy, 39 Cal.App.2d 593, 104 P.2d 61.

[12-14] The cases we have considered and cited support the following conclusions, where a confidential relationship is disclosed:

(1) That where there exists between the parties a confidential relationship such as parent and child, or husband and wife, there is a duty imposed to deal fairly, not fraudulently; to disclose the true facts and not to deceive; that a breach of this duty may constitute extrinsic fraud.

(2) That where a fiduciary relation exists such as guardian and ward, administrator and heir, executor and legatee, trustee and beneficiary or principal and agent, there is also a duty imposed to deal fairly, not fraudulently, to disclose the true facts and not to deceive; that a breach of this duty may constitute extrinsic fraud.

(3) That when a person is appointed by the probate court as a guardian, an executor, an administrator or a trustee, he is an officer and agent of the court; that there is also a duty imposed to deal fairly, not fraudulently, with the court; to disclose the true facts and not to deceive the court; that a breach of this duty may constitute extrinsic fraud.

The majority, if not all, of these rules are clearly stated and urged in 23 California Law Review 79, where many cases are cited which we have not considered.

If these rules are correct they bring many cases into harmony and rationalize others of which Stenderup v. Broadway State Bank of Los Angeles, 219 Cal. 593, 28 P.2d 14, is an example. In that case plaintiffs were creditors and had employed defendants to collect their debts. As they failed to secure satisfactory statements of the operations of defendants they brought suit for an accounting and recovered judgment. They subsequently discovered that defendants had collected over $9,000 more than the accounting disclosed; that defendants' testimony in the accounting action was false in that it failed to disclose these other collections. This judgment in the accounting case was clearly the result of perjury which constituted intrinsic and not extrinsic fraud under United States v. Throckmorton, supra, and the many cases following it. But the defendants were the agents of the plaintiffs for the collection of these debts. The duty was imposed on the agents to deal fairly, not fraudulently, with their principals, to disclose the true facts and not to deceive their principals. If a breach of this duty may constitute extrinsic fraud, the results reached are in harmony with the many cases supporting the views we have expressed.

[15] In the instant case the demurrer was to the entire amended complaint and not to its separate causes of action. It admitted the truth of all facts alleged. In considering the sufficiency of the pleading we must assume the truth of its allegations. By reciting those facts alleged here, we give them no probative force.

When we analyze the allegations of the amended complaint we find that Martin C. Madsen is accused of committing separate fraudulent acts against two persons, two against Hanne Madsen, his mother, and another against plaintiff. It was necessary for plaintiff to plead these frauds against Hanne Madsen and herself for unless she was successful in establishing that the deed and assignment from Hanne Madsen to Martin C. Madsen was obtained through fraud and that the decree of distribution in the estate of Hans Madsen was obtained through extrinsic fraud, the fraud practiced on the plaintiff in the estate of Hanne Madsen would not entitle her to any relief because the latter fraud against her could have caused her no injury if during her lifetime Hanne Madsen had lawfully divested herself of all interest in the property of the estate of Hans Madsen, deceased, she having no other property at the time of her death.

[16, 17] The first fraud alleged is in securing the deed and assignment to all of the property in the Hans Madsen estate by Martin C. Madsen. It is alleged that Martin C. Madsen was the son of Hanne Madsen, her confidential adviser and the trusted manager of all her affairs. Where such a relationship is alleged the law presumes fraud, where, as here, the son and agent comes out of a transaction with his mother and principal, owning all of her property. The burden of disproving such presumption is placed on the son and agent. In addition to this presumption of fraud there are

allegations that Martin C. Madsen was guilty of actual fraud in misrepresenting to his mother the character and effect of the document to which he secured her signature. It seems clear that had Hanne Madsen learned of the fraud during her lifetime and had she sought to set aside the deed and assignment to Martin C. Madsen by filing a complaint containing the identical allegations on that subject which appear in the amended complaint before us, her complaint would have alleged facts sufficient to constitute a cause of action. But Hanne Madsen did not file any such action because, as here alleged, she was in total ignorance of the fraud and did not learn of it during her lifetime because of her confidence in her son and agent and her belief in his honesty and integrity. Where such a confidential relationship exists the reliance on the duty imposed by that relationship on the son and agent to deal fairly and honestly and to disclose the true facts of any transactions should be sufficient excuse for failing to discover the fraud during the little more than seven months she lived after signing the instrument.

[18] It was incumbent on plaintiff to have alleged facts sufficient to support a finding and judgment that the decree of distribution in the estate of Hans Madsen was obtained by extrinsic fraud. This decree distributing all of the property of the estate of Hans Madsen to Martin C. Madsen was obtained on October 30, 1936, eleven days before the death of Hanne Madsen. In measuring the sufficiency of the allegations of the complaint on this subject we must answer this question: Had Hanne Madsen, during her lifetime, invoked equity to declare a trust in the property distributed to Martin C. Madsen, alleging the facts here alleged, would her complaint have stated facts sufficient to have constituted a cause of action?

In approaching this question we desire to paraphrase the holding of the Supreme Court in Sohler v. Sohler, supra, substituting only such of our own language as is necessary because of the difference in the relationships and the facts of the two cases. With such substitutions we have the following: Martin C. Madsen, the administrator, was not alone the trustee of the heir of the estate, he was the son and trusted agent of that heir and was chargeable with all of the high duties pertaining to that relationship. As administrator it might be argued that he was a disinterested party, having no concern whatever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But as son and trusted agent of Hanne Madsen, his position was a very different one. He was under the most solemn obligation to his mother and trusting principal. He was under like obligation to disclose to the court, on her behalf and in her interest, all knowledge which he possessed, and he was under the same obligation to see that her legal claims to the estate were properly presented before the court in probate; and with peculiar force did this duty press upon him, in view of the fact that during all this time he was administrator of, and administered upon, the estate through which his mother was to derive her property. Such being his position, it is charged that in violation of this duty he deceived both his mother and the probate court by concealing his prior fraud, thereby securing for himself all of his mother's inheritance, leaving her destitute and dependent on charity for support. Thus by concealing his own fraud and the truth from his mother, the rightful heir, and leaving her in ignorance, she was deprived of her patrimony and was, by fraud extrinsic to the case, prevented from being properly represented at the hearing, or from being represented at all.

It seems clear that had Hanne Madsen attacked the results produced by the decree of distribution in the estate of Hans Madsen, by the very allegations which are before us here, it would have been held that she had alleged facts sufficient to support a finding of extrinsic fraud and a judgment based on such extrinsic fraud. Martin C. Madsen as the administrator was an officer and agent of the probate court and as such he was under the high duty of dealing fairly and of disclosing the true facts to the court. It is alleged that he violated this duty and concealed those facts. Further. as such administrator, he was the trustee for his mother, the heir at law to the estate. He was also the son and trusted agent of his mother. These relationships placed upon him the high duty of honest dealings, to disclose and not to conceal the true facts. It is alleged that he violated these obligations to both the probate court and to his mother which, if true, made him guilty of extrinsic fraud collateral to the issues decided in the decree.

As Hanne Madsen might have attacked the deed and assignment and the decree of distribution in the Hans Madsen estate during her lifetime, that right of action descended to her executor and became vested in him. It is the duty of an executor or administrator to collect and reduce to his possession all of the property belonging to the deceased by suit if necessary. Therefore, under the allegations of the amended complaint it became the duty of Martin C. Madsen, the executor of the estate of Hanne Madsen, to demand of the same Martin C. Madsen, the individual, the execution of the trust and the delivery of the estate which Martin C. Madsen, the individual, held in trust for Martin C. Madsen, the executor. It was the further duty of the executor to enforce the execution of the trust by suit, if his demand was not complied with. This he did not do and thus violated his duty. By acceptance of the appointment as executor he assumed a position in which he became an adversary to himself. By accepting the office of executor he placed himself in control of the litigation against himself and prevented any hearing on the question of the trust and his fraud from which the trust arose. He alone had knowledge of those facts at that time. He should have disclosed them to the court so that he would not have been appointed to a position of trust the duties of which he could not perform without suing himself.

When he accepted the position of executor of the Hanne Madsen estate he became not only an officer and agent of the court but a trustee for the beneficiaries under the will of Hanne Madsen of which plaintiff was one. He then owed the duty to the court and to plaintiff to disclose every material fact within his knowledge bearing on the property of the estate or of any interest therein. He failed to perform this duty, which, under the decisions we have cited was extrinsic fraud. If the allegations of the amended complaint are true, which we must assume at this stage of the proceedings, he went further than the passive act of concealment and took the positive position of representing to the court that Hanne Madsen had no property nor estate at the time of her death. Whether or not this representation was intrinsic or extrinsic fraud, it is not necessary to decide, as the extrinsic fraud of breach of duty by concealment is sufficient.

[19] We have, therefore, reached the conclusion that the fraud alleged in the amended complaint is extrinsic and sufficient to sustain the action.

[20] Our attention is called to the copy of the will of Hanne Madsen attached as an exhibit to the amended complaint, and that this will is dated thirty-one days after the date of the deed and assignment of all of the property in the estate of Hans Madsen to Martin C. Madsen. It is argued that this will is inconsistent with the deed and is strong evidence that Hanne Madsen did not know that she had conveyed all of her property to Martin C. Madsen. In reply it is argued that it might have been the hope of Hanne Madsen to acquire some property after the execution of the will; that she might have had property of her own independent of that conveyed to Martin C. Madsen. This last argument overlooks the allegations of the amended complaint to the effect that the deed and assignment left her without property or means with which to support herself. The evidentiary value of the will should be considered at the trial. Its chief value at this time is to disclose the interest of plaintiff in the property in question.

Defendants next maintain that the amended complaint fails to state a cause of action because it is not alleged that the fraud in connection with the deed and assignment of March 26, 1936, and the decree of distribution in the Hans Madsen estate of October 30, 1936, was directed towards plaintiff and also that she had no interest in the property in question on those dates.

[21-23] It is true that plaintiff had no interest in any of the property in question on either of those dates and that those fraudulent acts were not directed towards plaintiff, but against Hanne Madsen, her predecessor in interest. If we take the allegations of the complaint as true, as we must, the legal situation presented is this: Due to his fraudulent acts on and before March 26, and October 30, 1936, Martin C. Madsen became the owner of the legal title to the property as trustee for Hanne Madsen, the beneficial owner, who could have enforced her rights at any time. Ordinarily a beneficial owner may dispose of her interest in property by will. The interest of the legatee vests on the death of the testatrix and not before. When the will of Hanne Madsen was admitted to probate, plaintiff, for the first time, had such an interest in the property so that

she could assert her rights to any of it, and at that time she first acquired that right.

In Harada v. Fitzpatrick, supra [33 Cal. App.2d 453, 91 P.2d 944], it was said: "A person, not a party to the action in which the extrinsic fraud is perpetrated, who is adversely affected by the judgment, may bring an action in equity to vacate it. Bowman v. Bowman, 97 Cal.App. 613, 275 P. 1023; Associated Oil Co. v. Mullin, 110 Cal.App. 385, 294 P. 421; [In re] Estate of Ince, 98 Cal.App. 763, 277 P. 886; Baar v. Smith, 97 Cal.App. 398, 275 P. 861." See, also, Wickersham v. Comerford, supra; Simonton v. Los Angeles Trust & Savings Bank, supra; Apablasa v. de Sepulveda, supra.

[24] While plaintiff was not interested in the property at the time of the frauds in March and October, 1936, her predecessor in interest was, and while plaintiff was not a party to the proceeding involving the estate of Hans Madsen, the extrinsic fraud in connection with the decree of distribution in that estate so adversely affected her as to enable her to bring this action.

Defendants urge that the cause of action is barred by subdivisions 3 and 4 of section 338 of the Code of Civil Procedure. Subdivision 3 has no application to this case which is to impose a trust on real and personal property because of the alleged fraud of Martin C. Madsen. It is not an action for the taking, detaining or injuring any goods or chattels nor for the specific recovery of personal property.

[25] Subdivision 4 of section 338 of the Code of Civil Procedure places a three-year limitation on an action for relief on the ground of fraud, the cause of action not being deemed to have accrued until the discovery of the fraud by the aggrieved party. It is alleged that Hanne Madsen never discovered the frauds alleged to have been committed against her; that plaintiff discovered the fraud on November 10, 1936. The complaint was filed on May 17, 1939, well within three years from its discovery.

Defendants maintain that plaintiff must allege (1) the date of the discovery; (2) the circumstances of the discovery; (3) the reasons why it was not discovered at an earlier date; that the second and third elements are not sufficiently alleged.

It is alleged that on November 10, 1936, one of the attorneys for plaintiff took the will of Hanne Madsen to the office of one of the attorneys for defendants and delivered it to him; that he was then told of the deed and assignment from Hanne Madsen to Martin C. Madsen and of the decree of distribution in the Hans Madsen estate; that this was the first time that plaintiff learned of these documents or that Martin C. Madsen claimed any interest in the property of that estate. This sufficiently alleges the time and circumstances of the discovery. The reason why the discovery was not made at an earlier date is necessarily inferred from the allegations of the amended complaint. As we have already indicated, plaintiff had no interest in any of the property before the death of Hanne Madsen. There was no occasion for her making any inquiry concerning the property before that event. This is sufficient reason for failing to discover the fraud at an earlier date. The allegations here are more specific than those held sufficient in Apablasa v. de Sepulveda, supra.

The judgment is reversed with directions to the trial court to overrule the demurrer and give defendants a reasonable time within which to answer the amended complaint.

We concur: BARNARD, P. J.; GRIFFIN, J.

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43 Cal.App.2d 473

LAURA VINCENT CO. v. CITY OF SELMA et al.

Civ. 2606.

District Court of Appeal, Fourth District, California.

March 14, 1941.

1. Municipal corporations 🔑692, 696

A city council has broad general powers to maintain streets and sidewalks for public use, prevent encroachments or obstructions, and provide for removal of obstructions. Gen.Laws 1937, Act 5233, §§ 862, 862.5, 862.20.

2. Municipal corporations 🔑692

Any regulation designed to carry out city council's power to maintain streets and sidewalks and prevent encroachments or obstructions must have a just relation to the object in view and a reasonable tendency to preserve or protect the public safety or convenience. Gen.Laws 1937, Act 5233, §§ 862, 862.5, 862.20.

3. Municipal corporations ⚷692

A right to maintain an obstruction in a street cannot be acquired by prescription. Gen.Laws 1937, Act 5233, §§ 862, 862.5, 862.20.

4. Municipal corporations ⚷63(1)

Whether a thing in fact constitutes an obstruction of or encroachment on street or sidewalk is, in the first instance, to be decided by the city council in regulating obstructions or enroachments, and decision will not be upset by the courts in absence of fraud, oppression or manifest abuse of discretion.

5. Municipal corporations ⚷667

Apart from legislative or municipal authorization, no person can lawfully maintain an awning or canopy over a sidewalk, and awning erected without such authority is a "public nuisance" whether it materially interferes with public travel or not.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

6. Constitutional law ⚷63(2)
Municipal corporations ⚷671(10), 680(3)

The Legislature may delegate to municipal authorities power to permit erection of awnings and canopies, but grant of permits is not justified if it will result in public nuisance or injury to adjoining owners, or if awning is permanent. Gen.Laws 1937, Act 5233, §§ 862, 862.5, 862.20.

7. Municipal corporations ⚷667

A municipality may prohibit encroachments on streets by erection of awnings, and such prohibition is not necessarily invalid as "special" because limited in operation to a portion of the city only. Gen.Laws 1937, Act 5233, §§ 862, 862.5, 862.20.

See Words and Phrases, Permanent Edition, for all other definitions of "Special".

8. Municipal corporations ⚷667

Under ordinance defining an awning as an overhead covering over sidewalk or street except a marquee, and defining marquee as covering which complies with requirements for marquee, overhead coverings of corrugated iron, supported by steel or iron brackets, which did not comply with requirements of a marquee, were "awnings".

See Words and Phrases, Permanent Edition, for all other definitions of "Awning".

9. Appeal and error ⚷1043(5)

Where structures constituted awnings as defined by regulatory ordinance, but could not be remodeled so as to comply with requirements for awnings and could be remodeled so as to comply with requirements for marquees by curing particular defects, and building owner obtained injunction against enforcement of ordinance, city and other defendants could not complain with respect to defects which trial court ordered owner to cure.

10. Municipal corporations ⚷667

A requirement in ordinance that no part of support for marquee in business district should be less than eight feet from sidewalk bore a reasonable relation to public use of highway and prevention of obstruction, and was not "discriminatory" in absence of clear showing of abuse of discretion.

See Words and Phrases, Permanent Edition, for all other definitions of "Discriminatory".

11. Municipal corporations ⚷667

A reasonable difference in classification may be made, in regulating awnings and marquees, between coverings over sidewalk which are movable and designed and intended to be frequently moved, and coverings which are permanent and immovable.

12. Municipal corporations ⚷667

A requirement in ordinance, that horizontal surface of marquee should not vary from horizontal plane more than one foot, was unreasonable and was not enforceable against existing structures wherein surface varied three feet from horizontal plane.

13. Injunction ⚷108

Where city did not require permit for building marquee over sidewalk until after structure had been erected and owner had sued to enjoin enforcement of regulatory ordinance, and it would have been idle for owner to ask for such permit, but issuance of permit would be a mere matter of form if owner complied with valid provisions of the ordinance, owner's failure to ask for permit did not preclude injunction against enforcement of the invalid provisions.

14. Appeal and error ⚿1043(5)

Where trial court enjoined enforcement of invalid provisions of ordinance regulating awnings and marquees over sidewalk, but required building owner to comply with valid portions of ordinance by curing defects, so that owner would be entitled to permit when it complied with the ordinance, failure to specifically require owner to apply for permit when possible was not reversible error.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by the Laura Vincent Company against the City of Selma and others, for injunction against enforcement of ordinance regulating awnings and marquees. From an adverse judgment, defendants appeal.

Reversed with directions.

Chester E. Shepard and Arthur C. Shepard, both of Fresno, for appellants.

Harold M. Child, David Peckinpah, and L. N. Barber, all of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for an injunction to prevent the enforcement of an ordinance regulating the erection and maintenance of awnings and marquees within the business district of the defendant city.

The plaintiff is the owner of certain buildings in the business district of Selma which have overhead coverings projecting over the sidewalk from the buildings to the vertical plane of the curb line. These coverings consist of sheets of corrugated iron resting on a wooden framework which is supported by steel or iron brackets on the front walls of the buildings. The drainage from these coverings is directly on the outer or street edge of the sidewalk. The brackets supporting said coverings are attached to the wall of the buildings at a point approximately seven feet three inches above the level of the sidewalk and rising to a distance of eight feet or more from the sidewalk at a distance of about two feet from the wall of the building. The tops of the coverings have a slope or departure from the horizontal plane of three feet.

While this action was pending the city council of the defendant city passed a new ordinance, No. 326, regulating the construction and maintenance of awnings and marquees, and notified the plaintiff that it was violating this ordinance and that it was required to remove said coverings or eliminate such violations within five days. These facts were set up in a supplemental answer.

Ordinance No. 326 defines an awning as any overhead covering over a sidewalk or street, except a marquee, and defines a marquee as any such covering which complies with the requirements for a marquee as set forth in the ordinance. It requires all awnings to be of the folding type which can be folded back within two feet of the building, and provides that the lowest portion of the framework of an awning must be not less than seven feet above the sidewalk. With respect to a marquee, so far as material here, it requires that the lowest part of the support thereof must be not less than eight feet from the sidewalk, that the marquee shall not extend closer than one foot to the vertical plane of the street curb line, that the "horizontal surface of a marquee shall not vary from the horizontal plane more than one foot", and that the marquee must be so designed as to provide gutters to carry all rain water through a conduit to within four inches of the building and thence underneath the surface of the sidewalk to the street gutter. It is further provided that no awning or marquee shall be either erected or maintained within the business district unless it complies in all respects with the requirements of this ordinance, and unless a written permit is issued therefor by the city clerk.

After a trial on the issues the court found that the coverings thus maintained by the plaintiff complied with the ordinance in force at the time they were constructed, that they are securely built and do not interfere with public travel upon the street or sidewalk, and that their removal would result in great injury to the plaintiff. It was found that plaintiff's coverings are marquees as the same are defined by Ordinance No. 326 and that said coverings comply with that ordinance except in four particulars, to wit: (1) that said coverings extend to the vertical plane of the sidewalk curb and are therefore a foot longer than allowed by the ordinance; (2) that the steel beams supporting the same are attached to the building at a height of seven feet three inches from the level of the sidewalk, although they rise to a distance of eight feet or more from the sidewalk at a distance of about two feet from the wall of the building;

(3) that the surface of the said coverings vary approximately three feet from the horizontal plane; (4) that there are no gutters for the purpose of carrying off rain water.

The court further found that the first and fourth of these defects constitute violations of reasonable provisions of this ordinance. With respect to the second defect, it was found that it was unreasonable to require the small portion of the supports of these coverings which are less than eight feet from the sidewalk to be removed, and with respect to the third defect that the provision of the ordinance that the horizontal surface of a marquee shall not vary from the horizontal plane more than one foot, is arbitrary, unreasonable and discriminatory insofar as it applies to a structure which was lawfully constructed and existing at the time of the adoption of the ordinance. A judgment was entered restraining the defendants from removing or interfering with the coverings thus maintained by the plaintiff, with the provision that the defendants might move to discharge this injunction unless the plaintiff, within thirty days after the judgment becomes final, shall remove that portion of the coverings which is within one foot of the vertical plane of the sidewalk and shall construct sufficient gutters to carry all rain water from said coverings through a conduit to within four inches of the building and thence underneath the surface of the sidewalk to the street gutter. From this judgment the defendants have appealed.

[1-4] A city council has broad general powers with respect to maintaining streets and sidewalks for the use of the public, prohibiting and preventing encroachments upon or obstructions in or to such sidewalks and streets, and providing for the removal of any such obstructions. Deering's Gen.Laws, 1937, Act 5233, §§ 862, 862.5 and 862.20. It is also well settled that any regulation designed to carry out this power must have a just relation to the object in view and have a reasonable tendency to preserve or protect the public safety or convenience. In re Mathews, 191 Cal. 35, 214 P. 981. A right to maintain an obstruction in a street cannot be acquired by prescription. Ex parte Taylor, 87 Cal. 91, 25 P. 258. Whether the thing in question in fact constitutes an obstruction or an encroachment is, in the first instance, a matter to be decided by the city council and its decision will not be upset by the courts in the absence of fraud, oppression or a manifest abuse of discretion. Vanderhurst v. Tholcke, 113 Cal. 147, 45 P. 266, 35 L.R.A. 267. The general rule is thus set forth in 44 Corpus Juris 950, section 3720:

> [5-7] "Apart from legislative or municipal authorization, no person can lawfully maintain an awning or a canopy over a sidewalk, and where an awning is erected without such authority, it is a public nuisance whether it materially interferes with public travel or not. The legislature may, however, delegate to the municipal authorities the power to permit the erection of awnings or canopies, and it would seem that they may grant such permits under their general power to regulate and control the streets, but such a grant is not justified if it will result in a public nuisance or injury to an adjoining owner, or if the awning is of a permanent character. On the other hand, the municipality may prohibit such encroachments on the street. Such a prohibition is not necessarily invalid, as being special in character, because it is limited in its operation to a portion of the city only."

The appellants contend that the powers of the city council are absolute in such matters as these if there is any foundation of reason for the action taken, that in the instant case the trial court substituted its judgment for that of the legislative department of the city with respect to the reasonableness of these regulations, and that the trial court entirely ignored the requirements of this ordinance providing that an awning or marquee could only be erected or maintained after securing a written permit from the city clerk. On the other hand, the respondent, while conceding the right of a city to order the removal of any structure which actually interferes with the public use of a street, maintains that when a municipality chooses to regulate structures of this nature, rather than to prohibit them altogether, the regulations enacted must bear a reasonable relation to the public use of the highway; that the obstruction here in question constituted only a trivial interference with any possible use of the street by the public; that the regulations of this ordinance which are material here could only have been for the purpose of eliminating a "relatively unimportant fire hazard"; that the court provided for the elimination of the only two defects which have any relation to a possible interference with the use of the public highway; and that the court correctly held that the other two defects need not be cured since they were trivial and had no reasonable relation to the object sought to be accomplished by the ordinance.

[8, 9] The coverings here in question are awnings as defined by this ordinance since they are overhead coverings which do not comply with the requirements of a marquee, as defined therein. Obviously, they cannot be so remodeled as to comply with the requirements for awnings as set forth in the ordinance. On the other hand, they can be remodeled so as to become marquees under the requirements therefor contained in the ordinance. This can be done by curing the four existing defects above noted. The court ordered the respondent to cure two of these defects and if that is done the appellants are in no position to complain with respect to those particular matters.

[10, 11] The court, however, held that the requirement that no part of the support for such a marquee should be less than eight feet from the sidewalk was unreasonable, as applied to these existing structures. This provision, as to the height at which a permanent and immovable obstruction would be permitted to exist over a sidewalk in a business district, bears a reasonable relation to the public use of the highway and the prevention of obstructions which might interfere with that use. It was a matter within the province of the city council and its decision cannot be set aside unless an abuse of this discretion and power clearly appears. No such abuse appears here, and we think the court erred in holding that that requirement was unreasonable and discriminatory. The only possible discrimination would be in the fact that the ordinance permits awnings, as therein defined, to be erected where the supports thereof are not less than seven feet from the sidewalk. We think, however, that a reasonable difference in classification may be made between coverings over a sidewalk which are movable, and designed and intended to be frequently moved, and coverings which are permanent and immovable.

[12] We see no error in the court's finding that the third defect in this structure, the fact that its surface varies approximately three feet from the horizontal plane, was unreasonable and unenforceable as to these existing structures. While such a structure, extending over the sidewalk at a height of at least eight feet, might at times interfere with the public use of the street this would be equally true whether the slope of the upper surface thereof was one foot or three feet. And where a city has permitted such an encroachment to exist there is nothing in the particular angle which results in a slope of one foot, rather than one of three feet, which bears any reasonable relation to the public use of that highway.

[13, 14] With respect to the appellants' contention that the respondent failed to ask for a permit, that requirement was not adopted until many years after this structure was erected and until after this action was brought, and the defense interposed discloses that it would have been an idle act for the respondent to have asked for such a permit. Moreover, under the terms of the ordinance, it would be the duty of the clerk to issue a permit if and when the respondent complies with the valid provisions of the ordinance and, under such circumstances, the issuance of a permit would be a mere matter of form. The respondent will be in a position to apply for such a permit when and if it complies with the terms of the ordinance as governed by the final judgment in this action and, under the circumstances here appearing, the failure of the trial court to specifically require the respondent to apply for a permit, after such action became possible, is not reversible error. The real controversy is as to the conditions on which the respondent will be entitled to demand a permit.

The judgment is reversed, with directions to the trial court to add to that portion of the judgment which requires the respondent to do certain things as a condition of the injunction becoming permanent, a further requirement that within the time named the respondent raise or alter the brackets which support its said covering to the extent that no part of said supports shall be nearer than eight feet to the sidewalk. Each party to pay its own costs.

We concur: MARKS, J.; GRIFFIN, J.

43 Cal.App.2d 467

PHILLIPS v. HOOPER et al.

Civ. 2603.

District Court of Appeal, Fourth District, California.
March 13, 1941.

1. Appeal and error 🔑110

An order denying motion for new trial is not appealable.

2. Appeal and error 🔑1011(1)

Where there was sharp conflict in the evidence concerning true location of boundary line, findings of the trial court could not be disturbed.

3. Boundaries 🔑37(3)

Evidence sustained trial court's findings which fixed location of boundary line between plaintiff's and defendants' land.

4. Boundaries 🔑42

Finding that improvements, structures, and cabins erected by defendants, on lot which the court found to be owned by defendants, did not encroach upon lot which the court found to belong to the plaintiff, was sufficient finding on issue concerning whether defendants' buildings encroached upon plaintiff's property.

5. Trial 🔑404(1)

Findings of fact must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision.

6. Courts 🔑99(1)

Antecedent expressions of trial judge cannot restrict his absolute power to declare his final conclusion in only manner authorized by law, by filing his decision consisting of findings of fact and conclusions of law. Code Civ.Proc. §§ 632, 633.

Appeal from Superior Court, Fresno County; Stanley A. Murray, Judge.

Action by Rufus A. Phillips against Annie E. Hooper and another to quiet title to land and for a writ of restitution. From an adverse judgment, plaintiff appeals, and, from an order denying a new trial, the plaintiff purports to appeal.

Judgment affirmed and purported appeal from order dismissed.

Clyde E. Cate, of Fresno, for appellant.

Dearing & Jertberg and B. M. Benson, all of Fresno, for respondents.

KLETTE, Justice pro tem.

This action involves a disputed boundary line between lot 54 of Roeding's Villa Colony, and lots 1, 2, and 17 of McCoon's Boulevard Acres, in Fresno county. The complaint of plaintiff and appellant is in two counts, the first seeking to quiet title to lot 54 of Roeding's Villa Colony, and the second alleging that defendants and respondents had encroached upon said property with buildings, outbuildings, fences, and curbs, to the extent of fourteen feet, and prayed for a decree quieting title, and for a writ of restitution.

The evidence shows that Roeding's Villa Colony was platted in 1902; that lot 53 thereof, which lies directly north of lot 54, was resubdivided into McCoon's Boulevard Acres, in 1913; that a resurvey map of McCoon's Boulevard Acres was filed and recorded in 1935; that prior to 1906 or 1907, lot 53 had been planted to olive and orange trees; that about 1907, lot 53 was purchased by Rose Miller, who erected a house thereon, which extended two to two and one half feet onto the land in dispute; that this building remained in this position until after defendants and respondents acquired lots 1, 2, and 17, in 1935 and 1936, after which it was moved by them to another position on the property; that about May, 1936, defendants and respondents constructed a row of brick cabins, used as auto courts, adjacent to the south line of this property; that lot 54 had remained unimproved until it was acquired by plaintiff in 1938, after which valuable improvements were placed thereon. It was stipulated that plaintiff and his predecessors in interest had at all times paid the tax on lot 54, of Roeding's Villa Colony, and that defendants and their predecessors in interest had, at all times since the subdivision of McCoon's Boulevard Acres in 1913, paid the tax on lots 1, 2, and 17, of said tract.

The evidence as to the boundary lines between the two properties was highly conflicting. Counsel, and all witnesses, agreed upon a common starting point, the northwest corner of said lot 54, and the southeast corner of said lot 17. But when they came to the east end of the line, they were approximately fourteen feet apart. Two civil engineers fixed the corner at the east end of the dividing line approximately fourteen feet north of the point, which the court found to be the dividing line of the property. One civil engineer, and one property owner, who lived in the tract, and who had aided in the survey, fixed the line as found by the court.

The court found that plaintiff was the owner of lot 54 of Roeding's Villa Colony, and that the defendants were the owners of lots 1, 2, and 17, of McCoon's Boulevard Acres, that the true line of division between the properties of the parties, was between a certain concrete curb, running easterly and westerly, and the buildings and improvements of defendants; and that the buildings and improvements of defendants are located on said lot 1, and do not encroach upon the lands of plaintiff. Judgment was entered accordingly. From this judgment plaintiff has appealed, as well as from the order denying him a new trial.

[1] An order denying a motion for a new trial is not an appealable order. Hill v. Fricke, 5 Cal.2d 320, 54 P.2d 460; Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698.

[2, 3] There being a sharp conflict in the evidence as to the true location of the boundary line between the two properties, the findings of the court, in this particular, cannot be disturbed. Thom v. Stewart, 162 Cal. 413, 122 P. 1069; Wood v. Lehne, 30 Cal.App.2d 222, 85 P.2d 910; Woods v. Cook, 14 Cal.App.2d 560, 58 P.2d 965.

[4] Appellant complains that the court did not find on the issue as to whether respondents' buildings encroached upon appellant's property. We believe this is fully covered by the finding of the court as follows: "and the said improvements, structures and cabins erected by the defendants upon lot one (1) of McCoon's Boulevard Acres do not encroach upon lot fifty-four (54) of Roeding Villa Colony".

[5, 6] Appellant further contends that the statements made by the trial court, during the trial, indicate that the court had an erroneous theory of the case, and based its judgment on this errroneous theory. It has been held that the findings of fact must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision. Goldner v. Spencer, 163 Cal. 317, 125 P. 347. And no antecedent expressions of the judge can in any way restrict his absolute power to declare his final conclusion, in the only manner authorized by law, to wit, by filing his "decision" (findings of fact and conclusions of law), provided in sections 632 and 633 of the Code of Civil Procedure. Scholle v. Finnell, 173 Cal. 372, 159 P. 1179; Fisk v. Casey, 119 Cal. 643, 51 P. 1077; Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113; Risinger v. Anderson, 10 Cal. App.2d 455, 51 P.2d 1119.

We find no errors in the record warranting a reversal of the judgment. The judgment appealed from is affirmed. The purported appeal from the order denying the motion for new trial is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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43 Cal.App.2d 444

PEOPLE v. SUTER et al.

Cr. 3411.

District Court of Appeal, Second District, Division 1, California.

March 12, 1941.

1. Criminal law 🔑510

The corroboration of testimony of accomplice is an essential prerequisite to conviction of accused where crime charged rests primarily and solely on testimony of accomplice. Pen.Code, § 1111.

2. Criminal law 🔑511(2)

The test in determining whether accomplice has been "corroborated" is to eliminate evidence of accomplice and then examine evidence of other witnesses, and if there is any inculpatory evidence left tending to connect accused with offense, accomplice is "corroborated", and if there is no inculpatory evidence, there is no "corroboration". Pen. Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

3. Criminal law 🔑511(2)

To constitute required "corroboration" of an accomplice to warrant conviction, the evidence must tend directly and immediately to connect defendant with commission of offense. Pen.Code, § 1111.

4. Criminal law 🔑511(1)

More than a mere suspicion is required to constitute "corroboration" of an accomplice so as to authorize a conviction. Pen. Code, § 1111.

5. Criminal law 🔑511(2)

Evidence in "corroboration" of an accomplice is sufficient if, standing by itself, it tends to connect defendant with commission of the offense, even though it be slight, and when standing alone entitled to but little consideration. Pen.Code, § 1111.

6. Criminal law 🔑511(1)

In prosecution for conspiracy to offer and give a bribe and for offering and giving bribe, evidence corroborating testimony of accomplice was sufficient to sustain conviction. Pen.Code, §§ 165, 1111.

7. Criminal law 🔑427(3)

Generally, proof of existence of a conspiracy should precede proof of acts or declarations of a coconspirator made during conspiracy or in assistance of common design.

8. Criminal law 🔑427(3)

Where facts from which conspiracy is to be inferred are so intimately blended with other facts constituting the crime that it is difficult to separate them, admission of evidence of acts and declarations of coconspirator prior to production of proof by other and independent evidence of existence of the conspiracy is within trial judge's discretion.

9. Criminal law 🔑427(3)

Admission in evidence of acts and declarations of alleged coconspirator prior to production of proof by other and independent evidence of existence of conspiracy did not constitute abuse of discretion under circumstances.

10. Conspiracy 🔑47

Evidence warranted jury finding of existence of conspiracy to secure appointment of a chief of police by bribery of city councilmen and to procure immunity from prosecution for violations of law relating to bookmaking. Pen.Code, § 165.

11. Criminal law 🔑1168(2)

Where there was sufficient competent evidence at conclusion of trial from which jury might legally determine that accused was guilty of conspiracy to bribe, of which convicted, he was not prejudiced by the order of proof and by denial of motion to strike out the evidence when submitted. Pen. Code, §§ 165, 1111.

12. Criminal law 🔑423(1)

The general rule that statements or declarations of one coconspirator may be used against his coconspirator requires, not only that conspiracy be then pending, but also that the statements must be made in furtherance of common purpose or design.

13. Criminal law 🔑423(9)

The common design of a conspiracy may extend in point of time beyond actual commission of the criminal act for which accused is being tried, hence, evidence is admissible to prove acts committed thereafter if such acts reasonably appear to have been committed in furtherance of common design of the conspiracy.

14. Criminal law 🔑736(1)

The questions as to when the design is accomplished, abandoned or frustrated, and whether the acts proved are a part of the design of the conspiracy, are for the jury to determine from circumstances of each case and nature and purpose of the conspiracy.

15. Criminal law 🔑736(1)

The question whether acts committed subsequent to commission of the crime are the ordinary and probable effect of the common design, or whether they are a fresh and independent product of the mind, outside of and foreign to object of original conspiracy is for jury to determine.

16. Criminal law 🔑1159(2)

A determination of the jury on question of whether acts of coconspirators after commission of the offense are a part of the common design, if supported by any evidence, is conclusive on appeal.

17. Criminal law 🔑423(9)

Where object of conspiracy to bribe city councilmen was not only to secure appointment of a chief of police, but also thereby to enable conspirators to continue thereafter to control bookmaking activities in city, evidence of acts and declarations of coconspirators occurring after appointment of police chief was admissible. Pen.Code, § 165.

18. Criminal law 🔑412(1)

In prosecution for conspiracy to obtain appointment, by bribery, of chief of police, testimony of a bookmaker employed by accused respecting telephone conversations between accused and codefendant police officer, in which witness heard accused say "That is too much money", and that accused would see if he could raise $5,000, were intelligible and pertinent, in view of other evidence and that neither accused nor police officer elected to take stand to deny or explain the conversations. Pen.Code, § 165.

19. Criminal law 🔑753(2)

Where there was sufficient competent evidence to support conviction for conspiracy to give bribe and for giving the bribe, refusal of motion to advise jury to acquit was proper. Pen.Code, §§ 165, 1118.

20. Criminal law 🔑742(2)

Where evidence tending to connect witness with conspiracy was susceptible of different inferences, question whether he was a coconspirator or accomplice was for jury to determine. Pen.Code, §§ 165, 1111.

21. Criminal law 🔑742(2)

In prosecution for conspiracy to bribe city councilmen to secure appointment of certain person as chief of police in order to obtain protection of bookmaking, whether a certain police officer, a bookmaker who was employee of one of defendants, and wife of another bookmaker, were accomplices so as to require corroboration was, under the evidence, for jury. Pen.Code, §§ 165, 1111.

22. Conspiracy 🔑48

In prosecution for conspiracy to bribe city councilmen to appoint a certain person as chief of police, instruction that under city charter appointment might come before councilmen at any time, and, therefore, was continuously pending before city council, was too broad in that object of conspiracy charged was limited to influencing councilmen as to particular person. Pen.Code, § 165.

23. Criminal law 🔑823(1)

In prosecution for giving bribe to secure appointment of chief of police, any error in instruction because it was too broad in not limiting the appointment to a certain person as charged in indictment was cured by another instruction that indictment limited conspiracy charged to person named. Pen.Code, § 165.

24. Indictment and Information 🔑159(1)

The statute authorizing amendment of indictment, authorizes amendment to be made after both sides have rested, without any continuance unless substantial rights of defendant are prejudiced, in which case a continuance must be granted. Pen.Code, § 1008.

25. Criminal law 🔑590(1), 1167(4)

Where accused pleaded to indictment as originally returned, and district attorney was thereafter permitted to amend indictment to show with more particularity the offense charged, but without changing the offense, the amendment did not prejudice substantial rights of accused, and court did not err in denying a continuance to afford accused an opportunity to demur or plead to amended indictment. Pen.Code, § 1008.

26. Criminal law 🔑261(2), 590(1)
Indictment and Information 🔑159(1)

Permitting district attorney to amend indictment in prosecution for conspiracy to bribe by addition of words "to-wit, money", without granting defendants a continuance or rearraignment and time within which to plead thereto, was not error, since offense charged was not changed and accused was afforded every opportunity to present any defense to indictment as amended. Pen. Code, §§ 165, 1008.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Warren Suter and others were convicted of conspiracy to bribe and of bribery in violation of Penal Code, § 165, and from the judgments of conviction and from an order denying a motion for a new trial, named defendant appeals.

Affirmed.

A. H. McConnell, of Long Beach, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an indictment returned by the grand jury, defendants were accused in count 1 of the offense of conspiracy to commit the crime of corruptly offering and giving a bribe, in violation of section 165 of the Penal Code, while counts 2, 3, 4 and 5 respectively charged violations of the same Penal Code section. Count 2 was subsequently dismissed on motion of the district attorney.

Upon a trial by jury appellant was found guilty of the offenses charged in counts 1 and 4 and was acquitted of the crimes alleged in counts 3 and 5 of the indictment. Following denial of his motion for a new trial and the pronouncement of judgment against him, appellant prosecutes this appeal from both the judgments and the order denying him a new trial.

The story of the alleged conspiracy which forms the basis of this prosecution is reflected in the testimony of Robert Ramsey, a defendant and coconspirator, against whom the case was dismissed pursuant to the provisions of section 1099 of the Penal Code. Ramsey was a cafe owner, and in conjunction with the conduct of his cafe he accepted wagers upon horse races and phoned them in to appellant, Suter, who was a bookmaker. Just prior to the election of a city council in the city of Long Beach in May, 1939, defendant Julius B. Lorge, a Long Beach city police officer, approached Ramsey, telling him that if a new council were elected it might be possible to get a new police administration. Following the election, Officer Lorge had another conversation with Ramsey, in which he said, "We want to get Cy Wright in as chief of police," and further stated that Mr. Wright was a "right guy" and would be liberal so far as bookmaking was concerned. A few days thereafter, Lorge asked Ramsey if the latter could get some money to bring about Wright's appointment, and Ramsey told the officer that he would see what he could do. Immediately thereafter he communicated with appellant Suter and asked the latter if he would be interested in putting up some money to get the right chief of police into office. Appellant wanted to know who was behind it, and Ramsey told him Officer Lorge was. Thereupon Ramsey introduced appellant to Lorge. A few days later appellant told Ramsey that he had given Officer Lorge $3,000 and that he would go through with the deal. During the month of August, 1939, Ramsey went to the apartment of the defendant Olive Wurster in response to a telephone call from her, and there met with her and Lorge. Prior to this meeting Lorge had informed Ramsey that there was a woman who was very influential, so far as politics was concerned, in the city of Long Beach, and who in his opinion could do a great deal of good toward getting Mr. Wright appointed chief of police. At this same meeting Mrs. Wurster said she would have to have at least $2,000 in order to make any headway and to convince her "contacts" that it was not all "hot air". Lorge then asked Ramsey what remuneration they would get from the bookmakers for protection, and Ramsey replied that he expected about 25 per cent of the net, that being the usual procedure. Mrs. Wurster suggested that it would be better if $5,000 could be obtained for delivery to the councilmen who were required to confirm the city manager's appointment to the office of chief of police. A couple of days later Ramsey asked appellant Suter for $2,000 to be delivered to the other parties in connection with the effort to secure the appointment of such chief of police. Suter informed Ramsey he would get the money, and thereafter did give $2,000 to Ramsey, who in turn delivered the money to Lorge with instructions to pass it on to Mrs. Wurster. Later Ramsey phoned appellant that Mr. Lorge had taken the money and that it was delivered. During the month of August, 1939, Ramsey met with Lorge and Mrs. Wurster and inquired of the latter how she was making out with her contacts, to which she replied, "Very well"; that she had seen one city councilman, who indicated an interest in voting for Mr. Wright in consideration of receiving a thousand dollars. This information, Ramsey testified, he conveyed to appellant. About a week or ten days thereafter, Mrs. Wurster told Ramsey that she had seen two more city councilmen who were agreeable to voting for the confirmation of Mr. Wright as chief of police in consideration of the payment of $1,000 to each of them.

During September appellant communicated with Ramsey and requested a return of the $2,000, which request was complied with. A week or ten days later Mrs. Wurster communicated with Ramsey, stating that she must have the money back again, as she could not do anything without it. Thereupon Ramsey called appellant and told him the money would have to be produced again. On that or the next day appellant returned the $2,000 to Ramsey. Subsequently, $1,500 of this money was returned to Ramsey by Officer Lorge, the latter stating that he had to use $500 for expenses. In the early part of October appellant told Ramsey he was afraid the deal "blew up"; that his wife got a "little high" the night before and talked too much to a couple of police officers. A day or two later Officer Lorge came to Ramsey's home and told the latter two of the councilmen had heard of Mrs. Suter's statements and were very much wrought up about the situation, because the two officers had informed Mr. Wright, and the latter had stated that if Mrs. Wurster did give a bribe in any way that he would be glad to put her in jail. Wright told Mrs. Wurster never to call him again and that if he were appointed chief of police he would get the office on his own merits and did not want any of her help.

Mr. Wright was appointed chief of police on October 17, 1939, and on that day Ramsey had a conversation with Mrs. Wurster and Officer Lorge in which Ramsey suggested that Wright had apparently gotten in through his own efforts, to which Mrs. Wurster replied, "No, no, the two which she had contacted would be expecting their money and they also would be looking for their cut of the 25 per cent of the net, and she said, we will have to have at least $2,000 to give to Moxley, who in turn can take care of Carl," whereupon Ramsey inquired about the rest of the money and Officer Lorge suggested they divide it among themselves. A few days thereafter Ramsey telephoned appellant and went to see him. On that occasion he told appellant, "We will have to have the $5,000 for the councilmen." Later appellant, accompanied by Mr. Irvine, met with Lorge and Ramsey, and appellant stated to Lorge that the payoff would be made monthly right after the first of every month. Later that day appellant and Irvine came to Ramsey's house, where they counted out $4,500 and gave the money to Ramsey. Ramsey then stated they were $500 short, to which appellant replied that the total amount was supposed to $5,000 and that Lorge had already used $500, so that the $4,500 plus what Lorge had already kept would make the total of $5,000 in accordance with their agreement. Ramsey further testified that he talked with appellant about the $5,000 before Mr. Wright was appointed chief of police and also talked with him about the $4,500 after the appointment; that he informed appellant that the $5,000 was to be used on councilmen and other contacts that might be needed in order to get Mr. Wright in as chief of police. When Ramsey received the $4,500, he turned it over to Officer Lorge, who gave Ramsey $625 and stated that he would take a like amount, give the new chief of police the same sum, and take the rest of it down to Mrs. Wurster. Thereafter, during the latter part of October, Ramsey saw Mrs. Wurster, who informed him that Lorge had given her the balance, $2,625, and that she had delivered $2,000 thereof to a councilman who in turn was to give one-half thereof to another member of the council. During the latter part of October, Ramsey had a conversation with Officer Lorge and appellant relative to the location of the bookmaking business, at which time appellant wanted to know when he could move in town, and was informed by Officer Lorge that no reason appeared why he could not move in the first of November, to which appellant replied, "All right, we will go on and make arrangements to that effect."

Ramsey further testified that shortly after the first of November, Officer Lorge asked him to obtain the addresses of the agents who called their bets into appellant and Mr. Irvine, and also to obtain the license numbers of their cars, in order that the connection of such persons with appellant and Irvine might be known to the police department. Ramsey communicated with appellant and conveyed to him Lorge's request. Thereafter, Mr. Irvine gave such addresses and license numbers to the witness Ramsey, who in turn delivered them to Officer Lorge, the latter of whom said, "All right, I will turn them over to the proper ones, so that they can take care of them."

About December 1, 1939, Officer Lorge asked Ramsey if it was not pay day and made inquiry as to whether appellant and Irvine had left any money, to which the witness Ramsey replied, "Not yet, I will see him." Ramsey did see appellant that evening, informed him that a month had passed by, and that it was time to pay off, to which appellant replied, according to Ramsey, "That they had not made anything so far, and furthermore, they could not seem to get any better protection than the rest of the bookmakers in town, and he said, I don't feel I should give you any money, and he didn't." According to Ramsey, Mrs. Wurster also inquired of him in the early part of December and about the first of the year 1940 as to whether he had collected any money, to which Ramsey replied that he had not. Just prior to the first of January, 1940, Ramsey again advised appellant and Irvine that it was around the first of the month and he thought they had better be paying, to which they replied, "No, we are not paying until we get different protection, and we are still not making any money."

[1-3] We shall first give consideration to appellant's claim that the corrobation of the coconspirator Ramsey's testimony was insufficient to meet legal requirements

in that regard. That Ramsey was an accomplice is unquestioned. A reading of section 1111 of the Penal Code immediately suggests that such statute imperatively makes corroboration of the testimony of an accomplice an essential prerequisite to the conviction of a defendant where the crime charged rests primarily and solely upon the testimony of such accomplice. As a rule of guidance in determining the sufficiency of corroboration, our Supreme Court in People v. Morton, 139 Cal. 719, 724, 73 P. 609, 611, quoted with approval the following language found in Welden v. State, 10 Tex.App. 400: "* * * Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." In the same case of People v. Morton, supra, our Supreme Court voices its approval of the rule as stated in Simms v. State, 8 Tex.App. 230: "The evidence must tend directly and immediately to connect the defendant with the commission of the offense." In New York, under a code provision similar to our own (Code Crim. Proc., § 399), it was said in People v. Ryland, 28 Hun. 568, 570, "The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime to be of any avail."

[4, 5] It is firmly established in the law of this state that by way of corroboration more than mere suspicion is required. People v. Kempley, 205 Cal. 441, 456, 271 P. 478, and cases therein cited; People v. Davis, 210 Cal. 540, 293 P. 32. However, though more is required by way of corroboration than to raise a mere suspicion (People v. Thompson, 50 Cal. 480), nevertheless, the corroborating evidence is sufficient, if it, standing by itself, tends to connect the defendant with the commission of the offense, even though it be slight, and when standing alone entitled to but little consideration. People v. McLean, 84 Cal. 480, 24 P. 32.

[6] Bearing in mind the principles just enunciated, let us now turn to the record to discern in what respects, if at all, the testimony of the accomplice Ramsey was sufficiently corroborated. By and through the testimony of other witnesses, numerous facts were proved. Willard S. Sibray was a bookmaker working for appellant in the capacity of a "telephone man". He testified that three weeks prior to the election of the city council in Long Beach appellant asked him if he could explain the method by which the chief of police of said city was selected, and the witness told him that to the best of his knowledge that official was appointed by the city council and confirmed by the city manager. Appellant also asked him if it would be possible for the right councilman to put in a chief of police that he [appellant] or someone else would select, to which the witness at that time replied that it would be very dangerous to have anything to do with donating money to appoint anybody, and cautioned appellant not to have anything to do with handling the money himself. This witness further testified that appellant told him he had a chance to put up some money to secure the appointment of a chief of police to allow them to enter the city of Long Beach and extend the scope of their business so that they would be free from arrest and be able to control the bookmaking activities of that city. The next day appellant told Mr. Sibray it would take a great deal of money to handle the proposition if it went through, and he would have to get somebody else to assist him. This witness also testified that between the latter part of August, 1939, and October 15 of the same year, defendant Officer Lorge phoned to appellant's bookmaking establishment, upon each of which occasions the witness answered the telephone and Officer Lorge asked for appellant. Upon one of these occasions the witness overheard appellant say over the telephone, "That is too much money." Upon another of these times appellant said over the telephone to Officer Lorge, "O. K., I will see you in fifteen or twenty minutes," whereupon appellant took a billfold from his pocket and counted out two stacks of bills amounting to one or two thousand dollars, and asked the witness to check them over as to the amount, whereupon appellant put the money in his pocket and left. Upon the occasion of another of Officer Lorge's phone calls, the witness heard appellant remark, "All right, we are all set if I can raise $5,000." In the latter part of October appellant told this witness, "We were to arrange a method of handling and recording bets not only for ourselves but for other bookmakers who would be

gathered under one roof in one room, so that the bookmaking of the city of Long Beach could be combined, and that we must devise a method whereby we could check on all the bookmakers to prevent errors happening and to keep the accounts straight." The same witness further testified that in the middle of November, 1939, appellant said in the presence of the witness and others that all men who owned automobiles should hand in slips showing the license numbers and a complete description of the car, so that it could be turned over to defendant Patrick E. Irvine, who was in turn to place such information in the hands of the police vice squad, so that there would be no interference on the part of the latter with those who operated these automobiles. There was also testimony that during the latter part of September, 1939, following a telephone conversation with a bookmaker, appellant remarked, "Now I have got to raise five thousand bucks," and on November 2 or 3, 1939, according to the witness Sibray, appellant told him that they would all be notified before any "knockover" occurred.

Another witness, J. W. Bent, who was also a bookmaker, testified that he had a conversation with appellant about July 9, in which the latter said they were going to form a combination, and if a certain man was elected to office they would have protection to run a book, and that the bankroll in this book would be about $10,000, and that the witness Bent would have 10 per cent of the profits if he would put up $2,500. About two weeks later appellant went to Bent's home and in the presence of the latter and his wife stated that in order to get a certain man elected he would need $700, and inquired of Bent if he had the money to put up. Upon inquiry by Mrs. Bent as to how the proposition was going to work out, appellant told her that the money would be used to elect a certain man into office, and if that particular man were elected there would be no interference with bookmaking and certain bookmakers would have protection to operate unmolested. Upon inquiry by Mrs. Bent as to what other bookmakers who were not receiving such protection would do, appellant informed her that those who did not join the combination would experience considerable trouble operating their business. Mrs. Bent disapproved of the proposal and told appellant she did not think it was right. The next day, however, her husband gave appellant $700 which was returned to him three weeks later with the remark by appellant that "the deal did not go through". On the evening of October 17, 1939, appellant again communicated with Bent, inquiring if the latter was able to pay $2,500, stating that their man was in office and everything "was all set", and further advised that those who were not "in on the combination would have pretty tough sledding because the people in on the deal were going to get a 25% cut on the profits of the books, and it would be to their benefit to see that no other book operated". On this occasion the witness Bent told appellant his wife was very much against the proposition; that he himself was not in favor of it, and could not join in. Three days after this refusal on his part Bent's bookmaking establishment was raided by the police.

S. W. Tubbs, a police officer of the city of Long Beach, was approached by defendant Officer Lorge in the office of the vice squad during the first few days of November, 1939, and was told that Wright had been appointed chief and had named Officer Lorge to take charge of all bookmaking activities, and that the witness Tubbs was to work on the bookmaking detail and to take orders from Lorge. The latter told Officer Tubbs on that occasion that what Chief Wright wanted to do with the bookmakers was to get them all down in the harbor in one place, and if there were any complaints on the agents to turn such complaints over to Lorge, who would get in touch with the bookmakers and the latter would refuse to take any more bets from such agents, thereby forcing them out of business. Defendant Officer Lorge thereafter gave Officer Tubbs three index cards containing a list of bookmaking agents for him to copy, and from time to time also gave Tubbs slips of paper containing the names and addresses of those engaged in bookmaking activities.

William C. Wright, who was appointed chief of police of Long Beach on October 17, 1939, had a conversation with defendant Lorge concerning the former's aspirations. Thereafter Officer Lorge came to Chief Wright's home and said he would like the latter to meet a Mrs. Wurster; that she was a person who had been quite active in most of the councilmen's campaigns; that she knew all of them, talked to them, and that it was quite apparent there was going to be a change in the city manager and the chief of police; that he thought Mrs.

Wurster would be able to do Wright a lot of good by way of obtaining for him the appointment as chief of police. On that day Wright accompanied Lorge to Mrs. Wurster's house. Wright was also introduced to the accomplice Ramsey by defendant Lorge, who informed Ramsey that Mr. Wright was the person who had been mentioned as the possible chief of police. In August or September, 1939, Chief Wright, accompanied by his wife, in response to a telephone request from Mrs. Wurster, went to the latter's home. There he met Ramsey, Lorge and Mrs. Wurster. While Mr. and Mrs. Wright were there the doorbell rang, Mrs. Wurster went to the door, and upon her return said, "This man Carroll is at the door", and showed Mr. and Mrs. Wright into a back bedroom. Although Wright did not see the party who called, he heard Mrs. Wurster say as the caller was leaving that she felt that Mr. Wright would make a good chief of police. Mrs. Wurster thereupon informed Wright that she was speaking to a city councilman, and that it would be worth $1,000 to see the then chief of police discharged.

About the first week in October, 1939, Chief Wright met with Officer Lorge and Mrs. Wurster, informed them he had heard some rumors regarding some sort of deal where there were bookmakers putting up some money on the futherance of his appointment, and that their names had been connected with it. In response to Wright's query as to what they knew about it, they said they knew nothing whatever. Upon that occasion Chief Wright informed Officer Lorge and Mrs. Wurster that he did not care to see them or discuss the matter with them, and for them not to do anything in connection with his desire for appointment as chief of police.

A city councilman who was also engaged in the insurance business responded to a telephone request from Mrs. Wurster in regard to an insurance policy. During that conversation Mrs. Wurster told the councilmen that she would like to see a change in the office of chief of police; that Mr. Wright was in her opinion qualified, and that there would be "money in it for the fellow who would make the change". She then took something out of the piano, held it in her hand and said she had a thousand dollars there to show that she "was not fooling". The councilman replied that he was not interested, and left. Another councilman testified that he was approached by Mrs. Wurster about October 7, upon which occasion she said she would like to see Mr. Wright made chief of police, highly recommended him, and advised that the gambling interests were back of him, and that there was money up for his appointment. Still another councilman testified that in a conversation with Mrs. Wurster about the middle of November she said, "I think the gambling interests would be willing to pay $1,000 to see Wright made chief"; to which this councilman replied, "They don't need to contact me because I think Wright is a good man and they are just trying to discredit him by boosting for him." Another councilman was told by Mrs. Wurster that if Wright were appointed chief of police there was $4,000 in it; that the gambling interests were going to pay that sum for his appointment. This councilman replied that he was not interested; that he had served as a member of the grand jury in Los Angeles county and had seen many people in trouble because of that kind of activities, and if any one offered him any money they would have to tell their story to the grand jury.

Certainly there is nothing in the record from which it could be concluded that the foregoing witnesses, Sibray, Tubbs, or Mrs. Bent, were liable to prosecution for the identical offense charged against the defendants in the instant prosecution in which the testimony of the accomplice Ramsey was given. Hence they were not accomplices (Pen.Code, § 1111); and their testimony as herein narrated certainly tended to connect appellant with the commission of the offenses with which he was charged. Such corroborative evidence, therefore, met the requirements of our law.

[7-11] Appellant insists that the trial court erred in admitting into evidence the acts and declarations of his coconspirators made outside his presence prior to proof of the existence of the conspiracy by other and independent evidence. Beyond question it is the general rule that proof of the existence of a conspiracy ordinarily should precede proof of the acts or declarations of a coconspirator made during the conspiracy or in assistance of the common design; but such rule is not absolute, and sometimes, such as in the case at bar, the facts from which the conspiracy is to be inferred are so intimately blended with the other facts going to constitute the crime that it is difficult to separate them, and in such cases the admission of evidence of acts and declarations of an alleged coconspiractor prior to the production of sufficient proof by other and independent evidence of the existence of such conspiracy, is a matter committed to the sound discretion of the trial judge, and we perceive no abuse of such discretion in the instant case. People v. Fehrenbach, 102 Cal. 394, 36 P. 678; People v. Sing, 42 Cal.App. 385, 397, 183 P. 865; People v. Rodley, 131 Cal. 240, 253, 63 P. 351. When we contemplate all the evidence introduced at the trial, we have no hesitancy in saying that it abundantly warranted the determination of the jury that a conspiracy to secure the appointment of a chief of police by the liberal use of bribes with the appointing power and to thereafter procure immunity from prosecution for violations of the law did in fact exist as alleged in the indictment. When, as here, there was present in the record at the conclusion of the trial sufficient competent evidence from which the jury might legally reach a conclusion that by means of an established conspiracy appellant committed the offenses of which he was convicted, then no substantial prejudice was created against him; and the so-called "order of proof" assumes no consequence when no prejudice to a defendant arises from the exercise by the court of its sound discretion in admitting such evidence by denial of appellant's motion to strike at the time all the evidence was submitted to the jury for its consideration. People v. Compton, 123 Cal. 403, 56 P. 44; People v. Collier, 111 Cal.App. 215, 295 P. 898.

[12–17] We are in thorough accord with appellant's conception of the general rule "that statements or declarations of one coconspirator may be used against his coconspirator, requires not only that the conspiracy be pending at the time and its object not accomplished, but also that such statements must be made in furtherance of the common purpose or design of the conspiracy". In fact, this court so held in People v. Gilliland, 39 Cal.App.2d 250, 103 P.2d 179. Appellant's theory in the instant case is founded on the claim that the object of the conspiracy was accomplished when on October 17, 1939, W. C. Wright was appointed chief of police, and therefore any acts or declarations of conspirators made outside the presence of appellant after such date were incompetent, immaterial and inadmissible. It has been held that the common design of a criminal enterprise may extend in point of time beyond the actual commission of the act constituting the crime for which the accused is being tried, such as for the purpose of concealing the crime, securing the proceeds thereof, sharing in or dividing the proceeds of the crime, or bribing or influencing witnesses, and that consequently, evidence is admissible to prove acts committed after (Hollingshead v. State, 21 Okl.Cr. 306, 207 P. 104), as well as before (People v. Arnold, 199 Cal. 471, 250 P. 168) the perpetration of the crime for which the accused is on trial. Of course, it must reasonably appear that such acts were committed in furtherance of the common design of the conspiracy. It must also be remembered that the question when the design is accomplished, abandoned or frustrated, and whether the acts proved are a part of the design of the conspiracy are for the jury to determine from the facts and circumstances of each case and the nature and purpose of the conspiracy. In other words, the question of whether or not the acts committed subsequent to the commission of the crime are the ordinary and probable effect of the common design, or whether they are a fresh and independent product of the mind, outside of and foreign to the object of the original scheme, is for the jury to decide. If there be any evidence to support the findings made by the jury on any of the foregoing questions, its determination thereof is conclusive on appeal. People v. Lorraine, 90 Cal.App. 317, 265 P. 893. A review of the record in this case indicates that the object of the unlawful enterprise was not only to secure the appointment of a chief of police who would immunize from arrest certain bookmaking establishments, but also to thereby enable appellant and his coconspirators to continue thereafter to control the operation of bookmaking activities in the city of Long Beach, in return for which power appellant and his confederates were to pay $5,000 and a monthly "payoff" of 25 per cent of the bookmaking profits to city councilmen and others involved. The objectives of the conspiracy, in other words, contemplated not only the appointment of a certain chief of police, but thereafter the continued "protection" of appellant and his and other bookmaking establishments in Long Beach. There being ample proof of the existence of a conspiracy herein as a continuing one, the evidence of acts and declarations occurring after the accomplishment of the primary objective, viz., the appointment of a certain man as chief of police, were admissible as being in furtherance of the general plan of the conspiracy in its entirety.

[18] Appellant next contends that it was error for the court to admit in evidence what he terms "fragmentary parts" of the telephone conversations heretofore set forth held between appellant and other persons, as testified to by the witness Sibray. We conclude that the portions of the conversations heard by the witness were intelligible and pertinent to the case when taken in connection with all the other facts and circumstances in evidence. If the part not heard by the witness would in any material respect modify or explain the part he heard, the appellant was privileged to give it in explanation. In the instant case appellant, by not becoming a witness in his own behalf, and the codefendant Officer Lorge, with whom the witness Sibray testified appellant was talking, not taking the witness stand in his defense, chose to neither deny nor explain the conversation, and the witness having testified to all the conversation he heard, its admission by the court under the circumstances present in this case was proper. The case of People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707, decided by this court and cited by appellant, is easily distinguishable from the case at bar. In the cited case there was presented nothing which established the pertinency of the fragmentary portions of the conversation to the charge upon which the defendant was on trial and which would justify an inference that the defendant was occupying certain premises in violation of section 337a of the Penal Code. But such is not the case here. There was much in the portions of the conversations now before us and as heard by the witness which, when considered in the light of other facts and circumstances in evidence, established not only the pertinency, but the relevancy and materiality of such conversations to the issues before the jury, and from which portions of conversations inferences of the culpability of appellant could be drawn. The ruling of the trial court in admitting testimony of the portions of the conversations heard by the witness was correct.

[19] Holding as we do that there was sufficient legal and competent evidence to support the verdict, it is clear that the trial court did not err in denying appellant's motion to advise the jury to acquit him. Had the court so advised the jury, the latter would have been justified, in view of the evidence before them and pursuant to section 1118 of the Penal Code, in declining to follow such advice from the court.

Appellant's next ground of appeal is thus stated: "Where there is no conflicting evidence as to a witness being an accomplice, and that fact stands undisputed in the testimony, the court should as a matter of law instruct the jury that such witness is an accomplice." By reason of this rule, appellant asserts that the court erred in giving to the jury an instruction as follows:

"The court instructs the jury that it is your duty to determine whether or not the witnesses, Robert W. Ramsey, S. W. Tubbs, W. S. Sibray, J. W. Bent and Vera Bent are coconspirators in the commission of the offense charged in Count I of the indictment herein and for which the defendants are on trial, and if you so decide then the instructions that are here given to you on the subject of coconspirators should be applied by you to the testimony of said witnesses."

[20, 21] As to the witnesses Tubbs, Sibray, and J. W. and Vera Bent, the instruction was absolutely correct, because as heretofore in this opinion pointed out, it appears from the record that the witnesses Tubbs, Sibray and Mrs. Bent as a matter of law were not accomplices, and while as to the witness J. W. Bent, even though we assume that there is evidence tending to connect him with the crime, the facts in connection therewith are susceptible of different inferences, and therefore the question of accomplicity is one to be decided by the jury. People v. Payton, 36 Cal.App.2d 41, 45, 96 P.2d 991. As to the witness Robert W. Ramsey, there can be no doubt but that he was an accomplice and the court so instructed the jury in the following explicit language contained in another instruction: "* * * In that connection, you are further instructed that the witness Robert Ramsey has testified to matters in the cause on trial which, if true, would make him an accomplice of the defendants and you are therefore instructed that you will consider him as an accomplice. * * *" It cannot, therefore, be held that any substantial right of appellant suffered as a result of the instruction under attack.

[22, 23] It is next contended by appellant that the court erred in giving the following instruction:

"The City Manager shall have the power to appoint the Chief of the Police Department of the City of Long Beach, provided that such appointment by the City Manager must be with the confirmation of the City Council. The Chief of Police so appointed shall serve during the pleasure of the City Manager.

"You are further instructed that under the provisions of the City Charter of the City of Long Beach the matter of the appointment of a Chief of Police of the City of Long Beach and a confirmation by the City Council of such appointment is a matter which may under the law come before them at any time for their official consideration, and consequently is a matter continuously pending before the City Manager and City Council of said City."

In support of the claim of error appellant asserts that "the object of the conspiracy charged in the indictment was limited to influencing of certain members of the city council, not on the confirmation of any person as chief of police, but to one person, namely, W. C. Wright". We must agree with appellant that the concluding part of the just-quoted instruction uses language too broad in its scope, but when considered in the light of another instruction given immediately thereafter on the court's own motion, it seems only reasonable to assume that no confusion could arise in the minds of the jurors or that any of appellant's substantial rights were impaired by the concluding phrase of the challenged instruction. The instruction which we feel cured any error that occurred from the broad language of the former instruction was as follows: "But this indictment limits the conspiracy charged to an effort to influence five members of the council, not on the confirmation of any Chief of Police who would yield to their purpose but to one person, namely, W. C. Wright, and there is no dispute that he was appointed and confirmed as Chief of Police on October 17, 1939; therefore you are instructed that in order for you to find each particular defendant guilty of the conspiracy charged in count I, you must find that such defendant, prior to October 17, 1939, joined the conspiracy to bribe five councilmen for their vote on October 17, 1939, to confirm W. C. Wright as Chief of Police of the City of Long Beach. * * *"

[24-26] After both sides had rested at the trial the court granted a motion made by the district attorney to amend the indictment by inserting the words, "to-wit, money", following that portion of the allegation in the indictment that the defendants named therein "did wilfully, unlawfully, feloniously and corruptly offer and give a bribe or bribes"; and prior to the mentioning in the indictment of the names of the councilmen named therein, there were added the words "any five of the following persons, to-wit". Appellant here contends that he was entitled to be rearraigned upon the indictment as amended and to time within which to plead thereto. Section 1008 of the Penal Code, as amended in 1927, and pursuant to which section the amendments were allowed, reads as follows:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. The court may order its amendment for any defect or insufficiency, at any stage of the proceedings; and the trial shall continue as if it had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable continuance, not longer than the ends of justice require, may be granted. If the defect or insufficiency be one that cannot be remedied by amendment, the proceeding shall be dismissed, but the defendant shall not be discharged if the court shall direct the filing of a new information or the submission of the case to the same or a new grand jury. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

Obviously the section just quoted authorizes the type and kind of amendments permitted in the instant cause. It is only when the substantial rights of the defendant are prejudiced by the amendments that a continuance need be granted. Where, as here, the defendant had pleaded to the indictment as originally returned by the grand jury, and the district attorney was thereafter permitted to amend the pleading to the end that it might show with more particularity the offense charged, but did not change the offense, such amendment could not have prejudiced the substantial rights of the accused, and we are bound to hold that such amendments were not improperly allowed, nor was the court in error when it denied to appellant a continuance to afford him an opportunity to demur or plead to the indictment as amended. People v. Bryant 101 Cal.App. 84, 86, 87, 281 P. 404. This is especially true in the case at bar, where the trial court afforded appellant every opportunity to present any defense he might have to the indictment as amended, and did in fact upon request of the defendants permit the case to be reopened for the purpose of receiving testimony proffered by them of certain councilmen who had not testified for the prosecution, and which testimony was to the effect that such councilmen were never offered a bribe by any of the defendants.

We have painstakingly and carefully reviewed the voluminous reporter's transcript filed herein, from which we conclude that appellant had a fair and impartial trial. In fact the learned trial judge displayed to the defense unusual consideration and patience, while the record is singularly free from error.

For the foregoing reasons, the judgments and the order by which the motion for a new trial was denied are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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43 Cal.App.2d 396

YASUNAGA v. STOCKBURGER et al.

Civ. 6183.

District Court of Appeal, Third District, California.

March 10, 1941.

Hearing Denied May 8, 1941.

1. Mandamus 🔑154(2)

Where it appeared from petition for writ of mandamus to compel reimbursement of taxes allegedly erroneously collected for operating a trucking business that claims were not filed within five years from payments thereof as required by statute, demurrer was properly sustained to petition. St. 1935, p. 2263; St.1933, p. 2490; Const. art. 13, § 15.

2. Mandamus 🔑163

Where it appeared from petition for writ of mandamus to compel reimbursement of taxes allegedly erroneously collected for operating a trucking business that claims were not filed within five years from payments thereof as required by statute, and petitioner made no application to amend her pleading to allege such fact, petitioner "waived" right to amend her pleading and could not complain of an asserted abuse of discretion in sustaining demurrer without granting leave to amend. Code Civ.Proc. § 472c.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

3. Pleading 🔑225(2)

Prior to enactment of provision of Code of Civil Procedure on September 19, 1939, a pleader was deemed to have "waived" his right to assert that trial court abused its discretion by failing or refusing to grant leave to amend pleading to which a demurrer was sustained unless he requested permission to amend the pleading. Code Civ. Proc. § 472c.

4. States 🔑191(1), 201

Suits may be brought against state only in manner and within time allowed by statute. Const. art. 22, § 6.

5. States 🔑191(1)

Statutes authorizing suits to be maintained against state are in derogation of the sovereignty and must be strictly construed.

6. Limitation of actions 🔑179(2)

The time for commencing an action against state may not be suspended by a mere general allegation of ignorance of effect of statute limiting time within which action may be brought with relation to the subject involved.

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by Nami Yasunaga, etc., against Arlin E. Stockburger and others, for a writ of mandamus to compel the State Board of Control to reimburse the petitioner for taxes allegedly erroneously levied and collected for operating a trucking business. From a judgment in favor of respondents, after a demurrer to the petition had been sustained without leave to amend, the petitioner appeals.

Affirmed.

Harry A. Encell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for respondents.

THOMPSON, Justice.

The petitioner has appealed from an order sustaining without leave to amend a demurrer to her application for a writ of mandamus to compel the board of control of the state of California to approve, allow and direct to be paid two specific claims for reimbursement of taxes from a special fund created by the legislature, Stats.1933, chap. 968, p. 2490, which taxes were erroneously levied and collected under article XIII, section 15, of the Constitution of California, for operating as common carriers, a trucking business on the public highways of this state. Pursuant to that order, judgment of dismissal of the proceeding was rendered and entered.

The petition alleges that Kiso Yasunaga, under the fictitious name of Produce Transfer Company, conducted, in his lifetime, a trucking business in the vicinity of San Jose, from 1928 to 1930, inclusive, but that he did not convey goods or passengers as a common carrier between fixed termini or over regular routes on the public highways; that the company, as a private carrier under contracts, transported property for which he derived a revenue in the year 1928, of $15,345.40, upon which basis the state wrongfully levied and there was paid taxes in the sum of $1,896.66, all of which was illegal except the sum of $667.27; that the company received a revenue for a similar business during the year 1929, of $9,970.67, upon which income the state wrongfully levied and collected $1,555.04, no part of which was legally due except the sum of $498.53; that the excess taxes were paid through mistake and ignorance; that the company "did within five years of the date of payment of said sums as aforesaid, namely, *on September 16, 1935,* present its verified claim to said board of control wherein and whereby it was set forth that Kiso Yasunaga had on February 3, 1930, paid to the state of California for and on account of said invalid demands, as aforesaid, the sum of $1,229.39, and on July 10, 1930, * * * the sum of $1,056.51, and had within five years, namely on December 30, 1933, presented *a claim* to the board of control for the refund *of sums paid* * * by virtue of the invalid demands * * * as hereinabove set forth", that Kiso Yasunaga subsequently died, and upon application therefor Nami Yasunaga was duly appointed and qualified as administratrix of his estate.

The petition for a writ of mandamus was thereupon filed to recover from the special fund created by statute for that purpose the two specific sums illegally levied and collected of $1,229.39, paid February 3, 1930, and $1,056.51, paid July 10, 1930. To that petition the respondent demurred. The demurrer was sustained without leave to amend, on the theory that claims for those particular payments were not filed within five years from the dates when they were paid, as required by statutes of 1935, chapter 845, page 2263. A judgment of dismissal was thereupon rendered, from which this appeal was perfected.

[1] We are of the opinion the demurrer was properly sustained for the reason that it appears from the petition the claims for the particular assessments sought to be recovered in this proceeding were not filed within five years from the payments thereof, as the statute requires. It is definitely alleged the claims for those particular sums were presented September 16, 1935, for payments which were made February 3, 1930, and July 10, 1930. The statute of 1935, under which the petitioner seeks to recover in this proceeding, provides that: "The State Board of Control shall not examine any such claim or disburse any funds therefor from this appropriation unless the claimant has presented such claim to the State Board of Control or instituted a suit in a court of competent jurisdiction for the recovery of any such sum, within a period of five years after payment to the State."

It is true that the petition, after stating the exact dates in February and July, 1930, when claims for the particular amounts sought to be recovered were presented, further alleges that "On December 30, 1933, * * * *a claim* to the Board of Control *for the refund of sums paid* * * * by virtue of the invalid demands of the State of California as hereinabove set forth" was presented. It will be observed the petition alleges that other taxes besides those which are involved in this proceeding were illegally assessed and paid. It does not appear that the claim last mentioned, which was filed December 30, 1933, had any application to the sums sought to be recovered in this proceeding. In her opening brief, the petitioner seems to concede the claim which was filed in 1933 was not for the particular payments which are here involved. She says in that regard: "It is true that petitioner did not in 1935 present the identical claim which was presented by her husband in 1933. * * * The sums of money involved in each claim were extracted under exactly the same circumstances and from the same claimant."

[2, 3] This language infers that the claim which was filed in 1933 was merely one to recover other taxes which were illegally levied and collected under circumstances similar to those which are involved in this proceeding. We do not understand the petitioner contends the claim which was filed in 1933 included the same two payments which are involved in this suit. If it be true that claim covered these payments the petitioner should have asked the court for permission to amend her pleading to allege that fact. She failed to do so. She may therefore not complain of an asserted abuse of discretion in sustaining the demurrer without granting leave to amend the pleading. That right was waived. The demurrer was sustained in July, 1938. The authorities are uniform to the effect that, prior to the enactment of section 472c of the Code of Civil Procedure, September 19, 1939, a pleader was deemed to have waived his right to assert that the court abused its discretion by failing or refusing to grant leave to amend the pleading to which a demurrer was sustained unless he requested permission to amend the pleading. Powell v. Lampton, 30 Cal.App.2d 43, 47, 85 P.2d 495.

It is not alleged the claim which was filed December 30, 1933, conformed to the requirements of the statute as it then existed. Stats.1933, chap. 968, p. 2490. The statute then prohibited the board from considering or allowing a claim for reimbursement of taxes illegally collected unless it appeared they were paid under a written protest, and then only if the claim was filed within three years from the date when the payment was made. That statute then read in that regard: "No such claim shall be examined by the board unless the claimant at the time of payment to the State of the amount claimed *protested in writing such payment,* and has presented such claim or instituted suit in a court of competent jurisdiction for the recovery of any such sum, *within a period of three(3) years after payment to the State.*"

[4-6] Since the petition in this proceeding affirmatively alleges the payments sought to be recovered in this action were paid to the state in February and July, 1930, and that first claim was not filed until December 30, 1933, the cause of action was then barred because more than three years had elapsed since the payments were made to the state. The board was therefore precluded by the clear language of the statute from then considering or allowing the claim. That claim was therefore ineffectual for any purpose. Suits may be brought against the state only in the manner and within the time allowed by statute. Art. XX, sec. 6, Constitution of California; Estate of Bloom, 213 Cal. 575, 581, 2 P.2d 753; Brandt v. Riley, 139 Cal.App. 250, 33 P.2d 845; Liebman v. Richmond, 103 Cal. App. 354, 359, 284 P. 731; 23 Cal.Jur. 578, sec. 37; County of San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174. It has been frequently held that since statutes authorizing suits to be maintained against the state are in derogation of the sovereignty they must be strictly construed. 23 Cal. Jur. 578, sec. 37. The time for commencing an action may not be suspended by a mere general allegation of ignorance of the effect of the statute with relation to the subject involved. Easton v. Geller, 116 Cal.App. 577, 3 P.2d 74; 16 Cal.Jur. 565, sec. 161.

Since the right of action in this proceeding was actually barred by the specific provisions of chapter 968 of the statutes of 1933, at the time the first claim was filed in December of that year, even assuming that it included the payments sought to be recovered in this proceeding, we are doubtful whether that right of action could be revived by the subsequent enactment of chapter 845 of the statutes of 1935, which extended the time within which a suit of that nature might be commenced to five years from the time of payment. 16 Cal. Jur. 573, sec. 169. However, it is not necessary to determine that question and we specifically refrain from doing so.

The demurrer to the petition was properly sustained for the reason that it affirmatively appears no claim for payment of the particular amounts which are involved in this proceeding was filed within five years from the dates when they were paid to the state.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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43 Cal.App.2d Supp. 877

CONTINENTAL INS. CO. OF NEW YORK v. PACIFIC GREYHOUND LINES et al.

No. 102256.

Appellate Department, Superior Court,
San Diego County, California.
March 8, 1941.

1. Evidence 🔑222(2)

In action for damage to street sweeper from collision with bus, evidence of admission by sweeper operator that at time of collision he could not see anything because of dust, and was following right-hand ridge of parkway to keep his direction, was admissible.

2. Appeal and error 🔑931(1)

On appeal, all intendments are in favor of trial court's findings, and they will not be overthrown unless it is manifest that the conclusions reached cannot be sustained on any rational view of the evidence.

3. Appeal and error 🔑1010(1)

On appeal from judgment for plaintiff, reviewing court may not interfere with trial court's findings on question of negligence unless evidence discloses that the only reasonable conclusion to be reached is that no negligence has been established on defendant's part.

4. Automobiles 🔑244(12, 35)

Evidence that, immediately prior to collision with street sweeper, bus driver passed automobiles without sufficient room to return safely to right-hand side of road, and that bus driver drove into cloud of dust raised by sweeper at unsafe speed, supported finding that bus driver was negligent.

5. Automobiles 🔑146, 204

The operator of a street sweeper was under obligation to exercise reasonable care in behalf of traveling public, but public's right to use highway was subordinate to right of public authorities to make improvements, and travelers were required to be on guard against perils created notwithstanding exercise of reasonable care.

6. Automobiles 🔑207

A warning to travelers was required where it was necessary, in order to remove dirt spilled in filling cement island in highway, to operate street sweeper in northerly direction on side of highway devoted to southbound traffic.

7. Automobiles 🔑207

Where warning was posted that highway was under repair, and cloud of dust raised by street sweeper with which bus collided also warned bus driver of presence of sweeper, which was sweeping up dirt spilled in filling cement island in highway, there was no contributory negligence in failing to give warning which would preclude recovery for damage to sweeper.

8. Automobiles 🔑206

The operator of a street sweeper was justified in assuming that motorists would use reasonable care and caution commensurate with visible conditions and would approach with their vehicles under reasonable control.

9. Automobiles 🔑206

The operator of street sweeper, although he had been involved in an accident while sweeping up dirt spilled in filling cement island in highway, could presume that if there were sufficient passing room there would be no further difficulty, and that motorists using reasonable care could safely pass sweeper.

10. Appeal and error 🔑1008(1)

Where it was necessary to operate street sweeper in northerly direction on side of highway devoted to southbound traffic, in order to sweep up dirt spilled in filling cement island in highway, and bus collided with sweeper although bus driver was warned by signs and by dust raised by sweeper, whether contributory negligence barred recovery for damage to sweeper was for trial court.

11. Appeal and error 🔑1010(1)

The finding of trial court as to existence of negligence and its effect as contributing proximately to accident was conclusive unless contrary conclusion necessarily followed from undisputed facts.

2. Automobiles ⚷244(42)

Evidence showing that it was necessary to operate street sweeper in northerly direction on side of highway devoted to southbound traffic, in order to sweep up dirt spilled in filling cement island in highway, and that bus collided with sweeper although bus driver was warned by signs and dust raised by sweeper, supported finding that operator of sweeper was not guilty of contributory negligence which would bar recovery for damage to sweeper.

Appeal from Municipal Court, San Diego County; Joe L. Shell, Judge.

Action by the Continental Insurance Company of New York against the Pacific Greyhound Lines, a corporation, and another, for damage to a street sweeper, sustained in a collision with a bus. From a judgment for plaintiff, defendants appeal.

Affirmed.

Monroe & McInnis, of San Diego, for appellants.

Higgs & Fletcher, of San Diego, for appellee.

Higgs & Fletcher and DeWitt A. Higgs, all of San Diego, for respondent.

Monroe & McInnis, By C. M. Monroe, all of San Diego, for appellants.

PER CURIAM.

[1] In the forenoon of November 19, 1938, a collision occurred between a mechanical street sweeper owned by the City of San Diego and a Pacific Greyhound bus driven by the defendant J. E. Mort. This collision occurred on U. S. Highway No. 101 in Rose Canyon in the City of San Diego. At the time the street sweeper had been rented, together with its driver, by David H. Ryan, paving contractor. Mr. Ryan's insurance carrier, the Continental Insurance Company, having paid for repairs to the sweeper took an assignment of the City's claim for damages and commenced this action. Pacific Greyhound Lines and J. E. Mort filed their answer denying liability and Pacific Greyhound Lines also filed its action against Mr. Ryan, the contractor, and Thomas G. Harris, the driver of the street sweeper, to recover damages for injuries to the bus. The cases were consolidated and tried in the Municipal Court without a jury. The Court rendered judgment against the Pacific Greyhound Line in both cases. This appeal is taken in the action brought by the insurance carrier in which judgment is rendered against the defendants for the damages to the street sweeper. The highway at the site of the accident is a four-lane highway of the divided type. In the center is a cement island, the middle of which is filled with earth. In connection with the filling of this island considerable earth had been spilled on the cement pavement and part of this had been taken up with scrapers. To remove the balance of the dirt and contractor employed the sweeper. At the time of the accident the sweeper was proceeding in a general northerly direction on the side of the highway devoted to southbound traffic. The bus was proceeding southerly on its own side of the road. The sweeper was so constructed that it had to operate against a right hand curb. The driver of the bus knew that the highway was under repair and warning signs were posted on the highway above the point of repair, but there was no sign close to the site of the accident. Witnesses estimated the speed of the bus variously, from 25 to 60 miles per hour. The bus driver observed the equipment when he was about a mile distant therefrom but he could not identify it as a street sweeper. The sweeper was traveling forward about 3 miles per hour and was enveloped in a cloud of dust at the time of the collision. Immediately prior to the accident the bus had passed two cars on the highway and was in the process of returning to the right hand lane when it struck the sweeper. As the bus traveled the last 100 feet towards the sweeper it was astraddle of the center line and it was still partly over the center line when the impact occurred. The sweeper was eleven feet wide; the side of the highway where the accident occurred was made up of two concrete strips ten feet wide, a two foot gutter next to the island, and a paved shoulder approximately six feet in width. A white line indicated the center of the two paved strips. Skid marks on the pavement began eleven feet westerly of the westerly curb line of the center island and about two feet east of the white line in the center. The sweeper, 15,000 pounds in weight, was knocked back and astraddle of the center island a distance of approximately twenty-five feet. The bus, after the impact, jumped across the center island which was four to six feet wide and about eight inches high, and traveled one hundred eighty-six feet, coming to rest against a bank on the east side

of the highway. Within a space of ten minutes preceding the accident herein involved the street sweeper had collided with an automobile which had stopped because of the dust. The operator of the sweeper admitted at the time that he could not see anything and was following the right hand ridge of the parkway to keep his direction. This evidence was objected to but properly admitted by the Court. McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678.

[2] Upon this appeal all intendments are in favor of the trial court's findings and they will not be overthrown unless it is manifest that the conclusions reached cannot be sustained on any rational view of the evidence. "If there is any competent evidence to support the findings, they will not be disturbed, or if two different inferences can be reasonably and properly drawn from the facts proved, the findings of the trial court are binding on the reviewing court. In other words, the trial court's findings are conclusive on appeal unless it can be held as a matter of law that the evidence is without substantial conflict and the only reasonable inference to be drawn therefrom is contrary to the findings". Scholz v. Hilbert, 30 Cal.App.2d 228, 85 P.2d 902, 903.

[3, 4] We may not interfere with the court's findings on the question of negligence unless the evidence discloses that the only reasonable conclusion to be reached is that no negligence has been established on the part of the defendant J. E. Mort. Such a conclusion, of course, would not be justified by the facts of this case. The passing of cars without sufficient room to return safely to the right hand side of the road and the driving of the bus into a cloud of dust at an unsafe speed are two of several phases of the evidence upon which the court might have based a finding of negligence. Bixby v. Pickwick Stage Co., 131 Cal.App. 739, 21 P.2d 972.

It is pointed out by appellant that there was no flagman nor any warning sign or device used in connection with the sweeper; that the sweeper was being operated on the wrong side of the highway facing oncoming traffic; that the sweeper was of unusual width, eleven feet; that when operating the sweeper was enveloped in a cloud of dust which obscured the operator's vision; that the dust made it impossible for oncoming traffic to determine the direction of the sweeper or even to identify the sweeper as such; that immediately prior to the accident in question the sweeper had been in other accidents; that these facts considered separately or collectively should establish contributory negligence on the part of Thomas G. Harris, the operator of the street sweeper and, since he was the agent and servant of the City of San Diego, acting in the scope of his employment, bar recovery for the damage done to the sweeper.

In answer to these contentions respondent asks us to remember that the sweeper was used in necessary highway repair work; that its peculiar construction required it to proceed in the direction it at the time was going; that there were warning signs at the beginning of the repair area; that the cloud of dust at the place of collision was warning and notice enough; that under the circumstances it could not be said that the operator of the sweeper was guilty of negligence as a matter of law; that he was not even negligent as a matter of fact, and, finally, if he were negligent his negligence did not proximately contribute to the accident in question.

[5] With these contentions in mind we proceed with a brief review of the law. The operator of the sweeper was under obligation to exercise reasonable care and caution in behalf of the traveling public, "yet the right to public use of the highway, while roadwork is being done, is subordinate to the right of the public authorities to cause improvements to be made in the public interest. Township of Crescent v. Anderson, 114 Pa. 643, 647, 8 A. 379, 60 Am.Rep. 367. And even with the exercise of reasonable care and circumspection, the very nature of the work may sometimes create perils against which travelers must be on guard." Jones v. Hedges, 123 Cal.App. 742, 749, 12 P.2d 111, 114.

[6, 7] Reasonable care would require a warning to be given to approaching traffic. In this case there were warning signs at the beginning of the area under repair and the cloud of dust raised by the sweeper "was itself a sign of danger as categoric as a stop-signal." Jones v. Hedges, supra. The court in these circumstances reasonably could have concluded that no negligence existed respecting the warning.

[8-10] The standpoint from which the operator's conduct is to be judged is that of a person whose duties require him to operate a sweeping machine on the highway in

a manner properly to remove the dirt from the highway, and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions and would approach with their cars under reasonable control. Even though there had been a prior accident the operator of the sweeper had the right to presume that if there were sufficient passing room to his left hand that there would be no further difficulty and that motorists using reasonable care could safely pass the sweeper. The fact of this prior accident should have cautioned him to keep said sweeper well against the right hand curb. The sweeper was in this position when it was struck by the bus, and there was ample passing space, at least twelve feet, to the west of the sweeper. True, there was a cloud of dust which obscured the operator's vision, but either there was to be this cloud of dust or the machine was not to be operated at all. It was necessary to remove this accumulation of dirt from the highway and the operation could not very well be carried on without the raising of dust. The highway could have been closed to traffic but this would have worked an unnecessary inconvenience to the traveling public. The repairs were necessary, and the manner in which they were being performed and the use of the highway by others presented questions of fact for the trial court to decide. "It is only when the facts are clear and indisputable, and when no other inference than that of negligence or contributory negligence can be drawn from the facts, that the issue becomes one of law and not of fact. * * * When an honest difference of opinion between men of average intelligence arises as to the effect of the evidence, a question of fact arises and the finding of the triers of fact becomes conclusive upon appellate tribunals." McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309, 310.

[11, 12] It was for the court to determine what would have been the conduct of a person of ordinary prudence under the circumstances of the case, as well as to determine whether or not the facts show negligence. The finding is conclusive, both as to the existence of negligence and its effect as contributing, proximately, to the accident, unless a contrary conclusion necessarily follows from undisputed facts. "In considering as a question of law the relative negligence of plaintiff and defendant, and the conduct of either or both as contributing to the injury, an appellate court will assume that the jury took any view of the facts, justified by the evidence, which tends to support the verdict. Scott v. San Bernardino, etc., Co. [152 Cal. 604] 93 P. 677 [678]. The same rule holds good as to the findings of fact by the court where a jury is waived." King v. Green, 7 Cal. App. 473-477, 94 P. 777, 778. So considered, the evidence in the case at bar clearly sustains the finding of the court that Thomas G. Harris, the operator of the street sweeper, was not negligent. The court having found the operator of the sweeper free from contributory negligence and the bus driver guilty of negligence, which proximately caused the damage, we cannot disturb the judgment on appeal. Woods v. Wisdom, 133 Cal.App. 694, 24 P.2d 863.

Judgment affirmed.

HAINES, Presiding Judge, deeming himself disqualified, takes no part in this decision.

F. W. WOOLWORTH CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16468.

Supreme Court of California.

March 19, 1941.

Rehearing Denied April 17, 1941.

1. Workmen's compensation ⚷1939

On petition to review for insufficiency of the evidence an award of the Industrial Accident Commission, the only issue requiring consideration of Supreme Court is whether the commission's finding that the injury arose out of the employment is supported by substantial evidence.

2. Workmen's compensation ⚷1558

Commission's finding that injury to clerk found in light well outside of employer's store from which clerk had fallen from window after he had become dizzy while in elevator, "arose out of the employment" was supported by substantial evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Arose Out of the Employment".

3. Workmen's compensation ⚷1422, 1939

The Industrial Accident Commission may draw inferences from the evidence and its conclusion will not be disturbed unless it is wholly unreasonable.

4. Workmen's compensation ⚷656

A clerk did not step outside the permissible scope of his employment merely because in order to get fresh air he went into a hallway where his duties did not require him to be, as regards clerk's right to compensation for injury after going into hallway.

In Bank.

Proceeding under the Workmen's Compensation Act by Alva Sivley, employee, opposed by the F. W. Woolworth Company, employer, and the Travelers Insurance Company, insurance carrier. To review an award in favor of the employee by the Industrial Commission of the State of California, the employer and insurance carrier petition for a writ of review.

Award affirmed.

For prior opinion, see 103 P.2d 435.

R. P. Wisecarver, of San Francisco, for petitioners.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

GIBSON, Chief Justice.

Petitioners seek by this writ of review to annul an award made by the respondent Industrial Accident Commission to one Alva Sivley.

Sivley had been employed by the Woolworth Company for a period of over three years as a stock clerk at its Post street store in San Francisco. On the evening of November 21, 1939, Sivley and certain other employees worked overtime to decorate the store for the approaching holiday season. He was on duty from 8 o'clock in the morning until approximately 10:30 in the evening, with half an hour off for lunch and for dinner. Sivley had worked similar hours the preceding day, and he testified that his physical condition was under par from overwork and exhaustion.

During the evening Sivley was engaged in transporting material between the fifth floor and the ground floor of the building by means of a freight elevator at the rear of the store. At about 10:30, while unloading supplies on the fifth floor, he stopped his work to take the elevator down to the first floor in answer to a call. He testified that after unlocking a door to permit a fellow employee to leave the building he started back to the fifth floor to complete his task of unloading material from the elevator; that he remembered starting the elevator but did not remember reaching the fifth floor. During the trip he became faint and felt that he needed air; things were hazy to him and his mind went "foggy and blank". He had no recollection of what happened thereafter until he "came to" at the bottom of a light well, or shaft, between the store and an adjoining building. He was found there, seriously injured, by his fellow-workers who brought him into the store and sent for medical aid.

It was established by the testimony of others that the elevator was stopped at the fifth floor with its door open and with part of its load still inside. Sivley's pencil and pliers were found beside an open window a few feet down the hallway from the elevator and there were marks on both sides of the light well below the open window indicating the course of his fall.

The commission determined that Sivley had sustained an injury occurring in the course of his employment and arising out of it. Accordingly an award was made compensating him for the injury. Petitioners contend that there is no evidence to support the finding of the commission that the injuries arose out of his employment. Their argument is that there was no evidence that Sivley's duties took him into the hallway where this particular window was situated; that his presence at the window might be explained by some activity in no way connected with his employment; and that there is no presumption that the injury arose out of the employment merely because it happened during working hours.

[1] We need not concern ourselves with the speculations of petitioners as to the manner in which the accident might have occurred, or as to the possible reason for Sivley's presence at the window. The only issue requiring our consideration is whether the commission's finding that the injury arose out of the employment is supported by substantial evidence. Newton v. Ind. Acc. Comm., 204 Cal. 185, 190, 267 P. 542, 60 A.L.R. 1279; Ethel D. Co. v. Ind. Acc. Comm., 219 Cal. 699, 28 P.2d 919; General Acc. F. & L. Assur. Corp. v. Ind. Acc. Comm., 186 Cal. 653, 200 P. 419; Myers v. Ind. Acc. Comm., 191 Cal. 673, 218 P. 11; cf. Daugherty v. Ind. Acc. Comm., 220 Cal. 767, 32 P.2d 959; 27 Cal.Jur. 342 et seq.

[2-4] The established facts and the testimony of Sivley, if believed, furnish adequate evidence upon which the commission could find that the injury arose out of and was caused by his employment. It is true that the actual events which took place between the time the elevator arrived at the fifth floor and the time Sivley was found at the bottom of the light well cannot be established by direct testimony. But there is circumstantial evidence from which it can be inferred that Sivley went to the nearest window in order to gain relief from the "stuffy" feeling, and that, in so doing, he was overcome by exhaustion and fell from the window. It is well established that the commission may draw inferences from the evidence, and its conclusion will not be disturbed unless it is wholly unreasonable. Union Oil Co. v. Ind. Acc. Comm., 211 Cal. 398, 295 P. 513; Pacific Emp. Ins. Co. v. Chavez, 5 Cal.2d 247, 54 P.2d 701; George L. Eastman Co. v. Ind. Acc. Comm., 186 Cal. 587, 200 P. 17; 27 Cal.Jur. 579 et seq. Nor can it be successfully contended that Sivley stepped outside the permissible scope of his employment merely because, in order to get fresh air, he went into a hallway where his duties did not require him to be. See Leffert v. Ind. Acc. Comm., 219 Cal. 710, 28 P.2d 911; Whiting-Mead Commercial Co. v. Ind. Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R.1518; Jenks v. Carey, 136 Cal.App. 80, 28 P.2d 91; 18 Calif.L.Rev. 551; 22 Calif.L.Rev. 581; 27 Cal.Jur. 343.

The award is affirmed.

We concur: SHENK, J.; EDMONDS, J.; TRAYNOR, J.; CARTER, J.; CURTIS, J.

17 Cal.2d 659

CLENDANIEL v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16474.

Supreme Court of California.

March 20, 1941.

Rehearing Denied April 17, 1941.

1. **Workmen's compensation** 🔑1795

A claimant is not entitled as a matter of right to have a compensation proceeding reopened merely upon application and presentation of newly discovered evidence. St. 1937, p. 301, § 5803.

2. **Workmen's compensation** 🔑1939

The courts are bound by the statutory provision that the findings and conclusions of the Industrial Accident Commission on questions of fact are conclusive and not subject to review. St.1937, p. 305, § 5953.

3. **Workmen's compensation** 🔑1800

A finding of the Industrial Accident Commission to the effect that newly discovered evidence which was merely cumulative was not entitled to sufficient credence to justify a rehearing on an award, or reopening of the proceeding after final decision, is final notwithstanding that "good cause" for reopening a proceeding for newly discovered evidence is a relative term. St.1937, p. 305, § 5953.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Cause".

4. **Workmen's compensation** 🔑1939

Where there is an entire lack of evidence to support conclusions of fact of the Industrial Accident Commission, conclusions of the commission are not final. St.1937, p. 305, § 5953.

5. Workmen's compensation ⚷1939

On motion to reopen compensation proceeding on ground of newly discovered evidence which was cumulative, credibility of witnesses and the weight of the evidence was for the Industrial Accident Commission. St.1937, p. 301, § 5803.

6. Workmen's compensation ⚷1795

The Industrial Accident Commission's power to reopen a compensation proceeding in the exercise of its continuing jurisdiction invoked on the ground of newly discovered evidence should be exercised with great caution, and only when fraud, inadvertence, mistake, or excusable neglect are clearly shown. St.1937, p. 301, § 5803.

7. Workmen's compensation ⚷1794

An order of the Industrial Accident Commission refusing to reopen a compensation proceeding on ground of newly discovered evidence was not in excess of its powers, where, if court annulled the order and remanded proceedings for hearing of alleged newly discovered evidence, commission could make same order and court, under statute providing that findings of fact of commission are final, would be bound to affirm it. St.1937, pp. 301, 305, §§ 5803, 5953.

8. Workmen's compensation ⚷1795

Newly discovered evidence is not "good cause" for reopening a compensation proceeding unless there exists some good ground which rendered the original award inequitable. St.1937, p. 301, § 5803.

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In Bank.

Petition by Fred Clendaniel, employee, for a writ of review to annul orders of the Industrial Accident Commission refusing to reopen a decision in favor of the Horseshoe Tavern, employer, and the California Fireman's Fund Indemnity Company, insurer.

Award affirmed.

For prior opinion, see 103 P.2d 993; rehearing denied in 104 P.2d 555.

George B. Harris, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Keith & Creede, of San Francisco, for respondent Fireman's Fund Indemnity Co.

PER CURIAM.

This is a proceeding to review an order of the Industrial Accident Commission refusing to reopen its decision denying compensation to the petitioner.

The petitioner was a waiter employed at the Horseshoe Tavern in San Francisco. He worked on the night shift, commencing at 8 o'clock. He suffered a slight puncture or laceration of the thumb, which developed into blood poisoning. He claimed to have sustained the injury on the night of March 31, 1937, by striking his thumb on the end of a protruding nail while washing the top shelf of the salad counter in the tavern. He was confined in a hospital for several weeks. He did not report the alleged industrial injury. Shortly after his discharge from the hospital the insurance carrier of the employer initiated proceedings before the Commission for an adjustment of the claim for compensation. On November 18, 1937, the Commission denied compensation on the ground that the employee had failed to establish that his injury arose out of or in the course of his employment. No petition to review the order of denial of compensation was filed and said order became final.

At the time when the petitioner claimed to have suffered the injury a Chinese cook was working in the tavern. On May 10, 1937, the cook left for China and did not return until March 1, 1938. Shortly after his return the petitioner applied to the Commission to reopen the case so that he might avail himself of the cook's testimony to the effect that he had seen the petitioner's injured thumb immediately after the alleged accident and had suggested first-aid treatment.

The motion to reopen was made pursuant to section 5803 of the Labor Code, St. 1937, p. 301 (formerly section 20(d) of the Workmen's Compensation Act). It was made on the ground that the discovery of the return of the Chinese cook from the Orient on March 1, 1938, and of the fact that he would testify as above indicated, constituted good cause for the reopening of the case in his favor. The matter of the motion to reopen was referred to one referee and was completed before another, who recommended that the motion be denied. The Commission concluded that good cause had not been shown and denied the motion. Following the denial of a petition for rehearing the present application was filed.

The Commission denied compensation by its order of November 18, 1937, because of discrepancies and inconsistencies in the testimony on behalf of the petitioner and other evidence in conflict therewith, including an inspection of the premises by the referee. See Ethel D. Co. v. I. A. C., 219 Cal. 699, 704, 28 P.2d 919.

[1-4] It is contended that the determination of the Commission denying the petition to reopen the proceeding was in excess of its jurisdiction and amounted to a deprivation of property without due process of law. It is apparently the view of the petitioner that good cause exists to reopen a proceeding when, within the period of the Commission's continuing jurisdiction, the applicant seeks to present newly-discovered evidence material to the case. The petitioner has misapprehended the law on the question of when newly-discovered evidence may constitute good cause for the reopening of such proceedings. The petitioner is not entitled as a matter of right to have his case reopened merely upon his application and the presentation of newly-discovered evidence. This court in Bartlett Hayward Co. v. I. A. C., 203 Cal. 522, 532, 265 P. 195, concluded that the continuing jurisdiction of the Commission was not limited to a consideration of changes in the physical condition of the workman; that it included also the right to rescind or alter its awards upon good cause appearing; that what constituted good cause depended largely upon the circumstances of each case; and that the determination of the Commission as to what constituted good cause was entitled to great weight but would not be deemed conclusive. However, the courts are bound by the provisions which are now a part of the Labor Code. Section 5953 thereof states that the findings and conclusions of the Commission on questions of fact are conclusive and final and are not subject to review. Although "good cause" is a relative term, nevertheless the courts have uniformly deemed as final a finding and conclusion of the Commission to the effect that newly-discovered evidence which was merely cumulative was not entitled to sufficient weight or credence to justify a rehearing of an award or the reopening of a proceeding after final decision. Ingram v. Department of Industrial Relations, 208 Cal. 633, 284 P. 212; Cardoza v. Pillsbury, 169 Cal. 106, 145 P. 1015; Mantyla v. I. A. C., 130 Cal.App. 139, 19 P.2d 799; Fidelity & Casualty Co. v. I. A. C., 67 Cal.App. 648, 649, 228 P. 348. A situation is not here presented bringing into operation the rule relied on by the petitioner that where there is an entire lack of evidence the finality of the finding or conclusion does not obtain. See Market St. Ry. Co. v. I. A. C., 193 Cal. 178, 224 P. 95; George L. Eastman Co. v. I. A. C., 186 Cal. 587, 598, 200 P. 17.

The petitioner stated in his petition to reopen the case that he did not seek a review of the original order of denial of compensation, "deeming such procedure useless because of the specious conflict in the evidence as to the presence of the protruding nail on March 31, 1937." The evidence in that proceeding was in conflict. It was not a specious conflict, but was substantial.

[5-8] The record in support of the original order is not before us for review. It is present, however, on the question whether good cause was shown. There is in this record sufficient evidence, independently of the testimony of the Chinese cook, to support a finding or conclusion unfavorable to the petitioner's contention that his injury was sustained as claimed by him. The testimony of the cook and other evidence produced on the hearing to reopen was cumulative. The credibility of the witnesses and the weight of the evidence presented questions for the Commission's determination. Nielsen v. I. A. C., 220 Cal. 118, 119, 29 P.2d 852, 30 P.2d 995. This court said in Ingram v. Dept. of Industrial Relations, 208 Cal. 633, at page 637, 284 P. 212, at page 214, that the Commission's power to reopen the case in the exercise of its continuing jurisdiction, "invoked on the ground of newly discovered evidence, should be exercised with great caution, and when fraud, inadvertence, mistake, or excusable neglect are clearly known. Otherwise the process of introducing evidence before the commission would be interminable, and the commission might be held to abuse its discretion in the exercise of its power * * *." The observation made in Walsh v. I. A. C., 1 Cal. 2d 747, 748, 749, 36 P.2d 1072, is applicable here, to the effect that if we should annul the order under review and remand the proceedings to the Commission to reopen and hear further testimony relating to the newly-discovered evidence, the Commission

could make the same order and we would then be bound to affirm it. Furthermore, this court has held that before newly-discovered evidence may constitute good cause for reopening a case, there must exist some good ground which rendered the original award inequitable. Merritt-Chapman & Scott Corp. v. I. A. C., 6 Cal. 2d 314, 57 P.2d 501. In the case last cited the original order denied certain requested compensation to the applicant. The Commission reopened the case in the exercise of its continuing jurisdiction on the ground of newly-discovered evidence and made an additional award. This court annulled the award on the ground that the alleged newly-discovered evidence did not constitute "good cause" sufficient to justify the reopening of the case.

In the light of the foregoing authorities, there is no showing in the present case that the refusal of the Commission to reopen the case on consideration of the supposed newly-discovered evidence was in excess of its powers.

The award is affirmed.

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17 Cal.2d 625

ABRAHAM v. STATE BAR OF CALIFORNIA.

S. F. 16475.

Supreme Court of California.
March 17, 1941.

Attorney and client 🔑43

Where attorney, suspended from practice of law for nonpayment of State Bar dues, secured his reinstatement within month after notice of suspension was mailed to him, disciplinary proceedings for violation of suspension order were not instituted until over 2½ years after such violation, and no prior delinquencies in payment of dues were shown, he should not be suspended, and charge against him will be dismissed. St. 1939, p. 357, § 6103.

◆

In Bank.

Proceeding by Harold J. Abraham to review a recommendation of the Board of Governors of the State Bar of California that petitioner be suspended from the practice of law for 30 days.

Charge against petitioner dismissed.

Leo R. Friedman, of San Francisco, for appellant.

Claude Minard, of San Francisco, for respondent State Bar.

PER CURIAM.

This is a proceeding to review the recommendation of the board of governors of the State Bar that the petitioner be suspended from the practice of law for a period of thirty days.

The petitioner was admitted to practice law in this state on July 2, 1919, and is now about 43 years of age. He failed to pay his State Bar dues for the year 1936. On December 11, 1936, after the required delinquent notices were mailed to him, an order was made by this court suspending him from practicing for nonpayment of dues. Notice of such order was mailed to him on December 23, 1936. In the interim, and on December 18th, the petitioner, as attorney for the plaintiff, filed a complaint in the superior court. On January 20, 1937, the petitioner was reinstated by the payment of the delinquent dues. After the mailing of the notice and prior to his payment of dues and reinstatement, the petitioner entered into stipulations with the attorney for the defendant extending time. On October 6, 1939, he was notified to appear before the local administrative committee and show cause why he should not be disciplined for disobedience of the order of suspension in violation of section 6103 of the State Bar Act, St.1939, p. 357, and his oath as an attorney at law.

The local administrative committee recommended dismissal of the charge and stated in its recommendation that it felt the matter did not merit any disciplinary action "at this time." The board of governors recommended suspension for a period of thirty days.

In support of the recommendation of the board of governors, the attorney for The State Bar relies on the decision of this court in Hill v. State Bar, 14 Cal.2d 732, 97 P.2d 236. In that case the petitioner was suspended for nonpayment of dues on December 15, 1937. He admittedly maintained an office and continued the practice of law despite apparent knowledge of his suspension. On April 26, 1939, he was cited to appear before the local administrative committee, and only after such citation and on June 7, 1939, did he secure his reinstatement by payment of delinquent dues. Prior thereto he frequently had been delinquent in payment of dues. He was suspended for a period of three months.

Obedience to orders of court must of course be required. Nevertheless, there are two considerations in this case which would seem to support the recommendation of the local administrative committee. The first is that the petitioner secured his reinstatement within a month after notice was mailed to him; and the second is that disciplinary proceedings were not instituted until more than two and one-half years after the petitioner's violation of the court order. No instance of prior delinquencies in meeting payment of dues is presented, and the record does not show such a breach of the order of court as would require an order of suspension at this date. The reminder afforded by the present proceedings will no doubt suffice to prevent a recurrence of similar conduct on the part of the petitioner.

The recommendation of the local administrative committee is approved and the charge against the petitioner is dismissed.

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17 Cal.2d 638

PEOPLE v. WONG DON KAY.

Cr. 4336.

Supreme Court of California.
March 19, 1941.

Homicide 🔑253(3)

Evidence that defendant, because of alleged mistreatment by his victims, planned in advance to shoot them, that he did shoot them as they approached unarmed from a distance of 20 to 30 feet, that he threatened others present at the time, and expressed no regret for his action, sustained conviction for first-degree murder. Pen.Code, § 1239.

In Bank.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Wong Don Kay was convicted of first-degree murder, and he appeals.

Judgment affirmed.

Thomas F. Sargent, of Auburn, for appellant.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and Lowell L. Sparks, Dist. Atty., of Auburn, for respondent.

PER CURIAM.

In an information filed by the district attorney of Placer county defendant was charged in separate counts with the murder of two Chinese. It was also charged that he had suffered two prior convictions. When arraigned defendant admitted the prior convictions and entered pleas of guilty to the homicides. After taking evidence addressed to the degree of the murders, the court below found them to be of the first degree, and thereupon entered judgment and sentence of death. This appeal comes before us pursuant to the provisions of section 1239 of the Penal Code.

At the hearing to determine the degree of the homicides defendant, with others, took the witness stand. He freely admitted having shot his victims, but in attempted justification thereof testified that they had borrowed money from him aggregating $35 and $28, respectively, and had refused to repay him; that they had tried to make him gamble and otherwise had harassed him, knowing that he was on parole and assertedly unable to appeal to the authorities. He further testified that they had beat and robbed him, inflicting injuries which confined him to the hospital for several days. It is significant, however, that at the hospital he attributed his injuries to a fall from a ladder.

Following his release from the hospital, and after having planned to shoot his victims, defendant on the evening of September 17, 1940, proceeded with his hunting rifle to the front of a laundry in lower Auburn where the Chinese customarily gathered. As his victims approached, unarmed, defendant shot them from a distance of twenty to thirty feet. He threatened others present and, in fact, wounded a third man.

Upon his immediate arrest, defendant expressed no regret for his action, stating that the victims had received their just deserts. His attitude remained unchanged in court. Eyewitnesses also recounted the details of the shootings. A full and fair hearing was accorded defendant.

Although counsel who represented defendant in the court below has since withdrawn from the case and consequently no brief has been filed, the record has been examined with care. There is ample evidence therein to support the judgment and sentence imposed.

The judgment is therefore affirmed.

17 Cal.2d 628

LOCKHART v. WOLDEN.

S. F. 16508.

Supreme Court of California.

March 18, 1941.

1. Taxation 🔑**219**

The constitutional provision respecting exemption of property belonging to war "veterans" from taxation cannot be construed as not applying to women veterans on ground that provision cannot apply to any class not in existence at time of its enactment in 1911, since there were women veterans before 1911. 34 U.S.C.A. § 41; 38 U.S.C.A. § 311; Const. art. 13, § 1¼.

See Words and Phrases, Permanent Edition, for all other definitions of "Veteran".

2. Taxation 🔑**197**

In amending the statute defining "recognized wars" within meaning of constitutional provision concerning exemption of veterans' property from taxation to include the war with Germany-Austria, the Legislature merely applied to construction of statute the principle that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage. Pol.Code, § 3612; Const. art. 13, § 1¼.

3. Taxation 🔑**196**

The phrase "every resident of this State", as used in constitutional provision that property to amount of $1,000 of every resident of this state who has served in army, navy, marine corps, or revenue marine service of the United States in time of war, and received an honorable discharge therefrom, shall be exempt from taxation, applies to every person who fulfills requirements of provision as to wartime service, regardless of sex. Const. art. 13, § 1¼.

See Words and Phrases, Permanent Edition, for all other definitions of "Every Resident of This State".

4. Taxation 🔑**204(2)**

Constitutional and statutory provisions exempting property from taxation are strictly construed in matters involving the state's power to tax, but such rule is subject to rule that, where language of a statute is clear, plain, and unambiguous, there is no room for construction, strict or otherwise.

5. Mandamus 🔑**117**

Mandamus was appropriate remedy to compel assessor of city and county of San Francisco to allow petitioner, a woman who was a World War veteran, the benefit of constitutional provision respecting exemption of veterans' property from taxation, since remedy at law by payment of taxes and action to recover them would not be adequate, and complete relief could be given to a group of taxpayers by issuance of a single writ of mandate. Code Civ.Proc. § 1086; Const. art. 13, § 1¼.

6. Courts 🔑**207(4)**

Where conflicting official action in administration of tax laws with regard to whether women veterans were entitled to benefit of constitutional provision concerning exemption of veterans' property from taxation had produced a situation which could be clarified only by decision of Supreme Court, it was proper for petitioner, a woman who was a World War Veteran, to institute original mandamus proceedings in Supreme Court to obtain benefit of constitutional provision. Code Civ.Proc. § 1086; Const. art. 13, § 1¼.

In Bank.

Original mandamus proceedings by Florence Lockhart against Russell L. Wolden, etc., to compel respondent, as Assessor of the City and County of San Francisco, State of California, to allow petitioner the exemption specified in the Constitution, art. 13, § 1¼, regarding exemption of property from taxation.

Peremptory writ of mandate issued in accordance with prayer of petitioner.

Pillsbury, Madison & Sutro, of San Francisco (Eugene D. Bennett, John P.

Beale, Eugene M. Prince, and Gerald S. Levin, all of San Francisco, of counsel), for petitioner.

Ralph E. Hoyt, Dist. Atty., of Alameda, J. F. Coakley, Chief Asst. Dist. Atty., and Lynn J. Gillard, Deputy Dist. Atty., all of Oakland, Earl Warren, Atty. Gen., and James H. Oakley, Deputy Atty. Gen., amici curiae for petitioner.

John J. O'Toole, City Atty., and Sylvain D. Leipsic and Albert Skelly, Deputy City Attys., all of San Francisco, for respondent.

CURTIS, Justice.

This is an original proceeding in which the petitioner asks this court to issue its writ of mandate directed to respondent, as assessor of the city and county of San Francisco, state of California, compelling him to allow to petitioner the exemption specified in section 1¼ of article XIII of the Constitution of the state of California, adopted in 1911 and as amended in November, 1932. The case was submitted on general demurrer to the petition.

The facts stated in the petition are briefly as follows: Petitioner, a single woman and a legal resident of this state, is a veteran of the World War, having served in the army of the United States from 1917 to 1919 as a member of the Army Nurse Corps, and holds an honorable discharge. On May 31, 1940, she filed with Russell L. Wolden, as assessor of the city and county of San Francisco, an affidavit (pursuant to sec. 3612 of the Political Code) demanding an exemption of certain property from taxation to the extent of $1,000. The property on which she demanded an exemption is of the value of $400. The respondent allowed petitioner an exemption of $100 as a householder and no more, leaving property of the value of $300 subject to taxation. The said property of the assessed value of $300 is all of the property of petitioner in this state subject to taxation, and she has no other property in this state or elsewhere of a value in excess of $5,000. On the 15th day of October, 1940, respondent refused to grant petitioner's said demand on the ground that said section of the Constitution granting certain exemption from taxation did not apply to petitioner because she was a woman. This proceeding was then instituted.

This case involves two questions: (1) The question on the merits as to whether petitioner is entitled to the exemption claimed by her under section 1¼ of article XIII of the Constitution; and (2) the procedural question as to whether she is entitled to the particular relief here sought. We shall consider the above matters in the order indicated.

The pertinent part of section 1¼ of article XIII reads as follows: "The property to the amount of one thousand dollars of *every resident of this State* who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom * * * shall be exempt from taxation." (Emphasis added.)

[1, 2] Since respondent refused petitioner's claim on the sole ground that this section does not grant an exemption to women, we shall first consider whether or not the scope of the language employed in this provision permits of its applicability to every person who fulfills its requirements as to wartime service, regardless of sex. Respondent referring to the history of the times when this constitutional provision was enacted, contends that this section was not intended to apply to women and cannot apply to any class not in existence at the time of its enactment in 1911. But this statement is inaccurate, for there were "women veterans" long before 1911; women nurses had by express statute been part of the navy since 1908, 35 Stats. 146, 34 U.S.C. § 41, 34 U.S.C.A. § 41 and had been part of the army since the Civil War, 27 Stats. 348, 38 U.S.C. § 311, 38 U.S.C.A. § 311. Then when the World War came along, our state legislature amended section 3612 of the Political Code, which defines "recognized wars" within the meaning of section 1¼ of article XIII of the Constitution, to include the "War with Germany-Austria, April 6, 1917, to and including November 11, 1918". [Stats.1919, p. 306; Stats.1929, p. 441.] In so doing, the state legislature was only applying to the construction of this section a well-settled principle of law "that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview and scope coming into existence subsequent to their passage". 25 R.C.L. 778.

[3] The exemption runs to "every resident of this State," a phrase so general and all-inclusive in character as to render it incapable of limitation to men only. No amount of interpretation can turn the words "every resident" in such a manner

as to exclude either the masculine or feminine gender. Confirmatory of the comprehensive meaning given to this constitutional provision is said section 3612 of the Political Code, enacted as a regulation for the exercise of the right to this exemption and directed to "Every person entitled to or applying for the exemption from taxation or license specified in said provision of the Constitution * * *." The state legislature used the broadest possible language and thus gave double evidence that it did not consider that the constitutional provision makes any distinction between men and women. "One of the first rules of construction is that where the language is plain and unambiguous there exists no room for construction." General Pipe Line Company of California v. State Board of Equalization, 5 Cal.2d 253, 256, 54 P.2d 18, 19.

[4] Supplementing his discussion of the question of construction, respondent calls attention to the fundamental tenet that constitutional provisions and statutes exempting property from taxation are strictly construed. Cypress Lawn Cemetery Ass'n v. San Francisco, 211 Cal. 387, 295 P. 813; 23 Cal.Jur., p. 806, sec. 813. We are in accord with this general principle and we do not question the prevailing line of authority endorsing its application to matters involving the state's power to tax, but it is subject to the rule just stated, that where the language of a statute is clear, plain and unambiguous there is no room for construction, strict or otherwise. 23 Cal. Juris., p. 721; Norcop v. Jordan, 216 Cal. 764, 770, 17 P.2d 123; Bourland v. Hildreth, 26 Cal. 161, 180.

As authority for his disallowance of the exemption to petitioner respondent cites the recent case of Mohun v. Wolden, 30 Cal. App.2d 280, 86 P.2d 152. In that case Mohun applied to the superior court for a writ of mandamus against Assessor Wolden. Mohun, a World War soldier, holding an honorable discharge, owned $210 worth of property. The assessor refused to allow Mohun the exemption from taxation granted by section 1¼ of article XIII on the ground that the latter's wife (not a veteran) owned property in excess of the value of $5,000. In denying his claim, the assessor was complying strictly with the terms of said section, which limit the class of persons who are entitled to the exemption theretofore granted, in the following language: "provided, this exemption shall not apply to any person named herein owning property of the value of five thousand dollars or more, or where the wife of such soldier or sailor owns property of the value of five thousand dollars or more". Thus it is apparent that the Mohun case involved not the part of section 1¼ of article XIII which is the subject of our present consideration, but the proviso in that section as above quoted.

Mohun contended that that part of the proviso denying exemption to a veteran "where the wife of such soldier or sailor owns property of the value of five thousand dollars or more" was in violation of the United States Constitution as being class legislation. His argument in substance was that both male and female veterans were in the same class and that it would be discriminatory to deny the exemption to male veterans whose wives owned property of a value of five thousand dollars or more, yet grant the exemption to female veterans irrespective of the value of property owned by their husbands. The district court of appeal overruled Mohun's claims and upheld the assessor, stating at page 283 of 30 Cal.App.2d, 86 P.2d at page 153 of its opinion: "That proviso limits the men who may make claims for exemption but it does not create any right whatever in behalf of women." The ruling just quoted decided the only issue in that case, i. e., the construction of the proviso.

The question of whether men only or men and women veterans were granted exemptions by section 1¼ of article XIII of our state Constitution was not before the district court. The proviso involved in the Mohun case is simply an exception to the general clause granting the exemption to all residents with the requisite service. Whatever may be the construction of the proviso, the fact remains that no construction of it could nullify the express grant of exemption made by section 1¼, which grant is the provision involved in the present case, and it is our opinion that its language is broad enough to include and permit exemption to women whose service and discharge meet the requirements laid down therein.

Having decided the question of construction of section 1¼ of article XIII of our Constitution in favor of petitioner, we now turn our attention to the procedural phase of this proceeding. To facilitate our examination of this question, we shall consider its component parts under the following subdivisions: (1) adequacy of remedy;

and (2) propriety of petitioner's application to this court in the first instance.

Section 1086 of the Code of Civil Procedure, dealing with the writ of mandate, provides: "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested."

[5] No remedy other than mandamus would afford petitioner the remedy to which she is entitled, namely, cancellation of the assessment. Babcock v. Goodrich, 47 Cal. 488, 508. The well-settled rule that a plaintiff who recovers wrongfully collected taxes cannot recover interest prior to judgment (Engebretson v. City of San Diego, 185 Cal. 475, 479, 480, 197 P. 651) is a further reason why any remedy at law by payment of the tax and suit to recover would not be adequate, and it was so held in the case of Birch v. Board of Supervisors, 191 Cal. 235, 237, 215 P. 903, in a proceeding to review the action of the board of supervisors in raising the assessment upon property belonging to plaintiffs. Though we recognize that the interest item upon this particular assessment is small, it becomes very substantial when the rights of taxpayers situated similarly to petitioner are taken into consideration. Any other procedure would involve a multiplicity of suits, for the question as to the right to the exemption here claimed by petitioner applies to other women veterans in California—petitioner alleges there are approximately two thousand—in the same way as to petitioner. Thus this situation appears to be of considerable public importance, and the fact that complete and final relief may be given to this group of taxpayers by the issuance of a single writ further fortifies petitioner's argument supporting the propriety of this particular proceeding.

[6] Respondent's admitted sole reliance on Mohun v. Wolden, supra, a decision of the district court of appeal, in denial of petitioner's right to the exemption embraced in section 1¼ of article XIII, furnishes sufficient reason for petitioner's application to this court in the first instance. The attorney-general of the state of California appearing as amicus curiae herein avers that the administration of this veterans' exemption provision has been thrown into considerable confusion as the result of the Mohun decision, some assessors allowing the exemption to women on authority of administrative instructions expressing doubt as to the controlling effect of the Mohun case under those circumstances, and others refusing it on alleged governing authority of the opinion of the district court in that case. These conditions productive of a conflict of official action in the administration of the tax laws convince us that this situation can be clarified only by decision of this court. Dufton v. Daniels, 190 Cal. 577, 581, 213 P. 949; San Diego, etc., R. Co. v. State Board, 165 Cal. 560, 564, 132 P. 1044; Scott v. Boyle, 164 Cal. 321, 323, 128 P. 941; Grand Lodge, etc., v. Markham, 102 Cal. 169, 170, 36 P. 423.

Ordered that a peremptory writ of mandate issue in accordance with the prayer of petitioner.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; TRAYNOR, J.; CARTER, J.

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17 Cal.2d 639

COOK v. COOK.

S. F. 15960.

Supreme Court of California.

March 20, 1941.

Rehearing Denied April 17, 1941.

1. Insurance 🔑586, 587

Where insured reserves the right to change beneficiary named in life policy, change may be made at any time prior to his death, and beneficiary has no vested right therein prior to death of insured as will enable him to prevent change.

2. Descent and distribution 🔑8
Insurance 🔑199
Wills 🔑6

The insured's property right in life insurance may be passed by insured by transfer, will, or succession. St.1935, p. 638, § 10130.

3. Insurance 🔑121
Wills 🔑6

The object of statutes making life insurance transferable without notice to insurer, unless expressly required, to any person, whether he has an insurable interest or not, was to make insurance policies freely alienable, although transferee or legatee had no insurable interest. Civ.Code, §§ 2764, 2765; St.1935, p. 638, §§ 10130, 10131.

4. Descent and distribution 🔑8
Wills 🔑6

Where life policy has no named beneficiary, but is payable to insured's estate, policy may be disposed of by will or pass by intestate succession if insured dies intestate. St.1935, p. 638, §§ 10130, 10131.

5. Wills 🔑6

Where named beneficiary of life insurance predeceases insured who has power to change beneficiary, insured may dispose of policy by will, since beneficiary had no vested right therein. St.1935, p. 638, §§ 10130, 10131.

6. Wills 🔑78

A will does not become operative until death, and prior thereto it is revocable at whim of testator, and objects of his bounty have no vested rights.

7. Insurance 🔑58:
Wills 🔑6

The right of beneficiary to life insurance becomes vested upon insured's death, and no expression in insured's will purporting to assign policy or change beneficiary can be effective. St.1935, p. 638, §§ 10130, 10131; Civ.Code, §§ 2764, 2769.

8. Insurance 🔑587

The rigor of rule requiring that method provided by policy for changing beneficiary be followed is relaxed when controversy is between conflicting claimants and insurer is not raising the issue.

9. Insurance 🔑587

The method prescribed by life policy for changing beneficiary must be followed if change is to be accomplished, unless insurer has waived a strict compliance with its own rules and in pursuance of insured's request has issued a new certificate, literal compliance with regulations is impossible, or insured has followed prescribed method but dies before new certificate is actually issued.

10. Insurance 🔑587

Where life policy authorized change of beneficiary only upon request by insured filed with insurer and indorsement of change on policy by insurer, insured who had designated his wife as beneficiary could not change beneficiary by provision in his will directing that proceeds of insurance be paid to his daughter, in absence of any attempt to comply with provisions of policy or of anything preventing compliance. Civ.Code, §§ 2764, 2765.

11. Insurance 🔑199

The statutes authorizing transfer of life insurance without notice to insurer, unless expressly required, to any person, whether he has an insurable interest or not, cannot be altered or frustrated by contract, because of reasons founded on public policy. Civ. Code, §§ 2764, 2765; St.1935, p. 638, §§ 10130, 10131.

12. Insurance 🔑587
Wills 🔑6

The statutes authorizing transfer of life insurance without notice to insurer, unless expressly required, to any person whether he has an insurable interest or not, did not render effective, as a transfer of insurance at death or as a change of beneficiary, provision of insured's will directing that proceeds of life policy, under which his wife was beneficiary, should be paid to his daughter, where wife was living at death of insured, who had made no attempt to comply with policy provisions for change of beneficiary. Civ.Code, §§ 2764, 2765.

13. Insurance 🔑587

The collection of life insurance by insured's wife, who was beneficiary under policy and executrix under insured's will, without disclosing to insurer or insured's daughter that will directed payment of proceeds of insurance to daughter did not "estop" wife from defending against daughter's claim to proceeds on ground that will was ineffective to change beneficiary.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

14. Wills 🔑800

Where insured's wife was beneficiary named in life policy and was also legatee under insured's will which directed that proceeds of policy be paid to insured's daughter, wife's action in taking under will did not constitute an "election" requiring her to recognize daughter's right to insurance policy which was referred to in will as a policy payable to insured's son.

See Words and Phrases, Permanent Edition, for all other definitions of "Election".

15. Wills 🔑800

Where insured's wife, who was named beneficiary under life policy and a legatee under insured's will directing payment of proceeds of policy to insured's daughter, collected proceeds of policy prior to distribution of property under will, action of wife in offering will for admission to probate and in seeking appointment as executrix did not constitute an "election" requiring her to recognize daughter's right to proceeds of insurance.

16. Executors and administrators 🔑315(6)

The decree of distribution of assets of insured's estate was conclusive as to interpretation of insured's will, rights of legatees thereunder, property covered by will, and incidental matters necessarily involved in determination on those subjects, and could not be collaterally attacked except for extrinsic fraud or certain jurisdictional defects.

17. Executors and administrators 🔑315(6)

The decree distributing property under will is conclusive as to rights of heirs, devisees and legatees, and decision as to them includes determination of persons entitled as such and parts or proportions to which each is entitled.

18. Executors and administrators 🔑315(6)

A decree distributing property under will determines heirship of claimants and is conclusive that a prior decree determining heirship is valid, where prior decree was questioned on distribution, but was followed.

19. Executors and administrators 🔑315(6)

A decree distributing property under will cuts off legacies not mentioned in decree, and a claim of interest upon a legacy should be asserted in proceeding for distribution, and a distribution without interest is a determination that legatee is entitled to none.

20. Executors and administrators 🔑315(6)

A will becomes merged in and superseded by decree distributing property devised by will, and will cannot be used to impeach decree which is conclusive against collateral attack, even though in contravention of terms of will.

21. Executors and administrators 🔑315(6)

Although provision in will may have been invalid, decree distributing estate in accordance therewith is conclusive, when final, as to validity of will.

22. Executors and administrators 🔑315(6)

Where decree of distribution did not distribute any property to insured's daughter or to his son as her trustee, notwithstanding that will directed that proceeds of insurance policy named therein were to be collected by son and paid to daughter, decree determined that daughter was entitled to nothing under will and barred recovery by her of proceeds of insurance from insured's wife who was named beneficiary under policy and had collected proceeds prior to distribution under will.

23. Executors and administrators 🔑315(6)

A decree of distribution in a probate court is conclusive on validity and rights under a testamentary trust.

24. Executors and administrators 🔑315(6)

Where decree distributing property under insured's will, which directed that proceeds of insurance policy be collected by insured's son and paid to insured's daughter, distributed no property to daughter or to son as her trustee, decree conclusively determined that no trust was created by will and precluded recovery by daughter against insured's wife on theory that wife, who was named beneficiary under policy and had collected proceeds, held proceeds subject to an "involuntary" and "voluntary trust."

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Trust" and "Voluntary Trust".

25. Trusts 🔑95

An "involuntary trust" must be predicated on acquisition of property which is impressed with a trust knowing that it is so impressed, or upon wrongful acquisition of trust res under such circumstances that equitable principles create a trust.

26. Limitation of actions 🔑103(4)

An action by insured's daughter against insured's wife to recover proceeds of life policy on theory that wife held proceeds in trust was barred by limitations, where evidence established that prior to date four years before commencement of action daughter was aware of terms of insured's will upon which her claim was based, and that wife had collected proceeds of policy and claimed proceeds as her own. Code Civ.Proc. §§ 337, 338, 343.

27. Appeal and error 🔑1011(1)

The Supreme Court does not resolve conflicts in the evidence, as that is the province of the trial court.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Pauline Cook against Agnes Keegan Cook to recover the amount of the proceeds of a life insurance policy on the theory that the defendant held the proceeds as trustee for the use and benefit of the plaintiff. Judgment for the defendant, and the plaintiff appeals.

Judgment affirmed.

Marion Vecki, of San Francisco, for appellant.

Williamson & Wallace and Thomas J. Keegan, all of San Francisco, for respondent.

CARTER, Justice.

This case arose out of a controversy between the defendant, widow of a decedent, Milton H. Cook, and the plaintiff, Pauline Cook, the daughter of decedent and step-daughter of defendant, concerning the proceeds of a life insurance policy in the sum of $2,020.39 on the life of decedent; plaintiff's claim to the proceeds arises from a provision in decedent's will, whereas defendant's claim arises from the fact that she was named beneficiary in the insurance policy.

The decedent having been married to Valerie Cook was divorced from her in 1908. The issue of that marriage were a son, Horatio Nelson Cook, and a daughter, plaintiff herein. Plaintiff and her mother moved to Paris, France, after the divorce and remained there until after the death of decedent; she was 18 years of age at the time of decedent's death and 21 years of age on November 27, 1927. On December 22, 1919, while decedent was unmarried, there was issued to him by the Equitable Life Assurance Society, a policy of insurance on his life; the named beneficiary was his son, Horatio Nelson Cook. By the terms of the policy the insured reserved the right to change the beneficiary, and such change was to be made by written request therefor followed by endorsement thereof on the policy by the insurer. The policy authorized a change in beneficiary and then provided: "Beneficiary—If the right to change the beneficiary has been reserved and there is no written assignment of this policy on file with the Society, the Insured may from time to time during its continuance, change the beneficiary or beneficiaries by a written request upon the Society's blank filed at its Home Office, but such change shall take effect only upon the endorsement of the same hereon by the Society. If there be no beneficiary surviving at the death of the Insured, the proceeds of this policy shall be payable to the executors, administrators or assigns of the Insured." With reference to assignment the policy provided: "No assignment of this policy shall be binding upon the Society unless in writing and filed at its Home Office." In 1921, decedent married defendant, and a daughter was the issue of that marriage. On September 21, 1921, decedent, in the manner provided by the policy, changed the beneficiary therein to defendant, and the policy so existed when decedent died. Decedent died on November 16, 1926, while a resident of California, leaving surviving him defendant and the above-mentioned children. His entire estate was his separate property. He left a will dated March 17, 1925, in which he bequeathed sixty per cent of his estate to defendant and forty per cent to his son; his son was directed to pay $40 per month to plaintiff but to have sole control of his share of the estate; the will also referred to a life insurance policy, concededly not here involved, the proceeds of which were to be used to pay a certain indebtedness, and the balance to his son and defendant; it then provided:

> "Because my beloved daughter Pauline is well provided for by my former wife who recently inherited from her mother I am leaving forty percent of what I possess to my son Nelson knowing that he will pay his sister the forty dollars a month referred to or more if he is able. A policy of insurance Equitable Life Assurance Co. No. 2,536,262 payable on its face to Horatio Nelson Cook is to be collected by him and paid to her * * *
>
> "I have left certain insurance policies other than those specified which are to be paid direct to the beneficiaries and are not to be considered part of my estate."

The policy here involved is No. 2,536,262. The will was admitted to probate on defendant's petition, and she being so designated in the will, was appointed executrix. Defendant administered the estate; and an order settling the final account and a decree of distribution were entered on January 16, 1928; those orders were not appealed from and are final. The estate was accordingly distributed. Due notice was given in the estate proceeding and the decree was not obtained by fraud. The insurer paid the proceeds of the insurance policy here involved to defendant shortly after decedent's death and the same was not included in or probated as a part of the assets of the estate. Plaintiff's demand on defendant for the proceeds of said policy made on September 7, 1935, being refused, she commenced this action on October 24, 1935, to recover same on the theory that they were held by defendant as trustee for the use and benefit of plaintiff by reason of the above-quoted portion of decedent's will. Plaintiff claimed in her complaint that defendant, with full knowledge of the terms of the will and the insurance policy, elected to and did take under the will; and that she represented to plaintiff that all of decedent's insurance policies had been disposed of during his lifetime, and in reliance thereon, and in ignorance of the payment of said proceeds to defendant, and that the policy of insurance was transferred to plaintiff or that she was made beneficiary therein by the will, plaintiff did not take any action in the premises until she discovered the true situation shortly before she commenced this action. Defendant controverted those allegations and pleaded as special defenses, the decree of distribution in the estate proceeding, laches and the statute of limitations. The trial court found in favor of defendant on the general issue of fraud, and also found that the action was barred by sections 337, 338 and 343 of the Code of Civil Procedure and laches, and that the decree of distribution was a bar to the action.

The main premise upon which plaintiff relies for a reversal of the judgment, is that the above-quoted provision of the will effectively transferred the insurance policy upon decedent's death to decedent's son, Horatio Nelson Cook, in trust to collect the proceeds thereof and pay them to plaintiff, and that said provision accomplished an effective change in beneficiary from defendant to Horatio Nelson Cook as trustee. Several other contentions of plaintiff are but ramifications or varying approaches to that main ground.

[1, 2] It is a fundamental rule of law, as conceded by both parties, that in an ordinary life insurance policy where the insured reserves the right to change the beneficiary named therein, such change may be made by him at any time prior to his death, and that the beneficiary has no such vested right therein prior to the death of the insured as will enable him to prevent the change. Blethen v. Pacific Mutual Life Insurance Co., 198 Cal. 91, 243 P. 431. The same is true of the rule that in an ordinary life insurance policy the insured's property right therein is such that it may be passed by the insured by transfer, will or succession. Insurance Code, sec. 10130, St.1935, p. 638; Blethen v. Pacific Mutual Life Insurance Co., supra. Further, it must be conceded that decedent here could have changed the beneficiary from defendant to whomever he desired, at any time prior to his death. It is asserted, however, that by virtue of sections 2764 and 2765 of the Civil Code (in force at the time here involved), upon which sections 10130 and 10131 of the Insurance Code are based, the clause in the will above-quoted constituted a transfer on death of the insurance policy or a change in the beneficiary, and thus deprived defendant of any rights thereunder, although no request for such change was made to the insurer nor was it endorsed on the policy. Section 2764 provided:

"A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered." Section 2765 provided:

[3-7] "Notice to an insurer of a transfer or bequest thereof is not necessary to preserve the validity of a policy of insurance upon life or health, unless thereby expressly required."

There are several reasons why these sections are not applicable to the case at bar. Their manifest object was to make insurance policies freely alienable, although the transferee or legatee had no insurable interest. That result has been reached by court decision without the aid of legislation. Grigsby v. Russell, 222 U.S. 149, 32 S.Ct. 58, 56 L.Ed. 133, 36 L.R.A.,N.S., 642, Ann.Cas.1913B, 863; Lewis v. Reed, 48 Cal.App. 742, 192 P. 335. Section 2764 merely clarified and made certain the law on the subject. We are not disposed to hold, however, that that rule made it possible, under all circumstances, for the insured to assign his policy or change the beneficiary by his will where there had been no attempt to change the beneficiary or assign the policy during life or to comply with the requirements of the policy to consummate such change. Of course, there are instances in which an insured may transfer his policy by will. Where the policy has no named beneficiary but is payable to the estate of the insured, the policy may be disposed of by will or pass by intestate succession if the insured dies intestate. 14 Cal.Jur. 585; In re Mattley's Estate, 110 Cal.App. 439, 294 P. 37. Where the named beneficiary predeceased the insured and the power is reserved to change the beneficiary, the latter thus having no vested right in the policy or proceeds, the insured may dispose of the policy by will. This is true for the reason that, under such circumstances, the mere expectancy held by the beneficiary during the life of the insured vanishes with the death of the beneficiary prior to the death of the insured; and naturally the proceeds fall into the estate of the insured and are subject to testamentary disposition. Supreme Council, etc., v. Gehrenbeck, 124 Cal. 43, 56 P. 640; In re Estate of Castagnola, 68 Cal. App. 732, 230 P. 188. And there may be instances in which by the terms of the particular policy involved, it is transferable by will. There may be other instances, but the rule cannot have any application to the facts in the instant case. A will does not become operative until death; prior to death it is revocable at the whim of the testator, and the objects of the testator's bounty have no vested rights. In that respect it is very similar to the rights of a beneficiary under a life insurance policy in which the insured reserves the right to change the beneficiary such as we have in the instant case. However, upon death the beneficiary's right becomes vested, and that being the case, no expression in the insured's will purporting to assign his life insurance policy or change the beneficiary can be effective. At death he no longer has a policy to assign. It has passed to his heirs, if no beneficiary was designated; if a beneficiary is named it passes to such beneficiary. He cannot then change the beneficiary because the right of the named beneficiary has vested. It should be noted that section 2764 not only authorizes the transfer by will of a policy of insurance but also authorizes such transfer by "succession" as well and assignment. If plaintiff's argument were to be adopted, it must necessarily extend to all modes of transfer mentioned in the section, and if it were applied to a transfer by succession, then a beneficiary would never under any circumstances receive the proceeds of a life insurance policy except possibly in case of a person dying without heirs. In connection with the interpretation of section 2764 it may well be pertinent to consider the provisions of section 2769 of the Civil Code, which provide: "The proceeds of every policy of insurance due on the death of insured shall by the insurer be paid either to the beneficiary designated therein, or, if no beneficiary is designated therein, to the estate of insured; or, if the policy has been assigned, to the assignee thereof; and such payment shall satisfy all obligations of the insurer with respect to said policy." This section is clearly in accord with section 2764 as we have interpreted it, but it is contrary to plaintiff's position. The express direction is that the proceeds are to be paid to the beneficiary if one, but not to the estate unless there is no beneficiary.

What was said by the District Court of Appeal in the case of Supreme Lodge v. Price, 27 Cal.App. 607, 623, 150 P. 803, 809, is pertinent in this connection. We quote the following from the opinion in that case.

"It is very clear that the instrument signed by the deceased, even if it had been executed and attested according to the formalities prescribed by our law for the execution and attestation of wills (section 1276, Civ.Code), cannot operate as a testamentary disposition of the fund, nor, as a will, to change the beneficiaries. Besides the consideration that the laws of the plaintiff expressly prohibit such testamentary disposition, there is another insuperable objection to such mode of disposing of the benefit money, in this: That a will cannot take effect until after the death of the testator, and, of course upon property only belonging to him, and therefore, since, in a case where, as here, no change of beneficiaries has been made according to the laws of the society, or permitted by an informal method under a waiver of said laws, the interest of the beneficiary designated in the certificate in the benefit fund becomes vested eo instanti upon the death of the assured. In other words, the title to the benefit money vests in the beneficiary immediately upon the death of the assured, and, of course, any provision in the last will of the latter purporting or attempting to make a different disposal of the fund would be as ineffectual for the purpose for which it was intended as would be a provision attempting thus to dispose of property which the testator never owned or had any interest in.

"Nor can the document be upheld as a direction to the association to make the change, for, as before explained, the fact of the desired change was never in any manner communicated to the association during the lifetime of the assured, and, therefore, the consent of the association was not and could not be obtained for a change of beneficiaries in that informal manner."

See, also, De Silva v. Supreme Council of Portuguese Union, 109 Cal. 373, 42 P. 32. Although it may be that the above statement was dictum and that sections 2764 and 2765 of the Civil Code were not mentioned by the court, it is persuasive and sound argument in support of defendant's position in the case at bar; as above shown those sections of the Civil Code are not applicable to this case in any event. The reasoning of the court in the case of Supreme Lodge v. Price, supra, is not dependent to any extent for its force or logic upon the issue of whether or not an insurance policy may pass by will to a person with no insurable interest. Therefore it is immaterial to the conclusion reached that the court there did not consider the effect of section 2764 of the Civil Code authorizing a disposal of a policy by will to one without an insurable interest. The sole object of sections 2764 and 2765 was to legalize a transfer by will, etc., under appropriate circumstances, regardless of whether the transferee had an insurable interest.

[8, 9] Furthermore, there was no attempt, other than the will which was not effective, on decedent's part to comply with the provisions of the policy to consummate a change in the beneficiary nor was he prevented from so complying. The rigor of the rule requiring that the method provided by the policy for a change of beneficiary must be followed, is relaxed when the controversy is between conflicting claimants and the insurer is not raising the issue. Pimentel v. Conselho Supremo, etc., 6 Cal. 2d 182, 57 P.2d 131, 133. However, as a general principle, the method prescribed by the policy must be followed, and if it is not, no change is accomplished, unless whatever occurred in that respect comes within one or more of the three exceptions to the rule. Those exceptions are based on equitable principles and are designed to assist an insured in carrying out his intent to change a beneficiary in instances such as when he has done all he could have done to make the change, there is a waiver, or he was prevented from making the change, and where there was not a literal compliance with the terms of the policy. In the case of Pimentel v. Conselho Supremo, supra, this court said:

"There are three often-repeated and well-recognized exceptions to the rule that where the contract of insurance provides a method for making a change of beneficiary the insured must follow substantially the method prescribed: (1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; (2) If it is beyond the power of the insured to comply literally with the regulations a court of equity will treat the change as having been made; and (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will treat such certificate as having been made. McLaughlin v. McLaughlin, 104 Cal. 171, 37 P. 865, 43 Am.St.Rep. 83; Supreme Lodge v. Price, 27 Cal.App. 607, 150 P. 803; Barboza v. Conselho [Supremo], etc., 43 Cal.App. 775, 185 P. 1028.

[10] "With the first exception we are obviously not concerned. The second and third are not so clear of application nor always easily distinguished from each other. However, we think the second does not apply here for the reason that it was not impossible that the course prescribed by the constitution and by-laws of the society be carried out. The third exception has been variously interpreted as meaning all that is required of the insured, leaving only ministerial duties to be performed by the insurer (McLauglin v. McLaughlin, Barboza v. Conselho [Supremo], etc., both supra, and Garrett v. Garrett, 31 Cal.App. 173, 159 P. 1050), or as all that it was possible for the insured to do under the circumstances under which he attempted to make the change. Supreme Lodge v. Price, supra; Johnston v. Kearns, 107 Cal.App. 557, 290

P. 640, 643, and see Bell v. Criviansky, 98 Mont. 109, 37 P.(2d) 673." Obviously, the making of his will, the only thing done by decedent, does not come within any of those exceptions. Even if the will when made in 1925 should be considered as an attempt to change the beneficiary or assign the policy at that time rather than on the date of decedent's death when the will became operative, still the case would not fall within any of the exceptions because no endeavor was made to communicate such change to the insurer, and the insured would be presumed to know the law that a will is ineffective until death. A whole year elapsed after decedent made his will and before he died, and he did nothing to change the beneficiary in the policy. The will at the time of its execution could not be said to be a present assignment of the policy because a will is revocable and the beneficiaries thereunder have no vested rights prior to the testator's death. Nothing could have passed by the will at that time, and on death when the will became operative, the defendant's right as named beneficiary had vested. In any event the provision in the will was quite apparently an attempt to bequeath the proceeds of a policy of insurance rather than assign the policy itself.

[11, 12] In reaching the foregoing conclusions we have not overlooked the principle that provisions such as sections 2764 and 2765 of the Civil Code, now embodied with minor changes in sections 10130 and 10131 of the Insurance Code, providing for a transfer of a policy of life insurance by will or otherwise, and that notice to the insurer of the transfer is not necessary to preserve the validity of the policy unless expressly required, cannot be altered or frustrated by contract, because of reasons founded on public policy. Lewis v. Reed, 48 Cal.App. 742, 192 P. 335. As above stated, however, those sections are not applicable to the instant case, and a change of beneficiary or a transfer of a policy cannot be accomplished by will where the named beneficiary in the policy has not been changed or died prior to the death of the insured.

In re Estate of Mattley, 110 Cal.App. 439, 294 P. 37, relied upon by plaintiff, does not pass upon the issue here involved. The court there assumed with respondent that the proceeds of the insurance policy belonged to the estate, therefore no issue was determined as to whether it did belong to the estate or the beneficiary named in the policy. Pimentel v. Conselho Supremo, etc., supra, does not support plaintiff's position because in that case, all that could have been done by the insured to change the beneficiary was done by him prior to his death.

[13] We are not impressed with the argument advanced by plaintiff that defendant is estopped to assert that the provision in the will was ineffective to change the beneficiary, or that her right as beneficiary became vested on decedent's death because the insurer was not notified of the alleged transfer by will, or that the insurer had not waived the necessity for compliance with the terms of the policy in respect to a change of beneficiary. From all that appears the will was in the possession of the insured, decedent, until after his death, and defendant, beneficiary, did nothing to prevent him from assigning it or changing the beneficiary. Assuming that after the insured's death, defendant did know of the provision in the will mentioning the policy but nevertheless collected the same from the insurer, there was no obligation or duty on her part to disclose such information to the insurer or plaintiff. Defendant did not profit by her own wrong; she did no wrong. The elements of estoppel are lacking. In the case of Jory v. Supreme Council, 105 Cal. 20, 38 P. 524, 26 L.R.A. 733, 45 Am. St.Rep. 17, relied upon by plaintiff, the estoppel and equitable relief were based on the fact that the beneficiary having possession of the policy, refused to deliver it to the insured and concealed it when the insured attempted to obtain it from her to change the beneficiary. The insured then proceeded to comply with all other requirements for a change of beneficiary, except the delivery of the policy to the insurer which she was prevented from doing by the then beneficiary. We have no such facts in the case at bar.

[14] Plaintiff advances the theory that by reason of the aforementioned clause in the will dealing with an insurance policy coupled with the fact that defendant was a devisee of property under the will, defendant was put to her election and she having taken under the will, there was an election requiring her to recognize the will in toto and by so doing must recognize plaintiff's right to the proceeds of the policy of insurance. We agree with defendant that the provision in the will did not purport to dispose of the policy here involved because it referred to a policy "payable on its face to Horatio Nelson Cook". When

the will was made and at decedent's death there was no policy payable to Horatio Nelson Cook; it was payable to defendant as beneficiary. Thus there was no attempted disposal of property belonging to defendant, i. e., a policy payable to her. Also the proceeds of the policy did not belong to defendant until the insured's death. Prior to that time she had no vested property right therein. There was thus no disposal of property owned by defendant which is an essential factor in the doctrine of election.

[15] Furthermore, it cannot be said that defendant was ever in fact placed in a position where she was forced to make an election. The offering of a will for admission to probate and seeking appointment as executrix does not constitute an election. In re Estate of Gwin, 77 Cal. 313, 19 P. 527. Neither the insurance policy nor its proceeds were listed as an asset of the estate or included in the probate proceeding thereof. Therefore it might be said that they were not disposed of or affected by the will or the decree of distribution. If anything, it might well be argued that defendant elected to take against the will because she collected under the policy long before there was any property distributed to her under the will. Under such circumstances plaintiff's action would be to recover whatever was left to her by the will, but under that theory plaintiff would be met with the fact that the decree of distribution contained an omnibus clause which distributed all property not described in the decree to defendant and Horatio Nelson Cook; none was distributed to plaintiff. That decree is final.

[16] Whatever may be the merit of plaintiff's contentions, the decree of distribution in the probate proceeding in decedent's estate was conclusive as to the interpretation of the will, and the rights of legatees thereunder, and the property included or covered by the will, the existence, validity of and rights under any testamentary trust, and the incidental matters which necessarily are involved in a determination on those subjects whether right or wrong. It cannot be collaterally attacked except for extrinsic fraud or certain jurisdictional defects. The general rule in this respect is thus stated:

[17, 18] "The decree is conclusive 'as to the rights of heirs, devisees and legatees,' and a decision as to them includes determination of the persons entitled as such and the parts or proportions to which each is entitled. Thus the court has jurisdiction to determine who are the legal heirs, devisees, or legatees, and all questions concerning the distribution, including questions of community property involved. The decree, therefore, determines the heirship of claimants, and it is conclusive that a prior decree determining heirship is valid, where such prior decree was questioned on distribution but was followed." 11b Cal.Jur. 794. And again:

"If there is a will the court must pass upon the validity of the disposition attempted by the testator, and the decree of distribution is conclusive thereof.

[19] "The decree is necessarily a judicial construction of the will and fixes the several interests of the distributees by designating the persons and the proportions or parts to which each is entitled, and is conclusive thereof. Legacies not mentioned in the decree are cut off. A claim of interest upon a legacy should be asserted in the proceeding for distribution, and a distribution without interest is a determination that the legatee is entitled to none.

[20-23] "The will is merely a part of the evidence upon which the decree is based, and becomes merged in and superseded by the decree, the decree becoming the measure of the rights of the beneficiaries and the law of the estate. The decree therefore is conclusive as against collateral attack, even though in contravention of the terms of the will. In other words, the will cannot be used to impeach the decree. Although a provision in the will may have been invalid, a decree distributing the estate in accordance therewith is conclusive, when final, as to the validity of the will. The question whether a claimant has forfeited his rights under a noncontest clause properly arises on distribution." 11b Cal.Jur. 796.

In the instant case the decree of distribution did not distribute any property to plaintiff or to Horatio Nelson Cook as her trustee. All of the property was distributed to Horatio Nelson Cook, free and clear of any trust or obligation, and to defendant. The decree was pleaded as a defense by defendant and the lower court found in its conclusions of law that the decree was a bar to plaintiff's action. It cannot be denied that it was at least a conclusive determination of essential factors in plaintiff's case. It decided that plaintiff was entitled to nothing under the will; thus plaintiff acquired no interest in the insurance policy or its proceeds thereby, or it might be said, that the insurance policy here involved was not contemplated by the provision in the will in respect to plaintiff. It decreed, in effect, that no election was required of defendant; and that the insurance policy was not disposed of by will upon death. As a necessary incident of the determination in respect to the interpretation of the will it may be said that the alleged power in trust to Horatio Nelson Cook to collect the policy and pay it to plaintiff was invalid and ineffective and therefore plaintiff never became the beneficiary of any trust and has no standing in this action. A decree of distribution in a probate court is conclusive on the validity and rights under a testamentary trust. 11b Cal.Jur. 798. We believe that the decree of distribution in the estate proceeding is an insuperable obstacle to plaintiff's recovery. The only possible circumstances under which it might be claimed that it was not, would be under the theory that the will, taken as a document, independent of its character as a will, transferred the policy of insurance or changed the beneficiary; but that we have seen it did not accomplish.

[24, 25] Plaintiff claims that both an involuntary and voluntary trust were created subject to which defendant held the proceeds of the insurance policy. Inasmuch as we have concluded that no rights in the insurance policy were acquired by plaintiff by the provision in the will, i. e., that the will did not dispose of the insurance policy or the proceeds, it necessarily follows that no trust was impressed thereon. An involuntary trust must be predicated on the proposition that a person has acquired property which is impressed with a trust knowing that it is so impressed, or that he wrongfully comes into possession of the trust res under such circumstances that equitable principles create a trust. Here defendant rightfully acquired property which was not impressed with a trust. Even if it be conceded that defendant by assuming the duty to act and acting as executrix and carrying out the provisions of the will, accepted the provisions of the trust purportedly imposed by the will on the insurance policy and thereby became a voluntary trustee, the result cannot be different for the reason that the decree of distribution conclusively determined that there was no valid trust created and that no interest in the insurance policy was acquired by any trustee or beneficiary. For those reasons further discussion of plaintiff's trust theories would be superfluous.

[26] Plaintiff asserts that the action was not barred by the statute of limitations. Code of Civ.Proc., secs. 337, 338 and 343. In this connection plaintiff, to escape the statute, alleged: "That at the time of the death of said Milton H. Cook, as aforesaid, plaintiff was a minor, and was continuously residing in Paris, France, until the summer of 1935, when she returned to San Francisco, California; that shortly after the death of said Milton H. Cook, defendant by and through her attorney advised and informed plaintiff that said Milton H. Cook, deceased, had disposed of all of his life insurance during his lifetime, and plaintiff believed said statements and information so stated and given to her regarding her father's life insurance, and relied thereon, and plaintiff did not learn, or receive knowledge of the true facts and circumstances connected with the collection and payment, as aforesaid, of the proceeds of said life insurance policy hereinbefore described in Paragraph IV, until she returned to San Francisco, California, in the summer of 1935." Defendant pleaded the statute of limitations and in this connection the court found:

"At the date of the death of said Milton H. Cook his said son Horatio Nelson Cook was over twenty-one years of age and the said plaintiff, Pauline Cook, was over the age of eighteen years, and she attained the age of twenty-one years on or about the 29th day of November, 1927. That within three months after the death of said Milton H. Cook the said plaintiff received a copy of his last will and testament and was fully advised of the nature and character of his estate and thereafter and after the said plaintiff had attained her legal majority and while the probate proceedings of the estate of Milton H. Cook were still pending and as much as a year prior to the final distribution of said estate, the said plaintiff was fully and definitely advised of the fact that the said policy of insurance on the life of Milton H. Cook was at the death of said Milton H. Cook payable to the defendant in this action, and the defendant claimed the same for her sole separate use and benefit and had collected the amount due under said policy and had kept and retained the same. That plaintiff made no claim to the said insurance policy or to the moneys payable or paid thereunder during the said probate proceedings, or at any time prior to the 7th day of September, 1935, and did not institute this action or any action until the 24th day of October, 1935. * * *

[27] "That plaintiff's cause of action is barred by the provisions of Sections 337, 338 and 343 of the Code of Civil Procedure of the State of California."

The findings wholly negative plaintiff's claim that the running of the statute was tolled by fraudulent concealment and clearly establish that her purported cause of action was barred by the statute. The decree of distribution was entered on February 6, 1928. Plaintiff reached 21 years of age on November 29, 1927; and she was 18 years of age on November 29, 1924. Defendant obtained the proceeds from the policy shortly after the death of insured on November 16, 1926. Even applying the four-year period of limitation, we find that several years prior to the date four years before the action was commenced, plaintiff was fully advised of the terms of the will and that defendant had collected the insurance policy and claimed it as her own. This shows that any trust created by the will was repudiated by defendant and plaintiff knew it. It was not until September 7, 1935, that plaintiff made a demand for the insurance policy or the proceeds thereof. She did not commence her action until October 24, 1935. Conceding that the evidence on the subject embraced in the findings on the statute of limitation is conflicting, this court does not resolve conflicts; that is the province of the trial court and it found against plaintiff. There is ample evidence that by correspondence between plaintiff and her mother and the attorney for the insured's estate and by oral communication, plaintiff was informed of the will and of the insurance policy and that she had no interest therein and that the proceeds were all claimed by defendant. Plaintiff admits by her own letter to said attorney that she knew those things. There is no evidence that defendant ever recognized any claim of plaintiff to the policy or its proceeds. She always asserted full ownership of both after decedent's death.

Plaintiff objects to the findings of the court claiming that they do not cover all of the issues, that they are contradictory and do not support the conclusions of law. Without discussing in detail the pleadings and findings, suffice it to say we are satisfied that the findings are responsive to the pleadings and find on all of the material issues raised, and that they are not contradictory or fail to support the conclusions of law. In any event as we have determined that the fundamental theory of plaintiff's case is unsupportable, that her action is barred by the statute of limitations, and that it is defeated by the decree of distribution, it would not be profitable or useful to make an extensive review of the pleadings and findings. All of the essential matters are sufficiently and properly covered by the findings and the findings support the conclusions of law.

The judgment is affirmed.

We concur: SHENK, J.; EDMONDS, J.

17 Cal.2d 657

WYNECOOP v. SUPERIOR COURT IN AND FOR COUNTY OF SUTTER et al.

S. F. 16451.

Supreme Court of California.
March 20, 1941.

1. Appeal and error 🔑616(1)

Where transcript on appeal was certified only by clerk of Superior Court, documents of evidentiary nature contained therein could be authenticated solely by certificate of judge.

2. Appeal and error 🔑612(1)

Where transcript contained only documents of an evidentiary nature required to be authenticated solely by certificate of judge, and did not contain oral testimony of the only witness, the trial judge properly refused to certify transcript on ground that it did not contain the oral evidence received, and did not constitute a full, true and fair transcript of the proceedings. Code Civ. Proc. § 953a.

3. Appeal and error 🔑612(5)

On an appeal from an order a complete record may be brought up under the alternative statutory method only where all evidence is documentary, or where transcript of all evidence may be secured, and in authenticating the evidentiary matter the judge's

certificate must state, not only that evidence contained in record was considered in determination of the matter appealed from, but also that record contains all the evidentiary matter so considered, and when such authentication is impossible, appellant must proceed by bill of exceptions unless he elects to bring up the judgment roll alone. Code Civ.Proc. § 953a et seq.; Rules for Supreme Court and District Courts of Appeal, rule 29.

◆

In Bank.

Petition by George Wynecoop for a writ of mandate to compel the Superior Court of the State of California in and for the County of Sutter, Warren Steel, Judge, to certify a transcript to be used on appeal from an order vacating the judgment.

Alternative writ discharged, and peremptory writ denied.

King & King, of Napa, and Huston, Huston & Huston, of Woodland, for petitioner.

Rich & Weis, of Marysville, for respondent.

GIBSON, Chief Justice.

[1] Petitioner seeks a writ of mandate to compel the respondent Superior Court to certify a transcript to be used on an appeal from an order vacating a judgment. The matter for consideration here arises out of an appeal in Wynecoop v. Coats. In that case appellant, petitioner here, gave notice to the clerk under the provisions of section 953a of the Code of Civil Procedure to prepare a transcript. Subsequently, a transcript was filed certified only by the clerk of the superior court. It contained documents of an evidentiary nature which may be authenticated solely by the certificate of the judge. Martin v. Pacific G. & E. Co., 195 Cal. 544, 234 P. 321; Jeffords v. Young, 197 Cal. 224, 239 P. 1054; Guyot v. Cassab, 118 Cal.App. 742, 5 P.2d 912; Mason v. Coalinga Union H. S. Dist., 31 Cal.App.2d 317, 87 P.2d 921.

Respondent moved to dismiss the appeal or affirm the judgment on the ground the record was defective, and petitioner made a counter-motion for return of the transcript to the trial court for further authentication. The motion to dismiss or affirm was denied and the counter-motion was granted, the clerk of this court being directed to return the transcript to the trial court "for further proceedings".

[2] Upon presentation of the transcript the judge declined to certify it for the reasons that it did not contain "the oral and parol evidence, offered, received and taken at said hearing, or any portion thereof"; and that it did not constitute "a full, true and fair transcript of the proceedings had at the hearing or of the testimony offered or taken, and evidence offered or received". It appeared that at the hearing on the motion to vacate the judgment in Wynecoop v. Coats, supra, a witness had been called who gave oral testimony, but that no reporter was present and hence no transcription of the oral evidence was possible.

[3] It is apparent that the trial judge properly refused to certify the transcript on the grounds stated. In an appeal from an order it is possible to bring up a complete record under the alternative method, Code Civ.Proc., § 953a et seq., only in cases where all of the evidence was documentary or where a transcription of oral evidence may be secured. In authenticating the evidentiary matter on such an appeal, the certificate of the judge must state not only that the evidence contained in the record on appeal was used or considered by him in the determination of the matter appealed from, but also that the record contains all of the evidentiary matter so used or considered. When such authentication is impossible, an appellant must proceed by bill of exceptions unless he elects to bring up the "judgment roll" alone. See Rule XXIX, Rules for Supreme Court and District Courts of Appeal; Charles v. City of Crescent City, 12 Cal.2d 241, 83 P.2d 34.

Since the purpose of the petition for mandate herein was to compel the certification of a defective record, and the same must be denied, it is unnecessary to discuss the methods of bringing up a partial transcript by stipulation (Code Civ.Proc., § 953a; Western Concrete Pipe Co. v. Grabovich, 118 Cal.App. 367, 5 P.2d 71) or under the procedure specified in Rule IX, § 2 of the Rules for the Supreme Court and District Courts of Appeal. Nor does anything we have said herein prevent the appellant from further prosecuting the appeal in Wynecoop v. Coats on the judgment roll.

The alternative writ is discharged and a peremptory writ of mandate is denied.

We concur: EDMONDS, J.; TRAYNOR, J.; SHENK, J.; CURTIS, J.

17 Cal.2d 664

BUTLER BROS. v. McCOLGAN, Franchise Tax Commissioner.

S. F. 16157.

Supreme Court of California.

March 21, 1941.

Rehearing Denied April 17, 1941.

1. Taxation ⚷397

A foreign corporation may determine its net income in state for franchise tax purposes by separate accounting method only if its business within state is truly separate and distinct from its business without state, so that segregation of such income may be made clearly and accurately. Gen.Laws 1937, Act 8488, § 10.

2. Taxation ⚷397

Where foreign corporation carries on interstate operations and portion of its business done within state cannot be clearly segregated from that done outside state, unit rule of assessment is employed in allocating to state its fair share of corporation's taxable values for franchise tax purposes. Gen.Laws 1937, Act 8488, § 10.

3. Taxation ⚷397

The entire business of foreign corporation, operations of which in state contribute to net income from its entire operations in United States, is "unitary business", so as to require fair system of apportionment by statutory formula method in determining portion of such income derived from business done within state for franchise tax purposes. Gen.Laws 1937, Act 8488, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Unitary Business".

4. Taxation ⚷397

In determining portion of foreign corporation's net income, derived from business done within state, for franchise tax purposes, sales by corporation in each state wherein it does business must be proportionately credited with profits resulting from purchasing power produced by such sales in aggregate, though elimination of amount of its sales in state would not reduce volume of all its sales sufficiently to affect prices at which it buys. Gen.Laws 1937, Act 8488, § 10.

5. Taxation ⚷376(1), 397

A corporation deriving income from series of transactions, beginning with manufacture of goods in one state and sales thereof in another, is engaged in "unitary business", so as to require employment of unit rule of assessment in allocating to each state wherein corporation does business fair share of its taxable values in determining portion of its net income derived from business done within state for franchise tax purposes. Gen.Laws 1937, Act 8488, § 10.

6. Taxation ⚷376(4)

The only limitation on use of statutory formula in allocation or apportionment of income from unitary business of corporation for state franchise tax purposes is that such formula must not be intrinsically arbitrary or produce unreasonable result. Gen. Laws 1937, Act 8488, § 10.

7. Taxation ⚷397

To rebut presumption that statutory formula for allocation of foreign corporation's income to various states wherein it does unitary business for state franchise tax purposes by giving weight to such factors as property, employees' services and sales, responsible for earning of income, produced fair result, burden is on corporation to make oppression manifest by clear and cogent evidence. Gen.Laws 1937, Act 8488, § 10.

8. Taxation ⚷543(7)

Where foreign corporation, suing for amount of additional franchise tax assessment paid by it under protest, introduced no evidence explaining why its business in state differed so from average in all states wherein it did business that statutory formula used in computing tax produced erroneous result, merely asserted loss was incurred by it in state, and failed to show variance from normal in its state sales, property, pay roll, expenses or revenue, it did not uphold burden of rebutting presumption that such formula produced fair result, as evidence must go to each element of formula equation in order to overthrow formula. Gen. Laws 1937, Act 8488, § 10.

9. Constitutional law ⚷230(1), 287
Taxation ⚷37

A foreign corporation, operating wholesale distributing houses in various cities of different states and maintaining central purchasing, advertising, accounting and management divisions, executive force, and general system of operations, was engaged in "unitary business", in view of unity of ownership, operation and use, so that state franchise tax commissioner correctly applied statutory formula method in determining portion of corporation's net income from business done within state for franchise tax

purposes, without thereby contravening restrictions in Fourteenth Amendment to Federal Constitution against taxing property outside state. Gen.Laws 1937, Act 8488, § 10; U.S.C.A.Const. Amend. 14.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Butler Brothers, a corporation, against Charles J. McColgan, Franchise Tax Commissioner, to recover an additional assessment made by defendant under the Bank and Corporation Franchise Tax Act and paid by plaintiff under protest. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 102 P.2d 776.

Rehearing denied; TRAYNOR, J., took no part in the consideration or decision of this matter.

Brobeck, Phleger & Harrison, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney, James J. Arditto, and Valentine Brookes, Deputy Attys. Gen. (Frank M. Keesling, of Los Angeles, of counsel), for respondent.

CURTIS, Justice.

This action was brought to recover an additional assessment made by the defendant as franchise tax commissioner under authority of the Bank and Corporation Franchise Tax Act (Stats.1929, chap. 13, p. 19, as amended, Gen.Laws, Act 8488) for the taxable year 1936, based upon income for the year 1935, paid by plaintiff under protest. Judgment was entered in favor of defendant, and plaintiff appealed therefrom.

The cause was submitted upon an agreed statement of facts, which may be summarized as follows:

Plaintiff, Butler Brothers (herein called "the Company"), is an Illinois corporation, having its principal corporate office at Chicago. It is engaged in the wholesale dry goods and general merchandise business, purchasing from manufacturers and others and selling to retailers only. It operates seven wholesale distributing houses at Chicago, Jersey City, Baltimore, Minneapolis, St. Louis, Dallas and San Francisco. Each of these houses serves a separate trade territory. At each house stocks of goods are maintained, from which sales are made in its territory. Each house handles its own sales, and all solicitation, credit and collection arrangements in connection therewith, and keeps books of account showing the operations of the house. All sales in California were made from the San Francisco house and all receipts credited thereto.

Part of the operating expense of the houses is directly and exclusively incurred at the respective houses, including such items as labor, rentals, etc. The remainder consists of certain items of common expense such as executive salaries and corporate overhead and the expense of operating a central buying division and a central advertising division. These expenses are allocated to the respective houses on bases which, it is agreed, are in accord with recognized accounting practice, and the accuracy and propriety of such bases of apportionment are here conceded. For the year 1935 the amount of such allocated expense charged to the San Francisco house was $100,091, of which, it is agreed, approximately seventy-five per cent would have been incurred even though the San Francisco house was not operated. Except for such common expenses, each house is operated independently of each other house.

The company maintains a central buying division through which goods for resale are ordered, but such goods are shipped by the manufacturers to the houses for which ordered, where the cost thereof and the transportation charges thereon are entered on the books of the house. No charges are made against any house for the benefit of the company, or any other house by reason of such centralized purchasing, but the actual cost of operating the central buying division is allocated to the houses, as stated in the preceding paragraph. By reason of the volume of purchases made by the company more favorable prices are obtained than would be obtainable in respect of purchases for the account of any individual house, but addition or reduction in the volume of purchases in an amount equal to the purchases made for the account of the San Francisco house would have no effect on the prices obtainable for the remaining houses.

The company computed its income from the operation of the San Francisco house by deducting from the gross receipts from sales of merchandise in California the costs of such merchandise, the direct expenses of the San Francisco house, and the apportioned share of common expenses previously described. According to this computation the San Francisco house operated at a loss of $82,851 for the year 1935. Within the time allowed by law a report showing this loss was made and the minimum tax of $25 was paid for the year 1936. In the year 1935 the operations of all houses of the company produced a profit of $1,149,677. The franchise tax commissioner subsequently assessed an additional tax of $3,798.43, which, with interest amounting to $344.67, was paid under protest on September 16, 1938. The additional assessment was predicated on the allocation to California of 8.1372% of the total income of the company derived from all sources, such percentage having been determined by mathematical average of the percentages which the value of the tangible property, payroll and gross sales attributable to California bore to the corresponding items of all houses of the company. If an allocation is proper, use of the particular percentage here is not questioned.

The tax in question was levied under the provisions of section 10 of the Bank and Corporation Franchise Tax Act (General Laws, Act 8488, Vol. 2, p. 3858, Stats.1929, pp. 19, 24, amended by Stats.1931, p. 2226, Stats. 1935, p. 965), which so far as here involved, reads as follows: "If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation."

It is claimed by appellant that the method by which the tax was fixed and computed was unauthorized and unlawful, and that such method had the effect of taxing plaintiff on and in respect to income derived from sources beyond the jurisdiction of the state. This resulted, it is contended, in a denial of due process of law and of the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

On the other hand, respondent contends that the tax was levied upon income from business derived from within this state, that the operations of the company are unitary in character, and that the formula for allocation of income used by the franchise tax commissioner was lawful and proper in arriving at the net income of appellant from business done in California—computed to be approximately $95,000.

[1-3] The sole question to be determined on this appeal is whether it is lawful and proper for the respondent, as franchise tax commissioner, to insist upon use of the formula for allocation of income in a case such as this, or whether the company is entitled to use the separate accounting of its San Francisco house to determine its net income in the state of California. The answer to this question depends entirely on the nature of the business conducted within and without the state by appellant, a foreign corporation. It is only if its business within this state is truly separate and distinct from its business without this state, so that the segregation of income may be made clearly and accurately, that the separate accounting method may properly be used. Where, however, interstate operations are carried on and that portion of the corporation's business done within the state cannot be clearly segregated from that done outside the state, the unit rule of assessment is employed as a device for allocating to the state for taxation its fair share of the taxable values of the taxpayer. Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 17 S.Ct. 305, 41 L.Ed. 683; Id., 166 U.S. 185, 17 S.Ct. 604, 41 L.Ed. 965; Pullman's Palace Car Company v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613; State Railroad Tax Cases, 92 U.S. 575, 23 L.Ed. 663. In the early cases in which the unit rule first made its hesitating appearance there was always a physical link, a palpable unity of substance, a binding together by a system of rails or by telegraph wires. State Railroad Tax Cases, 1875, supra; Western Union Telegraph Co. v. Taggart, 1896, 163 U.S. 1, 16 S.Ct. 1054, 41 L.Ed. 49. Then in Adams Express Co. v. Ohio State Auditor, 1897, supra, the standard unity of substance was openly replaced by one of unity of use and management. This decision clearly recognized that in assessing tangible property for taxation,

its value-producing qualities in connection with other pieces of tangible property outside the state must be considered. If there is any evidence to sustain a finding that the operations of appellant in California during the year 1935 contributed to the net income derived from its entire operations in the United States, then the entire business of appellant is so clearly unitary as to require a fair system of apportionment by the formula method in order to prevent overtaxation to the corporation or undertaxation by the state. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165. Such income would be within the purview of the statute quoted above—"The portion of net income derived from business done within this State".

[4] Preliminary to analysis and discussion of the cases cited by the parties as bearing on the issue involved in the instant case, we shall review briefly the relatively simple factual structure as it is logically reflected in the modus operandi of appellant's business. The company is engaged in buying merchandise from manufacturers and selling to retailers only. It maintains a central buying department outside the state. By its large scale purchasing activity, appellant concededly is able to buy at lower prices than would otherwise be possible, thus realizing a purchasing saving. But it is able to buy in large quantities only because it is able to sell in large quantities, so that it is apparent that the purchasing saving is made possible only because of the sales. Furthermore, it is pertinent to observe that the saving is not turned into profit until the sales are made. Thus, the purchasing activities and the sales activities are interdependent and supplement one another to form one single, unitary business. Appellant here calls attention to the fact that the parties stipulated that if an amount of sales equal to those of the San Francisco store were eliminated, the volume would not be reduced enough to affect the price at which appellant bought. On this ground appellant urges that the San Franciso store is the one which does not affect purchase price differentials. But, as respondent urges, it also should be noted that it was stipulated that appellant bought at lower prices because of the great volume it obtained through having several stores. The weakness of appellant's argument is readily apparent when pursued to its logical conclusion. If the omission of the California sales would have no effect on the purchasing power, the omission of sales in an equal amount wherever made would likewise have no effect on the company's ability to purchase at a saving. Thus, by proceeding in turn from state to state, it could be shown that none of the sales in any of the states should be credited with the income resulting from the purchasing of goods in large quantities. It is our opinion that the sales made in each of the seven states in which appellant does business must be proportionately credited with the profits resulting from the purchasing power which such sales in the aggregate produce. Other salient factors indicating the unitary character of appellant's business are the central advertising division and the central accounting and management division. The former enables appellant to spread its advertising cost over more stores and units and to secure its advertising at a lower cost per unit, thereby making possible advertising opportunities unavailable to a single store; as to the latter (central accounting and management department), the volume of business resulting from operation of the company's several stores permits better as well as more costly services of accounting and management to be available to each store, whereas if each were separately operated, services of such quality in all probability would be too expensive to be practicable.

[5] The Supreme Court of the United States has repeatedly held that companies whose income has resulted from a series of transactions beginning with manufacture in one state and sales in another were unitary businesses. Underwood Typewriter Co. v. Chamberlain, 1920, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165; Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission, 1924, 266 U. S. 271, 45 S.Ct. 82, 69 L.Ed. 282. While it is not clear from the record whether appellant manufactured any of its goods in the state of Illinois or elsewhere, it is conceded that appellant purchased most of its goods through the Illinois central purchasing arrangement. This central purchasing factor is completely analogous and comparable to the manufacturing activities in the Underwood Typewriter and Bass ale cases, supra, wherein we find recognition of the principle that income from sales is attributable to the series of transactions from which the income is derived. Since these two leading cases involve the validity of allocation by applying a percentage formula to the entire income in order to determine the income

taxable in a state where the business is only partly carried on, we shall consider them in some detail.

[6] In Underwood Typewriter Co. v. Chamberlain, supra, the company manufactured its typewriters in Connecticut and sold them generally throughout the country. Using a statutory method of allocation (by assigning to the state that portion of the total income which the value of real and tangible personal property within the state bore to the total value of such property within and without the state), Connecticut determined that 47 per cent of the company's net income was derived from property and transactions within the state. The company objected to the method of apportionment on the ground that only a little over 3 per cent of its net receipts was collected in Connecticut. The court upheld the Connecticut allocation for the reasons expressed in the following excerpt from the opinion at pages 120, 121 of 254 U.S. page 47 of 41 S.Ct., 65 L.Ed. 165:

"* * * The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in the state. The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached and was meant to reach, only the profits earned within the state. 'The plaintiff's argument on this branch of the case,' as stated by the Supreme Court of Errors [94 Conn. 47, 108 A. 154], 'carries the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs.' The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary, or that its application to this corporation produced an unreasonable result."

Here we have clear and concise expression of the only limitation on the use of a formula in the allocation or apportionment of income of a unitary business, to-wit, the formula must not be intrinsically arbitrary, and it must not produce an unreasonable result.

Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission, supra, involved a British corporation engaged in brewing and selling Bass' ale. Its brewing was done and a large part of its sales were made in England, but it had imported a portion of its product into the United States, which it sold in branch offices maintained in New York and Chicago. During the income year in question, the entire business was operated at a substantial profit, but the company for federal income tax purposes, reported no income for that year from its business within the United States. Presumably this result was reached by computing its income under the separate accounting method. The tax commission of the state of New York assigned to New York that portion of the total net income which the value of certain specified classes of assets within New York bore to the total value of such assets within and without the state. The company resisted the tax on the ground that it derived no income from New York and that the action of the commission was an attempt to assign to New York a portion of the company's income derived from business carried on outside the United States. The court, however, upheld the action of the commission and at page 282 of its opinion in 266 U.S., at page 84 of 45 S.Ct., 69 L.Ed. 282, expressed its views regarding the allocation of income of unitary businesses as follows: "So in the present case we are of opinion that as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business. In Wallace v. Hines, 253 U.S. 66, 69, 40 S.Ct. 435, 436 (64 L.Ed. 782) it was recognized that a State in imposing an excise tax upon foreign corporations in respect to doing business within the State, may look to the property of such corporations beyond its borders to 'get the true value of the things within it, when they are part of an organic system of wide extent,' giving the local property a value above that which it would otherwise possess, and may therefore take into account property situated elsewhere when it 'can be seen in some plain and fairly intelligible way that it adds to the value of the (property) and the rights exercised in the State.' This is directly applicable to the carrying on of a unitary business of manufacture and sale partly within and partly without the State."

Thus, it is apparent from the language of this case that with respect to a unitary business, income from the taxing state as determined by an allocation formula was controlling, where the statutory method of apportionment was not shown to be arbitrary or unreasonable.

In support of its argument that respondent's application of the formula would tax income from transactions taking place beyond the jurisdiction of California, appellant relies heavily upon Hans Rees' Sons v. State of North Carolina, 1931, 283 U.S. 123, 51 S.Ct. 385, 388, 75 L.Ed. 879. But an examination of the facts and legal principles involved therein reveals that there is nothing in that decision to support appellant's argument. The corporation was engaged in the business of tanning, manufacturing and selling leather products, and its principal manufacturing and supply house was located in North Carolina. Extensive sales and purchasing activities were carried on outside the state. The corporation offered proof which tended to show that for the years in question the average income having its source within the state was but 17 per cent of the total and actually showing that the percentage of its income attributable to North Carolina did not in any event exceed 21.7 per cent of the total, whereas the statutory formula, restricted to tangible property, had allocated to North Carolina approximately 89 per cent of the income. The opinion clearly recognized the necessity of using a method of apportioning to a state that portion of entire income which is "reasonably attributable to the processes conducted within the borders of that state", but because the particular statutory formula employed, consisting simply of the property factor, attributed to North Carolina a percentage of income "out of all appropriate proportion to the business transacted by the appellant in that state", the court refused to approve the result reached by the formula. Careful analysis of the underlying legal principles considered in the Hans Rees' case compels us to conclude that it, like the Underwood Typewriter and Bass Ale cases, supra, recognized that where a business is unitary in character, so that its separate parts cannot be fairly considered by themselves and the whole business in the several states derives a value from the unity of use, allocation of income upon a reasonable formula is properly sustained.

The latest expression of the Supreme Court of the United States on this subject brought to our attention is North American Cement Corporation v. Graves, 1936, 269 N. Y. 507, 199 N.E. 510; Id., 243 App.Div. 834, 278 N.Y.S. 920; Id., 299 U.S. 517, 57 S.Ct. 311, 81 L.Ed. 381, wherein it is significant to note that Bass, Ratcliff & Gretton Ltd., v. State Tax Commission, supra, was cited in support of its holding that income from the taxing state as determined by an allocation formula was controlling, although the taxpayer showed that by separate accounting much less income would be allocated to the taxing state. The United States Supreme Court and the New York courts from which the taxpayer appealed all decided the case with memorandum opinions, so the facts must be obtained from the record in the case (Volume 2253, United States Supreme Court Records). The taxpayer, a foreign corporation, owned and operated three cement plants and one lime plant and sold the products thereof. Two of the cement plants were in New York, one was in Maryland and the lime plant was in West Virginia. The corporation operated its four plants separately and sold their products in separate districts, kept separate accounts for them, and sold very little of the output of the West Virginia and Maryland plants in New York. The tax commission allocated the net income of the corporation by a one factor formula (property factor) for the income years 1925, 1926, 1927 and 1929. By this means large incomes were allocated to New York for each of those years. The corporation, by an elaborate separate accounting system, showed that for 1925 the New York income was much less than that allocated to that state by the formula, and that for 1926, 1927 and 1929 the corporation sustained large losses from its New York business instead of deriving from New York the income allocated to it by the formula. In the face of this evidence the Supreme Court of the United States, affirming the New York Court of Appeals and Appellate Division, Supreme Court, held that the results of the formula were controlling and upheld the assessment thereon.

The significance of this decision on two points involved in the instant case is readily apparent: (1) it holds that the operations of four separate manufacturing plants, one of them making a different product from different materials than the others, are so interrelated as properly to be treated as unitary; (2) it holds that separate accounting in accordance with recognized accounting practice is insufficient evidence to disprove the propriety and presumption of fairness of formula allocation. On both points this decision is contrary to Standard Oil Co. v. Wisconsin Tax Comm., 1929, 197 Wis. 630, 223 N.W. 85, on which appellant strongly relies in asserting that the results of its separate accounting must be accepted by respondent as tax administrator. However, careful examination of the factual situation in this Wisconsin case reveals a peculiar distinguishing allocation factor which undoubtedly exerted a strong influence on the result reached by the court there.

In Standard Oil Co. v. Wisconsin Tax Comm., supra, the plaintiff company produced, refined, transported and marketed petroleum products in eleven mid-western states, and its property within Wisconsin consisted principally of tanks and filling stations required to supply the Wisconsin demand. Fifty-four per cent of the oil stored in these tank farms was sold to Wisconsin and forty-six per cent without the state. Plaintiff company did practically no manufacturing in Wisconsin. The controversy arose as to the manner in which that part of its income properly taxable in the state of Wisconsin should be ascertained. The tax commission used a ratio method provided in the statute for unitary business transactions conducted within and without the state. The company contended that its income should be ascertained by the allocation and separate accounting method by which the Wisconsin business was charged at the market price with all products received by it, with the expense of transacting the business, including a proper allocation of general or overhead expenses and office accounting, that there should be credited to Wisconsin the gross amount received from sales of goods within the state, and that the difference constituted the taxable income of plaintiff company. The court upheld the plaintiff company's contentions. The distinction to be noted here differentiating this Wisconsin situation from the instant case is the fact that the products furnished to the Wisconsin business were charged at "market value" rather than at cost. Market value (at wholesale) included reasonable profit, and such profit became income to the company in the outside states. This amounted in effect to allocation of income as between Wisconsin and the other states. That the plaintiff company's arbitrary method of assigning a fictitious market value at which the selling division was deemed to have "bought" the oil from the refining division greatly impressed the Wisconsin court and furnished reason for its distinction of the Underwood Typewriter case, supra, appears from the following language at page 639 of the opinion in 197 Wis., at page 88 of 223 N.W.: "Nor do we find anything in Underwood Typewriter Company v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165, inconsistent with our conclusion in this case. There there was no separation on the basis of market value between the operations of the manufacturing department and the sales department as there is in this case. We perceive no reason why under the facts in this case, the profits derived from the sales operations should not be ascertained so far as plaintiff is concerned as they would be if the sales operations were conducted by a separate corporate entity." Whether the Wisconsin court by its decision placed too much emphasis on the value of fictions is not our concern here; suffice it to say that the Wisconsin court manifestly sanctioned the practice of charging the products to the Wisconsin end of the business at wholesale market prices in determining income derived in Wisconsin. The distinction between market price and cost cannot be ignored; the former includes profits and the latter does not; and it is this differentiation which decidedly limits the applicability of the Wisconsin case to the instant factual situation.

The unitary character of the buying and selling business has been recognized in International Elevator Co. v. Thoresen, 1929, 58 N.D. 776, 228 N.W. 192, and Great Atlantic & Pacific Tea Co. v. Grosjean, 1937, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293. In the Thoresen case, supra, plaintiff company operated a line of grain elevators, about half of which were in Montana and the other half in North Dakota. The company's income was de-state, of grain bought within North Dakota, and the question was whether North Dakota could assess a tax upon any part of the income from the sales outside the state. Like appellant here, the plaintiff company there tried to apportion its income by separate accounting. That procedure was held improper and allocation of income was sanctioned to North Dakota wholly out of proportion to the receipts within North Dakota. On the mere basis of accounting figures the instant case is less extreme than the North Dakota case, where the net income allocated to the taxing state by the formula exceeded the gross income allocated to the state by separate accounting; yet, in such situation because of the unitary nature of the business, the Supreme Court of North Dakota held that the transactions of buying constituted an essential part of the transactions from which the income collected outside the state was derived.

The Great Atlantic & Pacific Tea Co. case, supra, dealing with a state chain store tax act, bears on the instant issue in that it was there held that the out-of-state stores and central buying and advertising of the buying and selling corporation gave the within-the-state stores advantages which they otherwise would not have had and justified a chain store tax on the within-the-state stores which would otherwise have been, from a constitutional viewpoint, discriminatory. The manifest parallelism between that case and the instant one needs no other comment than the observation that the decision of validity in that case is based on the same reason as that for treating business as unitary in allocating income.

[7, 8] The formula method of allocating or apportioning income in the case of a unitary business was approved by this court in Matson Navigation Co. v. State Board of Equalization, 3 Cal.2d 1, 43 P.2d 805, affirmed 297 U.S. 441, 56 S.Ct. 553, 80 L.Ed. 791. In that case it was established that the power of California to tax foreign corporations measured by their net income and the provisions of section 10 of the Bank and Corporation Franchise Tax Act are coextensive in scope, and in this connection this court there held that section 10 measures the tax by income from California and excludes from the measure "income from business done entirely outside the state * * *." 3 Cal.2d 1, 8, 43 P.2d 805, 808. In such case as the instant one, allocation of income to the various states in which the business is done by means of a formula that gives weight to the various factors such as property, services of employees and sales, which are responsible for the earning of income, appears entirely reasonable. To rebut the presumption that the formula produced a fair result, "the burden is on the taxpayer to make oppression manifest by clear and cogent evidence". Norfolk & Western Ry. Co. v. State of North Carolina ex rel. Maxwell, 1936, *297 U.S. 682*, 688, 56 S.Ct. 625, 628, 80 L.Ed. 977. In considering the implications of the formula in the last-mentioned case, the Supreme Court of the United States, speaking through Mr. Justice Cardozo, also said at page 688 of 297 U.S., at page 628 of 56 S.Ct., 80 L.Ed. 977: "* * a taxpayer does not escape the application of the statute by evidence directed to only one of the related terms. Its evidence to be effective must be directed to each of them alike, for only thus can the assumed relation between them be proved to be unreal. * * *" In the case at bar appellant has not furnished any explanation of why its California business differs so from the average that the formula produced an erroneous result. Here there has been only an assertion that a loss was incurred in this state. As appellant has failed to show a variance from normal in either the California sales, property or payroll, or in either expenses or revenues, it is our conclusion that appellant has not upheld its burden of proof, for in order to overthrow a formula the taxpayer must introduce such evidence and the evidence must go to each element of the formula equation. Norfolk & Western Ry. Co. v. State of North Carolina ex rel. Maxwell, supra.

[9] In accordance with the foregoing analysis it is our opinion that the unitary nature of appellant's business is definitely established by the presence of the following circumstances: (1) unity of ownership; (2) unity of operation as evidenced by central purchasing, advertising, accounting and management divisions; and (3) unity of use in its centralized executive force and general system of operation. The reasonable and equitable character of this state's formula, based on factors properly reflecting the relative contribution of the activities in the various states to the production of the total unitary income so as not to contravene the restric-

tions implicit in the fourteenth amendment against taxing property outside the state, was recognized in Matson Navigation Co. v. State Board of Equalization, supra. Accordingly, respondent correctly applied the formula method of apportionment to determine California's portion of appellant's income from the business carried on within and without the state.

Judgment affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CARTER, J.

TRAYNOR, J., took no part in the consideration or decision of this case.

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43 Cal.App.2d 479

DE HART et al. v. ALLEN et al.

Civ. 11473.

District Court of Appeal, First District,
Division 2, California.

March 17, 1941.

Rehearing Denied April 16, 1941.

Hearing Denied May 15, 1941.

1. Appeal and error ⇨756

Where single ground for reversal urged on appeal is insufficiency of evidence to support judgment appealed from, respondents' argument respecting appellant's failure to present each point separately under appropriate heading, as required by court rule, is without merit. Rules of Supreme Court and District Courts of Appeal, rule 8.

2. Judgment ⇨19

A judgment cannot rest on suspicion alone.

3. Evidence ⇨89

Uncontradicted presumptions, declared by statute to furnish satisfactory evidence of fact to be proved, cannot be rejected arbitrarily by trial court because of suspicious circumstances in testimony offered to support them.

4. Evidence ⇨89

The statutory presumption that person takes ordinary care of his own concerns cannot be rejected by trial court solely because he does not believe witness who testified that such care was taken.

5. Husband and wife ⇨249

Money deposited in bank account by married woman is held for her exclusive right and benefit, free from control or lien of all other persons, except her creditors. St.1929, p. 444, § 15a.

6. Husband and wife ⇨262(1)

All property owned by wife before her marriage is presumed to be her separate property. Civ.Code, § 162.

7. Marriage ⇨40(4)

A man and woman, deporting themselves as husband and wife, are presumed to have entered into lawful marriage contract. Code Civ.Proc. § 1963, subd. 30.

8. Property ⇨9

Money paid to, or deposited in bank account of, another than person making payment or deposit is presumed to be due, and to belong, to such other person. Code Civ. Proc. § 1963, subds. 7, 8.

9. Property ⇨9

A person is presumed to own things possessed by him and property over which he exercises acts of ownership. Code Civ.Proc. § 1963, subds. 11, 12.

10. Husband and wife ⇨262(1)

Money deposited in bank, in ordinary course of business, to account of woman living with man as his wife at time of deposit, and subsequently marrying him formally, was presumably her property, regardless of its source. Civ.Code, §§ 79, 162; Code Civ. Proc. § 1963, subds. 7, 8, 11, 12, 30; St.1929, p. 444, § 15a.

11. Husband and wife ⇨249

Deposits in bank account after opening thereof by wife in her name became accumulations of principal fund, and ownership thereof followed wife's possession of such fund. Code Civ.Proc. § 1963, subds. 7, 8, 11, 12; St.1929, p. 444, § 15a.

12. Husband and wife ⇨262(1)

In action wherein balance in bank account, opened in name of woman living with defendant as his wife and subsequently marrying him formally, was attached as his property, judgment denying her third party claim to such balance was erroneous, in absence of evidence contradicting or rebutting statutory presumptions that property owned by wife before marriage is her separate property. Civ.Code, §§ 79, 162.

* * *

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Action by Rosemond T. De Hart and others against Joe Allen, in which the balance in a bank account was attached as defendant's property and Anna Allen filed a third party claim thereto. From a judgment against claimant, she appeals.

Reversed.

Ernest Spagnoli, and Walter F. Lynch, both of San Francisco, for appellant.

Abraham Setzer and Carl E. Day, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

[1] Upon a hearing of a third party claim under section 689 of the Code of Civil Procedure judgment went against the claimant and she appeals. The single ground urged on the appeal is the question of the sufficiency of the evidence to support the judgment. For that reason respondents' argument relating to appellant's failure to "present each point separately under an appropriate heading" (Rule VIII of the rules of the Supreme Court and the District Courts of Appeal) has no merit.

On July 30, 1936, Anna Allen deposited in bank the sum of $680 in a special savings and checking account opened in her own name. At the same time there was filed with the bank her written power of attorney authorizing Joe Allen to draw upon that account. The parties were then living together as husband and wife, though no legal marriage was shown. Other deposits were made in the account from time to time and Joe Allen drew some checks against the account which were signed "Anna Allen, by Joe Allen, agent." On January 4, 1940, the balance in the account of $370.75 was attached under a writ issued in an action pending against Joe Allen individually. On January 18, 1940, Joe and Anna Allen were formally married under the provisions of section 79 of the Civil Code.

[2-4] All the foregoing facts are conceded. The testimony of the third party claimant regarding the source of the moneys which went into the bank account from time to time and the use of the moneys withdrawn were apparently rejected by the trial court. The testimony of the debtor denying his interest in the fund and the source of the several deposits must also have been rejected. It is upon this assumption that the respondents argue that, as the trial court did not believe this testimony, it could reject all the testimony of these witnesses because of the suspicious character of the proof offered. This may be so, but it would leave respondents without a case. A judgment cannot rest on suspicion alone, and there are certain presumptions applicable here which the statute declares to be satisfactory evidence, if uncontradicted. When these presumptions furnish satisfactory evidence of the fact to be proved, and are uncontradicted, they cannot be rejected arbitrarily because of suspicious circumstances in the testimony offered to *support* them. Thus the presumption that a person takes ordinary care of his own concerns cannot be rejected solely because the court does not believe the witness who testified that such care was taken.

[5-9] Where money is deposited in a bank account by a married woman it is held "for the exclusive right and benefit of such depositor, and free from the control or lien of all other persons, except creditors." i. e., of the depositor. Sec. 15a, Bank Act, St. 1929, p. 444. All property owned by a wife before her marriage is presumed to be her separate property. Sec. 162, Civ.Code. A man and woman deporting themselves as husband and wife are presumed to have entered into a lawful contract of marriage. Subd. 30, sec. 1963, Code Civ.Proc. When money is paid to or deposited in the bank account of another it is presumed to be due to and to belong to the latter. Subdivisions 7 and 8 of the same section. A person is presumed to own things possessed by him, and to be the owner of property from exercising acts of ownership over it. Subdivisions 11 and 12 of the same section.

[10-12] The application of these presumptions seems plain. When the money was deposited in the bank to the account of the third party claimant in the ordinary course of business it presumably was her property no matter what its source. Subsequent deposits to the same account would become accumulations of the principal fund and ownership would follow the possession. There was not a word of evidence tending

to contradict or rebut any of these presumptions, and there was no evidence of any kind tending to prove that the debtor had ownership of or any lienable interest in the fund under attachment.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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43 Cal.App.2d 638

TAYLOR et al. v. LUNDBLADE et al.

Civ. 6513.

District Court of Appeal, Third District, California.

March 24, 1941.

1. Venue 🔑7

Under statute authorizing action to be maintained in county in which contract in suit was in fact entered into, an action for misrepresentation in the sale of a tractor was properly maintained in county in which the written sales contract was actually agreed upon and executed, notwithstanding recital in attestation clause of contract to effect that it was signed in a different county. Code Civ.Proc. § 395.

2. Evidence 🔑413

The statutory declaration as to the conclusive presumption of the truth of facts recited in a written instrument between the parties thereto has reference only to the essential facts necessary to determine the liabilities of contracting parties, and does not preclude proof, for the purpose of determining venue, that written contract was actually entered into in a county other than that stated in attestation clause to be the place of execution thereof. Code Civ.Proc. §§ 395, 1856, 1962.

3. Statutes 🔑181(1), 190, 205

The intention of the Legislature will be determined so far as possible from the language of the statute, read as a whole, and if the words of the enactment, given their ordinary and popular signification, are reasonably free from ambiguity, the courts will look no further to ascertain statute's meaning.

Appeal from Superior Court, Del Norte County; Albert F. Ross, Judge.

Action by James A. Taylor and others against Fred H. Lundblade and others. From an order denying defendants' motion for a change of venue, the named defendant appeals.

Order affirmed.

Hill & Hill, of Eureka, for appellant.

Ralph W. Scott, of San Francisco, for respondents.

PULLEN, Presiding Justice.

This appeal is from an order denying defendants' motion for a change of venue.

The amended complaint filed in the county of Del Norte, alleges misrepresentation in the sale of a tractor, the terms of which were embodied in a written agreement, and also alleges the agreement was made and entered into in the county of Del Norte.

The motion was made upon the grounds that the residence of the defendants was in the county of Humboldt, and that the written agreement was executed at Eureka, Humboldt county.

[1] It is the principal defense of plaintiffs, the respondents herein, that the agreement here in controversy was in fact entered into in the county of Del Norte, and therefore, under section 395 of the Code of Civil Procedure, Del Norte is a proper county for the trial of the action. With this contention we are in accord. Section 395 of the Code of Civil Procedure as amended, provides: "* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant * * * resides * * * shall be a proper county for the trial * * *."

It is claimed by respondents not only by the allegations of the amended complaint but by the affidavit of James A. Taylor that the contract was in fact made in Del Norte county. It is charged in the affidavit, and not denied, "that the contract referred to in the amended complaint herein, made and entered into on or about May 16, 1939, was in fact executed in the office of Klamath California Redwood Company, at Klamath, Del Norte county, California; said contract was signed by said affiant as general manager of said Klamath company and by Fred H. Lundblade in behalf of himself and/or Fred H. Lundblade Company at the aforesaid office in Klamath; that Mr. Lundblade brought the said contract or written instrument with him from Eureka and called at the office of Klamath California Redwood Company at Klamath, Del Norte county, at which place said contract was signed; that all negotiations, discussions and arrangements pertaining to the contract were had at Klamath, California, and were not had at Eureka or within the county of Humboldt; that at the time said contract was presented to this affiant for signature, it had been previously typed and prepared for execution."

It is to be noted that the legislature, in determining the place of trial, did not provide the proper county was where the contract may have been made, or where the contract declared it to have been made, or where the parties may have stipulated it was made, but declared that the county where the contract was *in fact* made is the proper county for the commencement of the action.

Appellant contends that because the attestation clause of the contract recites, "In witness whereof the parties have hereunto set their hands * * * the day and year first above written at Eureka, Calif.", that such recital is conclusive, and that the attempt to prove the contract was made in fact in Del Norte county, violates the parol evidence rule, citing sections 1962 and 1856 of the Code of Civil Procedure.

[2] The attestation clause and particularly the recital therein that the contract was executed at Eureka was not a material part of the agreement, and it has on several occasions been held that the foregoing cited sections of the Code of Civil Procedure do not extend to non-essential facts in the contract.

To this effect is the rule expressed in Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 87 Cal.App. 301, 262 P. 452, 455, where the court said: "The conclusive presumption of the truth of facts recited in a written instrument, between the parties thereto, as declared by the provisions of section 1962, subd. 2, Code of Civil Procedure, has reference only to the essential facts therein contained, which are necessary to determine the obligations or liabilities of the contracting parties [citing cases], and does not preclude the contradiction of the unessential designation of the mere time and place of the execution of the contract by extrinsic evidence. Although a contract may purport to have been executed in one county, upon competent evidence that it was in fact approved, executed, and mailed by one of the contracting parties, from another county, and that it was not finally accepted or executed until the mailing thereof, the contract will be deemed to have been consummated and become binding at the time and place where the last act necessary to its validity was performed. * * * While the place of execution designated in a contract is prima facie the location where it is made, this may be rebutted by other evidence. The term 'date,' as it is used in section 1963, subd. 23, Code of Civil Procedure, includes both the time and the place when and where the written instrument is deemed to have been made."

[3] It seems only necessary to recall one of the primary rules of statutory construction, to the effect that the intention of the legislature will be determined so far as possible from the language of the statute, read as a whole, and if the words of the enactment, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. 23 Cal.Jur. 730.

Applying this principle we find the language of section 395 of the Code of Civil Procedure clear and unambiguous and was evidently enacted to correct some abuse in the change of place of trials.

The order is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

43 Cal.App.2d 595

WILLS v. J. J. NEWBERRY CO. et al.

Civ. 2582.

District Court of Appeal, Fourth District, California.

March 21, 1941.

Hearing Denied May 17, 1941.

1. Negligence 🔑32(1)

A storekeeper is not an "insurer" of the safety of an invitee who enters his premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

2. Negligence 🔑32(3)

A storekeeper is not responsible for the act of another using his premises in a manner not intended or contemplated, unless storekeeper had actual knowledge of condition created by other person or it had existed for such a period that he should be charged with knowledge of it and, by use of ordinary care, should have discovered such condition and guarded against resulting injury.

3. Negligence 🔑67

Generally, storekeeper is not liable for injury resulting from a patent danger which the injured person should have seen and avoided.

4. Negligence 🔑136(16, 26)

In customer's action against store owner for injuries suffered in fall on vomitus on floor, evidence *held* to make jury questions on customer's negligence and owner's notice of dangerous condition because of fall of another customer four minutes before.

5. Negligence 🔑67

A customer did not act unreasonably in looking around store for her daughter rather than at floor, and hence was not barred thereby from recovering from store owner for injuries suffered in fall on vomitus on floor.

6. Master and servant 🔑333

Where employee's negligence is sole and primary cause of injury because employee alone committed negligent act, employer's liability is secondary, and hence verdict for employee is inconsistent with verdict against employer.

7. Master and servant 🔑333

In customer's action against store owner and floor lady for injuries suffered in fall on floor, where floor lady and about 160 sales girls were charged with duty of keeping floor clear, jury might have concluded that sales girls breached duty, and hence verdict for floor lady was not inconsistent with verdict against store owner.

8. Master and servant 🔑313

An action by customer against store owner for injuries suffered in fall because of employee's negligence might be maintained against employer or employee or both.

9. Trial 🔑228(3)

In instruction that store owner was bound to exercise reasonable care and vigilance to discover dangerous condition, use of word "vigilance" might have been unfortunate, but such word could not have misled jury in view of the word "reasonable" and other instructions correctly defining store owner's duty in considerable detail.

10. Trial 🔑260(8)

In customer's action against store owner for injuries suffered in fall, instruction, that customer was guilty of contributory negligence if reasonably careful person in her position would have observed condition of floor and would not have been injured, sufficiently covered subject of refused instruction on customer's duty of looking where she was going and seeing what was in plain sight.

11. Trial 🔑133(6)

In customer's action against store owner for injuries suffered in fall, offering evidence that customer's daughter saw girls counting money after accident, and that manager objected to daughter's disturbing such girls, was "misconduct" but not ground for reversal, where such evidence was later stricken out and jury was instructed to disregard it.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

12. Trial 🔑120(1)

An argument must relate to evidence in the case and be measured by it.

13. Trial 🔑133(6)

Alleged error in argument referring to plaintiff's support of her husband was curable by order striking it from record and instruction to jury to disregard it, where there was evidence that plaintiff was not poor and hence argument was directed more to plaintiff's fine character and devotion to her family.

14. Appeal and error 🔑1060(1)
Trial 🔑122

In customer's action against store owner for injuries suffered in fall, argument, that store owner could have obtained disinterested witnesses but did not do so, did not charge deliberate suppression of evidence of known witness, and was not ground for reversal where plaintiff's counsel conceded that it was mere inference, trial judge instructed jury not to consider it as evidence, and defendant's counsel did not request further ruling. Code Civ.Proc. § 1963, subd. 5.

15. Appeal and error 🔑207, 719(1)

Intemperate remarks by counsel were not controlling on appeal, where none of them was assigned as error, instruction to jury to disregard them was not requested, and they could have been cured by instruction to disregard them.

16. Trial 🔑129

Where defendant produced insurance adjuster to impeach plaintiff's witnesses, insurance was first injected into the case by defendant, and reference to adjuster in argument for plaintiff was not ground for reversal.

17. Appeal and error 🔑930(2)

Generally, reviewing court must conclude that jury obeyed instructions to disregard evidence and remarks of counsel where such instructions were given.

18. Appeal and error 🔑207, 719(1)

Where remarks of counsel are not assigned as error and no request is made for instruction to disregard them, usually the error cannot be urged on appeal.

19. Appeal and error 🔑978(2)

A conclusion of trial court on motion for new trial, based on alleged misconduct, is entitled to much consideration, though not final on appeal.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Jessie Wills against the J. J. Newberry Company and another, for injuries suffered in a fall. From a judgment for plaintiff against the named defendant but in favor of other defendant, the named defendant appeals.

Affirmed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellant.

Barcroft & Barcroft, of Madera, and David E. Peckinpah and L. N. Barber, both of Fresno, for respondent.

MARKS, Justice.

Plaintiff recovered judgment against J. J. Newberry Company for damages which she suffered as a result of slipping on some vomitus on the floor of an aisle in defendant's store on December 23, 1938. Blanche Mason, floor lady employed by defendant, and C. H. Landgraf, manager of the store, were made codefendants with their employer. The action was dismissed as to Landgraf and the jury returned a verdict in favor of Mrs. Mason, leaving the corporation as the only appellant. We will hereafter refer to the J. J. Newberry Company as the defendant.

Defendant urges the several following grounds for a reversal of the judgment:

(1) That there is no evidence of negligence because, (a) there is a lack of evidence showing that defendant had any actual knowledge of the vomitus on the floor or that it had remained there for a sufficient time to allow its discovery if reasonable diligence had been used, and, (b) that the vomitus and the danger from it were just as apparent to plaintiff as to anyone else and that a storekeeper is not liable for injury to an invitee resulting from a patent danger or defect.

(2) That the verdict absolving Mrs. Mason from liability is so inconsistent with the verdict against her employer that the latter cannot stand.

(3) Erroneous instructions given, and refusal of proper instructions requested by defendant.

(4) Misconduct of counsel for plaintiff.

The evidence is sharply conflicting. As those conflicts were resolved against defendant by the verdict of the jury, and again by the trial judge in denying the motion for new trial, we will only detail the evidence tending to support the verdict and judgment.

Plaintiff and her daughter entered the defendant's store to have lunch and to do some shopping. After they had lunched they separated, agreeing to meet at the front door after they had completed their shopping. The store was crowded with shoppers and the sales girls were busy waiting on them. The sales girls had all been instructed to keep the floor of the store free from any foreign substance at all times, making it as safe as possible for the public to walk over, to remove, or report, or have removed any substance that might endanger the public.

Defendant concedes that the record indicates that shortly before the accident a small boy had vomited in one of the main aisles near a cross aisle. There were several sales girls on duty in the immediate vicinity of the vomitus.

Florence Lazarus, in walking down the aisle slipped on the vomitus and fell to the floor. Several sales girls saw that she had fallen and pressed buzzers to give the alarm and call those in authority. They did nothing more to protect any customer against a similar fall. It is not shown that any sales girl had actual knowledge of the vomitus on the floor which caused Miss Lazarus to slip and fall.

Four or five minutes after Miss Lazarus had fallen, plaintiff, in walking down the aisle, slipped in the vomitus and fell, causing the injuries for which she recovered judgment. It is admitted that just before she fell she was looking around the store to discover her daughter and was not looking at the floor. The vomitus was in plain sight and had she looked at the floor she could have seen it.

[1-3] A storekeeper is not an insurer of the safety of an invitee who enters his premises. He is not to be held responsible for the act of another using his premises in a manner not intended or contemplated unless he had actual knowledge of the condition created by the other person or unless it had existed for such a period that he should be charged with knowledge of it and, by the use of ordinary care which should have been used by a reasonably prudent person, he should have discovered such condition and should have guarded against injury resulting from it. Crawford v. Pacific States Savings & Loan Co., 22 Cal.App.2d 448, 71 P.2d 333; Gold v. Arizona Realty, etc., Co., 12 Cal.App.2d 676, 55 P.2d 1254. Generally, he is not liable for injury resulting from a patent and obvious danger which the injured person should have seen and avoided. Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 44 P.2d 405; Clyde v. Mitchell, 14 Cal.App.2d 365, 58 P.2d 205; Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Goldstein v. Healy, 187 Cal. 206, 201 P. 462.

[4] We may assume the soundness of defendant's argument that it had no actual knowledge of the vomitus on the floor of the aisle. On the other hand, several of the sales girls who were charged with the duty of keeping the floor of the aisles free from any foreign substances and of making it as safe as possible for the public to walk upon, and of reporting or removing any substances that might endanger the public, saw Miss Lazarus slip and fall. That they realized this was an unusual occurrence that indicated a condition that required immediate attention is evidenced by the fact that several of them sounded their alarm buzzers. They did nothing more during the four or five minutes elapsing until plaintiff slipped and fell in the same vomitus that had caused Miss Lazarus to fall. The fall of Miss Lazarus was a warning of an unusual and dangerous condition in the aisle, for ordinarily young women do not fall while walking over a clean, dry, smooth floor. Therefore, the jury was justified in concluding that defendant had notice of a dangerous condition in the aisle at least four minutes before plaintiff was injured. Several of its employees were in the immediate vicinity and were expressly charged with the duty of "making it (the aisle) as safe as possible for the public to walk through". Having had notice of the condition and being charged with such duty it would seem that one of them might have gone to the place of the accident as soon as Miss Lazarus fell and directed the patrons of the store around the vomitus until it could have been removed, thus preventing another from falling.

In Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128, 1130, it was said: "Whether the floor of a store or public market place was so negligently maintained as to render the person responsible for its condition liable in damages is a question of fact to be decided by the jury. The same rule is also applicable to contributory negligence. * * * That it is the duty of storekeepers to keep the floors of their premises safe for those who must pass over them in the transaction of their business must be conceded. The fact that the attention of persons who visit public markets is attracted by the display of the wares offered for sale and more or less absorbed by the transactions which they have in mind would seem to increase the necessity of exercising care to the end that the floor spaces and aisles allotted to the use of customers should be made safe and kept fit for such purpose."

It was held in Rothschild v. Fourth and Market St. Realty Co., 139 Cal.App. 625, 34 P.2d 734, that "the question whether the condition which caused the injury had existed so long as to be discoverable by the defendant within a reasonable time is one for the jury [citing cases] and, where there is testimony as to the conditions previous to the accident by persons who had slipped on the same floor, such testimony is evidence tending to show notice to the defendant of the dangerous condition". See, also, Stoddard v. Roberts Public Markets, Inc., 27 Cal.App.2d 166, 80 P.2d 519.

Defendant operated a retail store for the purpose of selling goods to customers. In order to promote sales the goods were displayed on counters to attract the attention of the customers. It should be trite to suggest that a customer could not look at the goods on the counters and at the same time keep his eyes on the floor. Since it was the intention of defendant that its customers should see the goods displayed on the counters, and not have to watch the floor, it should have realized that dangerous substances on the floor would create a dangerous condition and should have acted accordingly. See, Tuttle v. Crawford, supra; Stoddard v. Roberts Public Markets, Inc., supra.

[5] This also bears on the question next argued by defendant, that as the vomitus which caused the dangerous condition was in plain sight, plaintiff should have seen it and should have avoided it. Plaintiff admitted that she was not looking at the floor before she fell but was looking around the store for her daughter. This was not an unreasonable thing for her to do under the circumstances. Defendant cites many cases, some of them involving collisions with railroad trains and motor vehicles, and others falling down open stairs (Blodgett v. B. H. Dyas Co., 4 Cal. 2d 511, 50 P.2d 801) where it has been held that it is the duty of a plaintiff to see that which was in plain sight and to avoid the danger. In Tuttle v. Crawford, supra, these cases have been distinguished from a case, such as we have here, where the attention of a patron may be attracted by goods on display or by the transactions she had in mind.

All these questions have been held to be of fact for the jury. The jury here having resolved all of them against defendant we cannot disturb its finding.

[6-8] Little need be said concerning the claim that the verdict in favor of Blanche Mason is so inconsistent with the verdict against defendant that it cannot be permitted to stand. This rule has been invoked where the negligence of the employee is the sole and primary cause of the injury because he alone committed the negligent act. In such a case the liability of the employer is secondary and he is held accountable solely because of his employee's wrong. Under such circumstances the verdict in favor of the employee is inconsistent with the verdict against the employer. See, Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171. Here it was brought out in the evidence offered by defendant that Mrs. Mason was not the only employee charged with the duty of keeping the floor clear and free from obstructions. According to her testimony there were about 160 sales girls charged with the same duty. The jury might have concluded that one or more of the sales girls and not Mrs. Mason breached this duty. Under these facts there was no inconsistency in the verdict, as the primary cause of the injury was not necessarily the negligence of Mrs. Mason but might have been the negligence of another employee. It was not necessary to join such negligent employee as a defendant as the action may be maintained against either the employer or the employee or against both.

Defendant argues that the trial court committed prejudicial error in instructing the jury at the request of plaintiff that defendant was "bound to exercise reasonable care and vigilance to discover any dangerous condition * * *."

[9] It may be conceded that the use of the word "vigilance" might have been an unfortunate choice. The paragraph containing the quoted phrase was preceded by a paragraph in which the jury was properly instructed that it was the duty of defendant "to use ordinary care to keep his premises in a safe condition" and "to exercise ordinary care and prudence to keep the aisles and passageways * * * in a reasonably safe condition so as not unnecessarily to expose the customer to danger or accident". Immediately following

the challenged instruction the trial court gave the following: "The proprietor of a store is not an insurer of the safety of its patrons. Such store proprietor is not liable for the unknown acts of negligence of an invitee, which, without knowledge on the part of the store proprietor, caused injuries to others. If you shall find in this case that the plaintiff slipped and fell, by reason of the fact that another customer of the store vomited on the floor, you must bring in a verdict in favor of the defendant, J. J. Newberry Co., unless you shall further find, by the greater weight of the evidence, that said defendant knew, or, in the exercise of reasonable care, should have known, of the dangerous condition of the floor, caused by said vomiting, for a sufficient length of time before the happening of said accident to have enabled said defendant in the exercise of due care, to have removed such dangerous condition, or to have given warning thereof to other customers of the store."

The words "care" and "vigilance" were qualified by the word "reasonable". As they were so qualified we cannot conclude that the use of the one word "vigilance" could have misled the jury, especially in view of the fact that other instructions went into considerable detail in correctly defining the duty of defendant under the facts of this case.

Defendant complains because the trial court refused to give an instruction proposed by it which placed the duty on plaintiff of looking where she was going and of seeing that which was in plain sight; that if she failed to do so she was guilty of negligence. The giving of such an instruction was approved in Jones v. Bridges, 38 Cal.App.2d 341, 101 P.2d 91.

The trial court gave the following instruction on the same subject: "You are instructed that it is as much negligence to fail to see that which can be observed by the exercise of ordinary care, as it is negligence not to look at all. If you find from a preponderance of the evidence that plaintiff, Jessie Wills, was injured as the proximate result of a dangerous condition of the floor, but that a reasonably careful person, in the position that Jessie Wills was in, would have observed the condition of the floor, and, by reason of such observation, would not have been injured, then the Court instructs you that she was guilty of contributory negligence and the plaintiff is not entitled to recover in this action."

[10] This instruction covered the same subject as did the refused instruction. The trial judge was not required to give an additional instruction on that subject.

Defendant has assigned misconduct of counsel for plaintiff in several particulars and urges that it was "inflammatory and prejudicial" and sufficient ground for reversal of the judgment. It must be admitted that counsel at least approached the extreme limit of propriety on more than one occasion. Whether or not their conduct furnishes ground for reversal remains for consideration.

The first instance of purported misconduct occurred during the direct examination of Roberta Wills, the daughter of plaintiff. After the accident she went to the office of the manager to see him. She was permitted, over the objection of defendant, to relate what happened there. She testified that through a window with bars in front of it she saw two girls counting money; that the manager approached and said, "Can't you see you are disturbing those girls that are counting this money?"; that he closed the door; that she pounded on the door and that when the manager opened it, she said: "If my mother dies you won't have to count that money", "Why won't you please call a doctor?" It is admitted that a doctor was called. Defendant moved to strike this evidence. The motion was denied on the promise that it would be connected up. Later this evidence was stricken out by the trial judge on his own motion and the jury was instructed to disregard it.

Defendant urges that this evidence could have had no other effect than to prejudice the minds of the jurors by depicting it as a rich but heartless corporation that was only interested in its monetary gains.

[11] That this evidence had no bearing on the liability of any of the then defendants, including the manager, goes without saying. It was misconduct to offer it as its immateriality was apparent and there was no attempt to connect it up. The trial judge should have granted the first motion to strike it from the record and should have immediately instructed the jury to disregard it. We fail to see how it could have been connected up or made material, even though the manager was then a defendant.

Defendant complains of the following portion of the opening argument of one of plaintiff's counsel: "And we want to say this of Mrs. Wills, that she told you candidly, here some years ago, owing to some little family difficulty or some inability upon the part of her husband to carry on, she took care of things, and Mrs. Wills didn't have any Hollywood instinct about her. She did not cast off her old husband and throw him out in the street, but she kept him and took charge of the affairs of the ranch, because he was still her husband and the father of her children, and she was working to keep from going on relief like so many people are going on relief these days; and little would it matter to the Newberry Company if she did, with her husband—." The trial court granted the motion to strike this portion of the argument and instructed the jury to disregard it.

[12, 13] Defendant urges that this argument stressed the poverty of plaintiff. An argument must relate to the evidence in the case and be measured by it. The evidence does not show plaintiff to be poverty stricken. She managed a 3,500 acre farm on which was grown annually about 1,700 acres of grain and between 250 and 400 hogs; also there were about 35 head of cattle. With this evidence in the record the argument did not suggest poverty but was directed more to the fine character of plaintiff and her devotion to her family. Under these facts there was no such error in it that could not have been cured by the order striking it from the record and the instruction to disregard it.

During the closing argument of counsel for plaintiff the following occurred:

"Doesn't it strike you as strange, with the experience that Newberry's must have, by the coaching of people who go to school for those things, who must have one experience after another, isn't it strange that just one name of a disinterested person wasn't gotten, and was not brought here by them to tell you what their employees told you? Isn't it strange? There they were, they were not hurt, they did not have an hysterical daughter that thought her mother might die. They were not concerned in that way. Couldn't they have gotten one person? The store was crowded. From their own lips they say the store was loaded, the aisles were crowded; and yet, out of all the people that were there they did not bring one person here that wasn't on the payroll of J. J. Newberry Company. I wonder why? I wonder if it isn't because those people would have testified to corroborate Mrs. Hyatt and these other witnesses? I wonder if there isn't something to that? Certainly there were other witnesses. Mrs. Wills didn't know enough to get them. She wasn't well enough to get them. Roberta Wills was too concerned about her mother, so they could not get them. But you can bet your bottom dollar that J. J. Newberry Company got them, and they are not here.

"Mr. Conley (interrupting): Now, just a moment. We object to that statement of counsel and assign it as prejudicial misconduct, based upon nothing whatsoever in the record; and we ask the court to instruct the jury to disregard it.

"Mr. Peckinpah: I'll consent to that. It is an inference, your Honor.

"The Court: What did you say?

"Mr. Peckinpah: I'll consent—

"The Court: It is only, of course, an inference, and Mr. Peckinpah is arguing it as an inference; and the jury, of course, must take into consideration that argument of counsel is not evidence, and it is argument here to assist the jury in interpreting the facts, but cannot be considered as evidence."

[14] Defendant now argues that it was wrongfully accused of willfully suppressing evidence favorable to plaintiff, (sec. 1963, subd. 5, Code Civ.Proc.), which charge, if wrongfully made, has been held reversible error. Keena v. United Railroads, 197 Cal. 148, 239 P. 1061; Weaver v. Shell Company of California, 13 Cal. App.2d 643, 57 P.2d 571. The argument of counsel for defendant did not go to the point of charging the deliberate suppression of evidence of a known witness whose testimony would have been favorable to the other party, which was held reversible in the two cases cited. See, Rogers v. Foppiano, 23 Cal.App.2d 87, 72 P.2d 239. If we concede that the argument should not have been made, we are confronted with the concession of plaintiff's counsel, and the ruling of the trial judge, which considerably limited the effect of the argument. If counsel for defendant had desired any further ruling from the trial judge they should have requested it. They did not make any further request.

[15, 16] Defendant also complains of other intemperate remarks made by counsel for plaintiff during the closing argument. None of these other remarks were

assigned as error and no request was made for an instruction to the jury to disregard any of them so they cannot be controlling here as they were not so prejudicial that they could not have been cured by an instruction to disregard them. Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672, 12 A.L.R. 1007; Mohn v. Tingley, 191 Cal. 470, 217 P. 733. These remarks include reference to an insurance adjuster who was produced as a witness by defendant to impeach the evidence of witnesses for plaintiff. The question of insurance was first injected into the case by defendant, not by plaintiff.

[17, 18] Certain well established general rules have an important bearing on the acts of misconduct complained of. Generally speaking, we must conclude that the jury obeyed the instructions of the trial judge to disregard evidence and remarks of counsel where such instructions were given. Borland v. Key System, 205 Cal. 153, 270 P. 194; Baker v. Market Street Ry. Co., 123 Cal.App. 688, 11 P.2d 912. Where remarks of counsel are not assigned as error and where no request is made for an instruction to disregard them, usually the error, if any, cannot be urged on appeal. Anderson v. United Stages, 192 Cal. 250, 219 P. 748; Aydlott v. Key System Transit Co., 104 Cal.App. 621, 286 P. 456; Ballard v. Krug, 111 Cal.App. 555, 295 P. 871; Imlay v. California Cab Co., 124 Cal. App. 68, 11 P.2d 1116; Rogers v. Foppiano, supra; Estate of Albertson, 31 Cal.App.2d 211, 87 P.2d 883.

[19] There is another rule which has become well established that has an important bearing on whether or not we must regard the misconduct as prejudicial and a ground for reversal of the judgment. It is thus restated by the Supreme Court in Mudrick v. Market Street Ry. Co., 11 Cal. 2d 724, 81 P.2d 950, 957, 118 A.L.R. 533: "Respecting the misconduct of counsel occurring during the trial and while he was cross-examining witnesses, the defendants cite us to five separate occasions in which they claim that counsel transgressed the rules of propriety. * * * The situation before us is much like that which confronted this court in a former case in which it was said: 'The trial court denied a motion for a new trial based upon the ground, among others, of misconduct of plaintiff's attorney. In doing this the court must be deemed to have concluded that no prejudice was suffered by defendant by reason of any of the matters to which we have referred. Conceding some of the statements made by counsel, whatever the provocation thought by him to exist therefor, were improper, we are satisfied that this conclusion of the trial judge should not be disturbed by an appellate court. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. This, we think, may not fairly be said here.' Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538, 540." See, also, MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 271 P. 509; Girard v. Irvine, 97 Cal.App. 377, 275 P. 840; Aydlott v. Key System, supra; Mangino v. Bonslett, 109 Cal.App. 205, 292 P. 1006; Mullin v. Rouseau, 112 Cal.App. 719, 297 P. 944; Wieck v. Hockett, 115 Cal.App. 600, 2 P.2d 476; Schlenker v. Egloff, 133 Cal.App. 393, 24 P. 2d 224; Alberts v. Lytle, 1 Cal.App.2d 682, 37 P.2d 705; Haskins v. Southern P. Co., 3 Cal.App.2d 177, 39 P.2d 895; Gerberich v. Southern California Edison Co., 26 Cal. App.2d 471, 79 P.2d 783; Behrendt v. Times-Mirror Co., 30 Cal.App.2d 77, 85 P.2d 949.

The foregoing rule is applicable here. We are informed by a supplemental transcript that on the hearing of the motion for new trial the trial judge was furnished a transcription of the reporter's notes showing the most serious of the various acts of misconduct now urged here. He had the record before him and by denying the motion for new trial inferentially held that the misconduct did not prejudice the rights of the defendant. Under the facts before us we must conclude "that the conclusion of the trial court on the motion for a new trial is entitled to much consideration" (Citti v. Bava, 204 Cal. 136, 266 P. 954, 955), and while its decision on the question is not final on appeal, we cannot conclude that it was wrong and that the defendant suffered prejudice or that the judgment is unjust.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

CLARK v. STANDARD ACCIDENT INS. CO. OF DETROIT, MICH.

Civ. 12280.

District Court of Appeal, Second District, Division 1, California.

March 20, 1941.

Rehearing Denied April 19, 1941.

See 112 P.2d 298.

1. Insurance ⟹665(5)

In action to recover indemnity under an accident policy, where insured sustained injury to eye resulting in "peripheral vision" which did not mean that insured only had side vision but that he could see out of all but the center portion of the eye, evidence did not sustain finding that insured had sustained an irrecoverable and entire loss of sight of his eye.

See Words and Phrases, Permanent Edition, for all other definitions of "Peripheral Vision".

2. Insurance ⟹527

The term "irrecoverable and entire loss of sight" as used in accident policy should be liberally construed in favor of the insured and a person need not be totally blind to recover indemnity as for an irrecoverable and entire loss of sight.

See Words and Phrases, Permanent Edition, for all other definitions of "Irrecoverable and Entire Loss of Sight".

3. Insurance ⟹527

Under policy providing indemnity for irrecoverable and entire loss of sight, the determination of loss of sight is based upon the practical use to which the injured eye may be put, and "practical use" does not necessarily mean use in a particular calling or occupation, but rather that use which will render practical service in respect to many needs and pleasures.

See Words and Phrases, Permanent Edition, for all other definitions of "Practical Use".

4. Insurance ⟹527

The loss of practical use of an eye is the equivalent of loss of "entire" sight of eye as that term is used in accident policy providing indemnity for irrecoverable and entire loss of sight of eye.

See Words and Phrases, Permanent Edition, for all other definitions of "Entire".

5. Insurance ⟹527

Where accident policy provided for lump-sum payment for certain enumerated losses, including loss of sight, but also provided for weekly indemnity payments for other accidental injuries which were not otherwise specifically enumerated and which prevented insured from attending to duties of his occupation, terms of the policy, read as a whole, did not indicate any intention to insure against loss of sight under a construction of the term different from that which would be placed thereon if loss of sight were the only disability covered.

6. Appeal and error ⟹1071(6)
Insurance ⟹670

In action for indemnity under accident policy for injury to eye, question whether insured suffered an entire loss of practical sight was primarily one of fact, and the failure of the trial court to make a proper finding thereon constituted prejudicial error.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Ralph Clark against the Standard Accident Insurance Company of Detroit, Mich., for indemnity under an accident policy. From a judgment for defendant, plaintiff appeals.

Judgment reversed and cause remanded for a new trial.

Joseph Brenner, of Los Angeles, for appellant.

Paul Nourse, of Los Angeles, for respondent.

DORAN, Justice.

The plaintiff in an action for indemnity under a policy of accident insurance appeals from a judgment rendered in favor of the defendant insurer, after trial by the court sitting without a jury.

The injury for which indemnity is sought under the policy was sustained while appellant was riding in an automobile, and consisted in the detachment of the retina of appellant's right eye, resulting in a decided impairment of the vision of that eye, as will hereinafter appear. Respondent admits the accidental injury and the only dispute here involved has to do with the nature and extent of the resulting loss of sight and the provisions of the policy as applied thereto. It is respondent's contention that appellant suffered the "irrecoverable and entire loss of sight of one eye" within the meaning of the policy as the applicable terms therein have been judicially construed. Prior to the commencement of this action respondent had offered to accept liability under that provision of the policy covering such a loss, which liability consisted of the obligation to pay the principal sum of the policy, namely, $1,500. However, the instant action was brought to recover weekly indemnity payments under the second article of the policy providing for other accidental injuries not otherwise specifically enumerated and which disabled and prevented the insured from attending to the duties of his occupation. Judgment on that basis was demanded in the total sum of $3,370 to cover such payments to the date of the trial. The action is based upon appellant's contention that the injury to the eye was less than irrecoverable and entire loss of sight and therefore indemnity applied under the second article of the policy providing for weekly indemnity during the period of disability rather than under the first article providing for lump-sum payments for certain enumerated losses, loss of sight as above defined among them.

There is no material conflict in the evidence as to the sight in appellant's injured eye. This evidence consisted largely of demonstrations of appellant's use of the eye in the courtroom and of expert testimony by qualified physicians. It appears therefrom that by the use of the injured eye alone, appellant could read printed letters or words of a size comparable to that of the large newspaper headlines, could exercise a fair degree of color perception and could distinguish certain geometrical figures and similar objects mounted on a white background. The demonstrations of sight were made through the use of various lenses upon the eye and appellant's success in the tests given, and the difficulty encountered in the use of the eye, varied according to conditions. The expert testimony showed appellant to be possessed of peripheral vision, enabling him to distinguish objects and to read as demonstrated. The term "peripheral vision" does not mean that appellant only had side vision, but that he could see out of all but the center portion of the eye. In other words, appellant could see both directly in front and to the side by the use of the injured eye, but the sight out of that eye was obtained through the outer or peripheral portion around the center. According to the testimony of one of the experts, central vision covers an area of half an inch in diameter. The expert testimony also indicated a possibility of further improvement in appellant's vision, though the chances thereof appeared uncertain. There was also expert testimony tending to show that peripheral vision such as possessed by appellant could be of some practical use in avoiding collision with objects. While sight appeared greatly impaired, the evidence as a whole established uncontrovertibly that appellant possessed vision in the injured eye to a degree greater than mere perception of light and darkness.

[1, 2] The trial court found as a fact that appellant had lost the entire sight of his right eye and had sustained an irrecoverable and entire loss of sight thereof. The finding is unsupported by the evidence. It is true that it has been held that the terms "irrecoverable and entire loss of sight" as used in insurance policies should be liberally construed in favor of the insured and that a person need not, therefore, be totally blind to recover indemnity as for an irrecoverable and entire loss of sight. Pan-American Life Ins. Co. v. Terrell, 4 Cir., 29 F.2d 460; Locomotive Engineers' Mut. Life & Acc. Ins. Co. v. Meeks, 157 Miss. 97, 127 So. 699, 702; International Travelers' Ass'n v. Rogers, Tex.Civ.App., 163 S.W. 421; Tracey v. Standard Accident Ins. Co., 119 Me. 131, 109 A. 490, 9 A.L.R. 521, and other numerous decisions, many of which have been cited by appellant. But the foregoing authority is of no help in the circumstances here presented, for manifestly in the absence of a necessary finding of fact supported by evidence, there can be no proper conclusion of law. If an individual is able to see at all it cannot be said as a matter of fact that the entire sight of the eye is lost, although it might well be concluded as a matter of law that such individual would be entitled to recover indemnity as for an entire loss, because the vision had been so greatly impaired. It is obvious that the above finding of the court in the instant case, in the light of the evidence, may be regarded as no more than a conclusion of law.

The question to be here determined, therefore, is whether such a finding, without basis in the evidence, requires a reversal of the judgment.

[3-5] Under the liberal construction of the terms of a policy providing indemnity

for irrecoverable and entire loss of sight, as above noted, the determination of loss of sight is based upon the practical use to which the injured eye may be put. See International Travelers' Ass'n v. Rogers, supra; Pan-American Life Ins. Co. v. Terrell, supra; Murray v. Ætna Life Ins. Co., D.C., 243 F. 285. Practical use does not necessarily mean use in a particular calling or occupation, but rather that use which will render practical service in respect to many needs and pleasures. See Murray v. Ætna Life Ins. Co., supra. While there is some authority holding that practical use is not the test, such decisions appear to be based upon a literal construction of the term "entire loss of sight". Hence, under a liberal interpretation, the loss of practical use of the eye appears to be the equivalent of the loss of the "entire" sight of the eye, as that term is used in the policy of insurance here in question. The fact that the policy provides for disabilities in addition to those specifically enumerated should not, as argued by appellant, alter the construction to be placed on the provisions for loss of sight. The terms of the policy, read as a whole, do not indicate any intention to insure against loss of sight under a construction of the term different from that which would be placed thereon if loss of sight were the only disability covered. The language of the policy indicates that under the terms thereof each enumerated loss is to be considered separately and independent of all other losses. Therefore, in the instant case, if from the evidence it can be said as a matter of law that appellant has lost the entire practical use of the injured eye, no prejudicial error has resulted from the finding of the court in question. On the other hand, if the loss of the practical use of appellant's eye, upon the evidence presented, is purely a question of fact to be determined by the trial court, the court has failed to make a proper finding of fact upon a material issue of the case, and the court's conclusions are without proper basis. It should here be pointed out that the court did not, as contended by respondent, make a finding that appellant had lost the practical use of the eye, the only finding on the question being that noted above, which, as already seen, cannot be construed as more than a conclusion of law.

[6] The research of the parties on this appeal covers practically every authority on the question presented. None of the cases cited, however, furnish any authority for holding appellant, upon the facts here, to have suffered an entire loss of practical sight as a matter of law. The question is primarily one of fact, and the failure of the trial court to make a proper finding thereon constitutes prejudicial error under the circumstances. Such a finding is indispensable.

It may be noted that the failure of the trial court to make a proper finding as to appellant's loss of sight would, on the record presented, require a reversal of the judgment herein regardless of the construction placed on the terms of the policy. However, of the two possible constructions to be given the terms "irrecoverable and entire loss of sight", the liberal interpretation above referred to appears to be more in accord with the apparent intent and purpose of the policy than a strict or literal interpretation.

For the foregoing reasons the judgment is reversed and the cause is remanded for a new trial.

We concur: YORK, P. J.; WHITE, J.

43 Cal.App.2d 6

In re WEBSTER'S ESTATE.

CRANE et al. v. YOUNG WOMEN'S CHRISTIAN ASS'N OF SAN DIEGO et al.

Civ. 2907.

District Court of Appeal, Fourth District, California.

March 12, 1941.

Hearing Denied April 5, 1941.

1. Wills ⚷372

Where trial court denied probate to residuary clause, revocation clause, and clause appointing beneficiary of residuary clause as executor but admitted to probate remaining clauses and earlier will in so far as it appointed executor, and reviewing court affirmed except as respects clauses revoking earlier will and appointing executor, as to which the case was remanded for jury determination, beneficiaries of residuary clause were not entitled to rehearing on ground that otherwise they would no longer have an interest entitling them to maintain the will contest. Probate Code, § 370.

2. Wills 🔑229

After will has been admitted to probate and executor has taken up administration, executor has right and duty to protect interests of beneficiaries, and hence right to oppose contest until final decision, and before probate executor has right if not duty to establish will and oppose contest. Probate Code, § 370.

3. Wills 🔑318(1)

In proceeding to contest will, proponents did not "waive" finding by jury on validity of revoking clause and clause appointing executor, by failing to submit special interrogatory concerning such matters.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 110 P.2d 81.

Arthur F. H. Wright, of San Diego, for appellants.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondents.

PER CURIAM.

[1] Appellants herein petition for a rehearing upon the grounds formerly urged and for the additional claimed reason that if the finding that they were not entitled to take under the clause of the will devising them the residue of the estate becomes final under the order as affirmed by this court, they would no longer have an interest entitling them to maintain the contest. In so far as James L. Crane is concerned, who is named executor in the 1934 will, there has been no proper determination that he is not entitled to serve as such executor.

[2] Section 370 of the Probate Code provides that "Any person interested may contest the will * * *." After a will has been admitted to probate and the executor has taken up the administration it becomes the executor's right and duty to protect the interests of the beneficiaries and he has, as such, a right to oppose a contest until final decision. Estate of Collins, 174 Cal. 663, 164 P. 1110; Estate of Heydenfeldt, 117 Cal. 551, 49 P. 713; Estate of Dillon, 149 Cal. 683, 87 P. 379; Estate of Langley, 140 Cal. 126, 73 P. 824; In re McKinney's Estate, 112 Cal. 447, 44 P. 743. The duty of an executor named, before probate, to establish the will and oppose a contest may be questioned. There is no doubt that such a named executor is given such right. Estate of Higgins, 158 Cal. 355, 111 P. 8; Estate of Hite, 155 Cal. 448, 455, 101 P. 448; 11B Cal.Jur., p. 221, sec. 819.

[3] Respondents contend in their petition for a rehearing that due to the failure of appellants to submit a special interrogatory concerning the revoking clause and the clause appointing the executor, they waived a finding thereon by the jury. This contention was decided adversely to respondents in Estate of Hewitt, 63 Cal.App. 440, 218 P. 778.

Petitions for rehearing denied.

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43 Cal.App.2d 591

PEOPLE v. ADDINGTON et al.

Cr. 3423.

District Court of Appeal, Second District, Division 2, California.

March 21, 1941.

1. Burglary 🔑41(1)
Robbery 🔑24(1)

In prosecution for robbery and burglary, evidence was sufficient to sustain conviction.

2. Burglary 🔑41(6)
Robbery 🔑24(3)

In prosecution for robbery and burglary, to sustain conviction, it was not necessary that the identification of defendant as perpetrator of the crimes be made positively or in a manner free from inconsistencies.

3. Burglary 🔑45
Robbery 🔑26

In prosecution for robbery and burglary, it was the function of the jury to pass upon the strength or weakness of the identification of defendant and the uncertainties of the witnesses in giving their testimony.

4. Criminal law ⚷720(8)

In prosecution for robbery and burglary, prosecuting attorney was not guilty of "misconduct" when in his argument to jury he referred to a witness for defendant as a relative of defendant where from testimony of defendant the jury could draw the inference that the witness was in fact his relative.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

5. Criminal law ⚷829(1)

Failure to give requested instructions was not error where instructions given fairly and fully informed the jury on all essential points of the case.

6. Criminal law ⚷775(3)

In prosecution for robbery and burglary, instruction sufficiently informed jury that they should acquit the defendant if the alibi evidence gave rise to a reasonable doubt of his guilt.

7. Criminal law ⚷958(3)

Defendant moving for new trial on ground of newly discovered evidence had burden of establishing that the proffered evidence could not have been discovered with reasonable diligence in time for presentation at the trial.

8. Criminal law ⚷958(1)

It was within the discretion of trial judge to pass upon issues presented by affidavits supporting motion for new trial for newly discovered evidence.

9. Criminal law ⚷958(3)

In prosecution for robbery and burglary, denial of motion for new trial for "newly discovered evidence" of alibi was not an abuse of discretion where affidavits supporting motion were cumulative of testimony given at trial and no diligence was shown on part of defendant in securing presence of new alibi witnesses at trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

John J. Addington and another were charged with the crimes of robbery and burglary, and the named defendant was also charged with prior conviction of a felony, and from judgment of conviction, the named defendant appeals.

Affirmed.

Ralph L. Loeb, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., by Bayard Rhone, Deputy Atty.-Gen., for respondent.

WOOD, Justice.

The appellant Addington and his codefendant, Chefalo, were jointly charged in an information containing two counts with the crimes of robbery and burglary. Appellant was also charged with the prior conviction of a felony, which charge he admitted. Having been found guilty, appellant has appealed from the judgment of conviction and from the order denying his motion for a new trial.

[1-3] Appellant's contention that the evidence is insufficient to justify the conviction is without merit. The Surplus Commodity Food Stamp store, 123 South McClay street in San Fernando, was robbed by two armed men at about 4:10 p. m. on May 8, 1940. The robbers entered the store and forced seven employees and two customers into a small office at the rear of the store and then seized approximately $738 in cash and $76 in food stamps. The manager and one of the clerks testified that appellant was one of the two robbers. Appellant now attacks the identification by these two witnesses, pointing out that the manager gave testimony at the preliminary examination showing that he then had some doubt as to the identification of appellant, and also pointing out that the clerk testified that there was a possibility of his being mistaken in his identification of the defendants. In order to sustain a conviction it is not necessary that the identification of the defendant as the perpetrator of the crime be made positively or in a manner free from inconsistencies. It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainties of the witnesses in giving their testimony.

[4] Appellant contends that the prosecuting attorney was guilty of misconduct when in his argument to the jury he referred to a witness for appellant, one Tunstall, as a relative of appellant. From the testimony of the appellant himself the jury could draw the inference that Tunstall was in fact his relative, for in attempting to establish an alibi he testified

that he had been at the home of his brother-in-law at Huntington Beach at approximately the time of the robbery. The witness Tunstall, in aid of the alibi, stated that appellant had been at his home in Huntington Beach. Moreover, although objection was made to the remarks which the prosecuting attorney had directed to the jury, no request was made to have the jury disregard them. There is no merit in appellant's contention.

[5, 6] Complaint is made that the court failed to give to the jury certain requested instructions but we find that the instructions actually given fairly and fully informed the jury on all the essential points of the case. Complaint is particularly made of the failure of the court to properly instruct the jury that if the evidence on the subject of the alibi raised a reasonable doubt in the minds of the jury as to the guilt of appellant they should acquit him. On this point the court gave the following instruction: "An alibi simply means that the defendant was at another place at the time the crime charged is alleged to have been committed. All the evidence should be carefully considered by you, and, if the evidence on the subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed." It cannot be reasonably argued that the jury was not informed by this instruction that they should acquit the defendant if the alibi evidence gave rise to a reasonable doubt of his guilt.

It is the contention of appellant that the trial court erred in denying his motion for a new trial made upon the ground of newly discovered evidence. He presented an affidavit by his wife and several affidavits from residents of Huntington Beach, wherein it is set forth that appellant was at Huntington Beach on the afternoon of the robbery. He also presented the affidavit of one Earl Rainwater in which it is set forth that on the day of the robbery the affiant was employed as a clerk in the Surplus Commodity Stamp store and that although he was personally acquainted with appellant he could state positively that appellant was not one of the robbers. These affidavits are cumulative of the testimony given at the trial. Moreover, no diligence was shown on the part of appellant in securing the presence of these witnesses at the trial. By exercising reasonable diligence he could have learned of the testimony of the new alibi witnesses and it would have been a simple matter for him to have had a subpoena issued requiring the presence of the employee of the store who was acquainted with him personally to elicit the information that he was not one of the robbers. It is to be noted that in the affidavit of Rainwater it is not set forth that affiant was present at the time of the robbery and had an opportunity to observe the two robbers.

[7-9] The burden was upon appellant to establish that the proffered evidence could not have been discovered with reasonable diligence in time for presentation at the trial. It was within the discretion of the trial judge to pass upon the issues presented by the affidavits. People v. Neal, 27 Cal.App.2d 655, 81 P.2d 593, and cases there cited. We find no abuse of discretion on the part of the trial court.

The judgment and the order denying a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

43 Cal.App.2d 538

BUNNELL v. BASICH BROS. CONST. CO. et al.

Civ. 12273.

District Court of Appeal, Second District, Division 1, California.

March 18, 1941.

Hearing Denied May 15, 1941.

1. Garnishment 🔑164

In action to enforce statutory liability of garnishee, evidence sustained finding that, at time of service of writ of attachment on principal contractor, it did not have in its possession any moneys belonging to subcontractor. Code Civ.Proc. §§ 544, 545.

2. Garnishment 🔑164

In action to enforce statutory liability of garnishee, a principal contractor, evidence supported finding that at time of service of writ of attachment and demand on the principal contractor the subcontractor had incurred, on account of labor and materials, lienable obligations in excess of amount of money earned by it under its subcontract, and that such obligations were extinguished, not by the subcontractor, but by the principal contractor and its surety by reason of which there existed an offset against the subcontractor in excess of amount earned by the subcontractor under its contract. Code Civ.Proc. §§ 544, 545.

3. Garnishment ⚿130

Where principal contractor had possession of money which had been earned by subcontractor, but principal contractor was entitled to an offset in excess of amount earned by the subcontractor, the principal contractor was not liable under statute regarding liability of garnishee for failure to surrender, pursuant to demand and writ of attachment, money earned by the subcontractor. Code Civ.Proc. §§ 544, 545.

4. Garnishment ⚿105

An attaching creditor takes only such rights or interest as his debtor has.

5. Garnishment ⚿49

Where debtor has no right to money in question, garnishment by creditor is unavailing. Code Civ.Proc. §§ 544, 545.

◆

Appeal from Superior Court, Los Angeles County; Dal M. Lemmon, Judge.

Action by F. O. Bunnell against the Basich Brothers Construction Company and others, to enforce a liability of a garnishee. From an adverse judgment, plaintiff appeals.

Affirmed.

L. E. Dadmun, of Los Angeles, for appellant.

Stephen Monteleone, of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff brought this action to enforce a liability allegedly created pursuant to the terms of sections 544 and 545 of the Code of Civil Procedure. The facts necessary for a proper consideration of the issues involved herein are that defendant Basich Brothers Construction Company, on or about the 10th day of September, 1930, entered into a contract with the state of California through its department of public works, division of highways, for the construction by said defendant corporation of certain highway improvements. Thereafter, on or about October 1, 1930, defendant corporation entered into a subcontract with Bakerbower Transportation Company (hereinafter referred to as the transportation company) for the performance by said transportation company of a portion of said work of highway improvement.

On or about January 9, 1931, plaintiff in the instant cause commenced an action in the superior court of Los Angeles county against the transportation company, and upon the issuing of summons therein a writ of attachment was also secured. On the day of its issuance the writ of attachment was served upon Basich Brothers Construction Company, who retained said writ until January 27, 1931, when in answer to the demand therein contained the construction company made return to said writ that it did not have in its possession or under its control any money or property belonging to the defendants in the action out of which the writ of attachment arose, and that it was not indebted to either or any of the defendants therein.

Following trial before the court, sitting without a jury, judgment was rendered in favor of defendants, and from such judgment plaintiff prosecutes this appeal.

[1, 2] By the terms of the subcontract of October 1, 1930, respondent construction company was authorized by the transportation company to retain all or any portion of the moneys which might become due or owing the latter thereunder, in the event and during all times where there was due, owing and unpaid by the transportation company any sum or sums for work or labor performed, supplies, implements, vehicles, or machinery furnished in connection with the work being performed by the subcontractor, transportation company. It was also provided in the subcontract that in addition to the provisions therein contained respondent construction company was clothed with the right to withhold sufficient moneys to answer for all unpaid labor and materialmen's claims against said transportation company. It was further stipulated in such subcontract that the transportation company provide a faithful performance and labor and material bond. Such bond was furnished by a surety company, and on January 13, 1931, said transportation company, finding itself financially

unable to carry its subcontract to completion, assigned the same over to its surety. There is contained in the record evidence of sufficient substantiality to support the findings made by the trial court that at the time of the service of the writ of attachment on respondent construction company the latter did not have in its possession any moneys belonging to the transportation company or to which such transportation company was entitled. Also supported by the evidence is the finding of the court that at the time of the service of the writ of attachment and demand upon respondent construction company the subcontractor, transportation company, had contracted and incurred, on account of labor and materials, lienable obligations in excess of the amount of money earned by it under its subcontract, and that such obligations were not extinguished by said transportation company, but by the construction company and the surety company, by reason of which there existed an offset against said transportation company, defendant in the action instituted by appellant herein, far in excess of the amount earned by the transportation company under its contract.

[3-5] We come now to a consideration of the question of whether, under the factual situation here narrated, was appellant entitled to have respondent construction company surrender, pursuant to the demand and writ of attachment, money in its possession which had been earned by the transportation company, but to the possession of which the transportation company was not entitled. It must be conceded that had the transportation company sought to recover from respondent construction company any such moneys, its efforts in that regard would have been futile, because under the terms of the subcontract respondent construction company was entitled to withhold such earnings and apply the same as it did to the liquidation of the outstanding obligations incurred but not satisfied by the subcontractor, transportation company. An attaching creditor takes only such rights or interest as his debtor has. The transportation company having no right to obtain the moneys in question, its creditor, appellant herein, stands in its shoes, and has no more rights than it has. When, as here, the debtor has no right to the money in question, garnishment by the creditor is unavailing. Walker v. Doak, 210 Cal. 30, 34, 290 P. 290.

By reason of the foregoing conclusion at which we have arrived, it becomes unnecessary to consider or determine other questions presented.

The judgment is affirmed.

We concur: YORK, P.J.; DORAN, J.

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43 Cal.App.2d 681

EI JITSUDA v. HIRT.

Civ. 12255.

District Court of Appeal, Second District,
Division 1, California.

March 26, 1941.

1. **Automobiles** 🔑244(50)

In pedestrian's action for injuries sustained when struck by automobile, under evidence, jury was justified in inferring that pedestrian was walking outside crosswalk at intersection and that she was contributorily negligent in continuing to walk across street without ascertaining if it could be done in safety, in view of fact that she was familiar with irregular course of street requiring her to practically turn her back to automobile which she knew was approaching.

2. **Automobiles** 🔑246(4)

In pedestrian's action for injuries sustained when struck by automobile while crossing street, instruction fully and fairly informed jury with respect to law applicable to facts.

3. **Appeal and error** 🔑782

Appeal from order denying motion for new trial was dismissed.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Personal injury action by Ei Jitsuda against J. L. Hirt. From an adverse judgment, plaintiff appeals.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellant.

Kenneth J. Murphy, of Los Angeles, for respondent.

YORK, Presiding Justice.

The accident which forms the basis of the instant litigation occurred in the city of Los Angeles on August 7, 1937, at approximately 1:50 o'clock in the morning, at the intersection of East First street and Central avenue.

It appears from the record herein that appellant, the proprietor of a Japanese noodle shop, left her place of business at the time stated and was on her way home. She walked west on the south side of First street for a short distance, crossed Central avenue and said "hello" to a friend, who was standing near the traffic signal at the southwest corner of the intersection. Appellant paused for a moment at this point, looked both to the east and to the west, and saw no automobile traffic approaching from the west, but did see the headlights of an automobile coming toward the intersection from beyond Alameda street, which was the first street east of the intersection in question. She thereupon started to walk in a northerly direction across First street and had progressed to a point slightly north of the street car tracks in the center of the street, when she suddenly saw respondent's automobile very close to her, and remembered nothing more.

Respondent made a right-hand turn into First street from Alameda and was proceeding westerly on First street east of its intersection with Central avenue. In the meantime a truck which had been traveling south on Central avenue reached the intersection and was preparing to make a left-hand turn into First street, when respondent passed in front of, or "made a little curve right ahead" of the truck and collided with appellant.

At the outset of the trial, by agreement of counsel, the question as to whether appellant was walking within or without the lines of the crosswalk was made a disputed issue.

At the close of the trial, the jury brought in a verdict in favor of respondent. From the judgment which was thereafter entered pursuant to such verdict, this appeal is prosecuted, as well as from an order by which appellant's motion for a new trial was denied.

Appellant urges that the evidence is insufficient to sustain the implied findings that respondent was not negligent and that appellant was contributorily negligent. Also, that the court committed prejudicial error in giving two specified instructions to the jury.

First street runs in a general easterly and westerly direction. However, west of its intersection with Central avenue its course turns to the north approximately 25 degrees from its course east of the intersection, and the curb lines of the two streets "on the northwest corner of the intersection form an acute angle of approximately 50 degrees by reason of the further angular intersection of Central avenue from the north, this angle being approximately 15 degrees west." North of its intersection with First street, Central avenue is 55 feet wide and south thereof narrows down to 34 feet. As a result of such irregularity in the way the two streets intersect and are laid out, a pedestian crossing First street from the southwest corner to the northwest corner (as appellant attempted to do), following any line parallel to the extended westerly line of Central avenue, would of necessity be walking in a northwesterly direction with his back partially turned toward traffic approaching the intersection from the east.

Appellant testified that she walked straight across First street from the southwest to the northwest corner of the intersection, and fixed the point of impact slightly to the north of the northerly rail of the street car tracks which, according to the mark which she made on the map of the particular location used at the trial, would be about 12 feet west of the extended westerly curb line of Central avenue, and also about 25 feet east of the point of impact as fixed by the witness Yanaka. The witness Hashimoto placed the point of impact as approximately nine feet west of the westerly boundary of the crosswalk.

Respondent testified that he shifted to second gear as he approached Central avenue; "I just come in high gear, was across, and I heard somebody scream and I applied the brake. I thought I hit somebody, and all of a sudden she darted in front of me with her arms up, and then it happened"; that his car had passed the intersection before he saw Mrs. Jitsuda; that he put on his brake when he saw her, just before he struck her; that she was about three feet from him, coming from the left side, "right in the reflection of lights."

Respondent indicated on the map the point of impact as being about 35 feet west of the point fixed by appellant in her testimony. He further testified that his car went about 10 feet after he struck appellant; that he knocked her 10 or 12 feet; that he was traveling at a speed of about 20 miles per hour and the skid marks extended along the pavement a distance of about 22 feet.

Upon cross-examination, appellant testified that before crossing First street, she looked to her right and saw the headlights of one automobile and that she did not again see the lights of that automobile or any other until she was struck. In answer to the question: "If you were watching it (the light), did you see it again, then, from the time you first saw it more than a block and a half away?" appellant replied: "No, I didn't watch it, but from the first time I saw it I thought it was safe for me to cross"; and that when she saw the headlights close to her, she tried to avoid the automobile by turning her body.

In rebuttal it was shown that a Japanese festival was in progress at the time in question and that, in addition to the ordinary street light at the corner of the intersection, a number of Japanese lanterns extending along First street between Central avenue and Los Angeles street were lighted. However, one of the police officers, who arrived at the scene after the accident occurred, testified he saw no lanterns and that the locality was dark; furthermore, that appellant instead of being unconscious, as she testified, was sitting up talking to the people around her and walked into the ambulance.

[1] From the evidence shown by the record herein, the jury was justified in inferring that appellant was walking outside the crosswalk at the intersection, and that she was guilty of contributory negligence when she continued to walk across First street without ascertaining if it could be done in safety, in view of the fact that she was familiar with the irregular course of the street requiring her to practically turn her back to respondent's automobile which she knew was approaching from the east, at a speed which she estimated to be around 40 miles an hour.

[2] A careful check of all the instructions which were given to the jury discloses that it was fully and fairly informed with respect to the law applicable to the facts before it and that appellant suffered no prejudice in that regard.

[3] The appeal from the order denying the motion for new trial is dismissed; the judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

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43 Cal.App.2d 577

CHICHESTER v. MASON et al.

Civ. 6386.

District Court of Appeal, Third District, California.

March 20, 1941.

1. Witnesses 🔑276

In bankruptcy trustee's action to set aside deeds executed by bankrupt as defrauding his judgment creditor, where testimony of bankrupt, called as adverse witness by plaintiff after dismissing action as against bankrupt, was required by plaintiff to prove many facts in connection with case, no error was committed in permitting him to testify over defendant grantees' objection.

2. Appeal and error 🔑971(2)

In bankruptcy trustee's action to set aside deeds executed by bankrupt as defrauding his judgment creditor, court's permission of bankrupt to testify as adverse witness, called by plaintiff after dismissing case as against bankrupt, *held* not prejudicial to defendant grantees.

3. Fraudulent conveyances 🔑86

Deeds executed in consideration of grantors' prior indebtedness to grantees are valid as against grantors' judgment creditor so far as question of consideration is concerned.

4. Fraudulent conveyances 🔑64(1), 74(1)

The code sections declaring transfer of property with intent to delay or defraud any creditor void as against all creditors of debtor, and providing that transfer of property, made voluntarily or without valuable consideration, by party while insolvent or in contemplation of insolvency, is fraudulent and void as to existing creditors, should be liberally construed with view to effecting their purpose. Civ.Code, §§ 3439, 3442.

5. Fraudulent conveyances 🔑**3**

The purpose of code sections providing that transfer of property with intent to delay or defraud any creditor is void against all creditors of debtor and that transfer of property, made voluntarily or without valuable consideration, by party while insolvent or in contemplation of insolvency, is fraudulent and void as to existing creditors is to prevent debtors from placing property, which should be available for satisfaction of creditors' demands, beyond their reach or, in other words, to compel person engaging in business to take hazards and risks thereof. Civ.Code, §§ 3439, 3442.

6. Fraudulent conveyances 🔑**271(3)**

In action to set aside deed as defrauding creditor, fraud must be proved by inference from circumstances surrounding transaction and parties' relationship and interests, as direct proof of their fraudulent intent is impossible and their real intent and facts of transactions are peculiarly within knowledge of those sought to be charged with fraud.

7. Fraudulent conveyances 🔑**271(3)**

In action to set aside deed as defrauding creditor, where facts and circumstances of transaction are entirely within defendants' knowledge and it is impossible for plaintiff to secure direct testimony as to such facts, trial court may draw reasonable inferences from evidence and base judgment on such inferences.

8. Fraudulent conveyances 🔑**295(2)**

In all cases of alleged fraudulent conveyances, it is permissible to prove fraud by circumstances.

9. Fraudulent conveyances 🔑**271(3)**

In action to set aside deed as defrauding creditor, legitimate inferences in aid of direct facts proved may be indulged to establish other facts not directly in evidence.

10. Trial 🔑**142, 382**

Where either one of two inferences may fairly and reasonably be deduced from admitted or uncontradicted facts, there remains in case a fact question to be determined by jury or judge trying case without jury.

11. Appeal and error 🔑**996**

A jury's verdict or trial judge's finding on question raised by admitted or uncontradicted facts fairly and reasonably warranting either of two inferences cannot be set aside by appellate court as not sustained by evidence.

12. Appeal and error 🔑**931(1)**

Evidence subject to opposing inferences must be regarded, on review thereof by appellate court, in light most favorable to support judgment appealed from.

13. Appeal and error 🔑**931(1)**

In reviewing question raised by admitted or uncontradicted facts, from which either of two inferences may fairly and reasonably be deduced, all inferences reasonably possible from evidence in favor of prevailing party must be indulged by appellate court.

14. Fraudulent conveyances 🔑**113(1), 159(1), 163**

Deeds to persons knowing of grantors' intent to defraud their judgment creditor and intending to assist grantors in such fraudulent purpose and to hold lands conveyed in secret trust for grantors should be set aside and declared void, even if there was consideration for execution thereof.

15. Appeal and error 🔑**994(3), 996, 1012(1)**

It is trial court's province to determine witnesses' credibility, weight of their testimony, and conclusion to be reached from all facts and circumstances before it and reasonable inferences therefrom.

16. Bankruptcy 🔑**303(5)**

In bankruptcy trustee's action to set aside deeds executed by bankrupt and his wife as defrauding their judgment creditor, evidence *held* sufficient to support trial court's findings and judgment for plaintiff.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Frank M. Chichester, as trustee in bankruptcy of the estate of Arthur A. Bergman, against Fred C. Mason, his wife, the bankrupt, and his wife to set aside two deeds, executed by defendants Bergman to defendants Mason, as fraudulent. Judgment for plaintiff, and defendants Mason appeal.

Affirmed.

Lloyd S. Nix, of Los Angeles, for appellants.

P. E. Keeler, of Los Angeles, for respondent.

MONCUR, Justice pro tem.

This is an appeal from a judgment in favor of the plaintiff in an action by a judgment creditor to set aside as fraudulent two deeds executed by Arthur A. Bergman and Anna L. Bergman, his wife, to appellants Fred C. Mason and Josephine V. Mason, his wife. The first deed covered lots 12 and 14, block 7, tract 5870, and the second deed covered lots 68 and 69, tract 7705, in Los Angeles county. The original plaintiff was O. F. Fitzpatrick and the respondent herein, Frank M. Chichester, as trustee in bankruptcy of the estate of Arthur A. Bergman, having been substituted in the place of plaintiff O. F. Fitzpatrick. Arthur A. Bergman and Anna L. Bergman were named as parties defendant in the action but, on motion, the action was dismissed as to them for the reason that the summons had not been served upon either of them and return made within three years after the commencement of the action, the judgment of dismissal being entered March 26, 1937.

The complaint is in two counts, the first alleging that Arthur A. Bergman and Anna L. Bergman transferred all of their property to Fred C. Mason and Josephine V. Mason except their home, upon which a homestead had been filed, and that upon information and belief, the conveyances were executed by the Bergmans without consideration and with intent to hinder, delay, and defraud their creditors, including the plaintiff herein. The second alleges, upon information and belief, that the said conveyances were executed by the said Bergmans without consideration and with intent to hinder, delay, and defraud their creditors, including the plaintiff, and that the said defendants Mason accepted and received said deeds with knowledge of the fraudulent intent upon the part of Bergmans and with intent upon their part, to assist the said Bergmans in their fraudulent purposes and to hold said lands as a secret trust for said Arthur L. Bergman and Anna L. Bergman.

The said Masons answered denying that the said Bergmans transferred all of their property to the Masons except their home upon which a homestead was filed; that the conveyances were executed without consideration and that the conveyances were executed with the intent to hinder, or delay, or defraud the creditors of the Bergmans, including said plaintiff; admits that the deeds were executed to the said Masons and alleges that the deeds were executed for good and valuable consideration. It is also denied that the Masons accepted the deeds with knowledge of the alleged fraudulent intent, or that the said Masons, or either of them, assisted said Bergmans in their alleged fraudulent purposes; and it is also denied that they held the whole of the said lands, or any portion thereof, for the said Bergmans as a secret trust. It is also alleged that the Masons were the owners of the said property so conveyed.

After trial, the court found in favor of the plaintiff upon both counts of the complaint and judgment was entered setting aside the said deeds.

The greater part of the evidence introduced at the trial consisted of the testimony of said Arthur A. Bergman and the depositions of said Fred C. Mason and Josephine V. Mason. These depositions were taken in Chicago, where they then and for a long time theretofore had resided. It appears from the evidence that O. F. Fitzpatrick recovered judgment on the 28th day of March, 1933, against the Bergmans and certain other persons for the sum of $4,715.57, together with costs, in the superior court of Los Angeles county, and execution was thereafter issued and returned wholly unsatisfied. On February 23, 1933, the deeds heretofore referred to were executed. The Fitzpatrick judgment, the return of the execution unsatisfied, and the execution of the deeds are admitted.

Josephine V. Mason is the sister of Anna L. Bergman. It appears that no consideration was given the Bergmans at the time of the execution of the deeds and it was contended that at the time the Bergmans were indebted to the Masons in the sum of approximately $14,300, which was said to be evidenced by five written instruments, dated respectively, February 1, 1928, September 24, 1928, February 20, 1929, July 26, 1929, and March 25, 1930. Arthur A. Bergman was, at the times mentioned, engaged in the construction of four family flats in the city of Los Angeles, each of which was financed in whole or in part by building loans secured by trust deeds on the respective buildings. The bank accounts used for all of said buildings were received in evidence by stipulation and were carried at the Wilshire and La Brea branch of the Security First National Bank in Los Angeles. The last of said buildings were constructed in 1930.

The depositions of the Masons were taken upon plaintiff's written interrogatories, under section 2055, Code Civil Procedure; no cross interrogatories were proposed by the defendants and the defendants were not present at the trial of the case. From these depositions it appears that Fred C. Mason was employed for about twenty-six years in the electrical department of the city of Chicago, starting at a salary of $83 per month, which was later increased to $240. He also worked in off hours for motion picture houses. The compensation for theatre work ranged anywhere from $35 to $110 per week, and for motion picture operating as high as $145 a week. He did not testify as to what portion of his time was engaged in this extra work. He testified that the moneys here in question were the savings from his salaries. He carried small bank accounts in Mid City Bank and in the Continental Bank in Chicago. When asked where the money was kept before it was sent to the Bergmans, he named several banks where at various times he had deposit boxes. Both Mr. and Mrs. Mason testified that in response to a letter from the Bergmans, Josephine V. Mason came to Los Angeles, bringing $6,500 in cash with her, which she and Arthur A. Bergman testified was delivered to him on or about February 1, 1928, and the instrument dated on that date was executed by the Bergmans and delivered to Mrs. Mason. A similar transaction occurred in July of 1929 as to a $2,500 loan. This money also was said to have been an accumulation from the salary savings of Fred C. Mason, and had been kept in deposit boxes and about the home, and was also brought to California by Josephine V. Mason and delivered to Arthur A. Bergman in cash about July 26, 1929. A written acknowledgment of the transaction was executed by the Bergmans and delivered to Mrs. Mason. Another like transaction was testified to as having occurred on March 25, 1930, when the sum of $2,600 was brought from Chicago to Los Angeles, in cash, by Josephine V. Mason and delivered to Arthur A. Bergman, which money was from the savings of Fred C. Mason and had been kept in safe deposit boxes prior to Mrs. Mason's trip to California. The document dated March 25, 1930, signed by the Bergmans, was said to evidence this transaction. The paper dated February 1, 1928, stipulated that the $6,500 was to be used for the purchase of lot 150, tract 8498, and the erection of a building thereon. This lot was not purchased by Arthur A. Bergman until June 15, 1928.

Arthur A. Bergman furnished to the referee in bankruptcy, in his bankruptcy proceedings, copies of all of the bank statements evidencing his bank transactions during the periods involved in this litigation. These statements do not show deposits of amounts corresponding to any of the alleged loans, and the manager of the La Brea and Wilshire branch testified that he had examined the original deposit slips of all deposits appearing on the bank statements and that none amounting to one thousand dollars or more were cash deposits.

Arthur A. Bergman, for the purpose of financing the erection of various buildings being built by him, secured a loan from the Western Mortgage Corporation in the sum of about $16,000. The assistant treasurer of the mortgage company testified to the progress payments made on each of the buildings, which corresponded with the deposits shown in the bank accounts amounting to as much as $1,000. When asked what he did with the $6,500 in cash, Arthur A. Bergman said, "I might have bought some property, I may have paid some bills and I may have put some in the bank. I can't remember that far back." He also testified that he did not remember whether he deposited the $2,500 which he said he received from Josephine V. Mason but that he did deposit the $2,600 in the bank which he received on March 25, 1930.

In his testimony before the referee in bankruptcy he testified he could not remember in what bank he deposited it, but he thought it was in the western section of Los Angeles. On the trial he testified the Wilshire and La Brea was the only bank in which he deposited any money in connection with these building operations.

Immediately following the execution of the deed of March 20, 1933, to the Masons, Fred C. Mason gave Arthur A. Bergman full authority to receive and disburse rentals from the four family flats conveyed by that deed. A bank account was opened in the name of Fred C. Mason and a part of the rentals received by Bergman was deposited in this bank where Fred C. Mason had lodged authority to honor checks drawn by Bergman. Approximately $900 of the moneys collected by the defendants were never deposited to the account, and Bergman testified that he had never kept any account of the receipts and disbursements in connection with these eight flats, each of which rented for from $35 to $55 per month, that he had never rendered a statement to the Masons of any receipts or disbursements in connection with said property;

and, further, that since the date of the deeds, neither of the Masons had been in California. The Masons testified that since the dates of the deeds, they had never requested or received any statements, or money from Bergman.

A number of statements from various persons for repairs and expenses in connection with the flat buildings were introduced, showing the charges were made by Arthur A. Bergman personally and were receipted showing payment to him.

At the time the deeds were made to the Masons, the five documents, signed by the Bergmans, were not delivered to the Bergmans, but were at the time of trial still in the possession of the Masons, photostatic copies thereof being attached to their depositions.

Testifying before the referee in bankruptcy, Bergman at first stated that the money was deposited "in our account", referring to the $6,500, but could not remember in what bank this money was deposited. He said Josephine Mason probably went with him to the bank. That testimony was as follows:

"Q. Did you deposit any of that money? A. I guess I did."

On the trial of the case he testified as follows:

"Q. What did you do with it (the $6,500)? A. I can't remember that far back.

"Q. Did you and Josephine Mason go to the bank to deposit that money? A. No."

In connection with the alleged loan of $6,500, it appears that Bergman did not acquire the contract for the purchase of lot 150, tract 8498, until June 15, 1928. He was not able to state where this money was kept down to the time the purchase was made.

[1, 2] Arthur A. Bergman was called as an adverse witness by the plaintiff and was permitted to testify over the objection of the defendants, and it was contended that as the case stood dismissed as to him at the time of the trial that the court was in error in permitting this procedure. However, it appears that Bergman's testimony was necessarily required by plaintiff in proving many of the facts in connection with the case and, under these circumstances, we are satisfied that no error was committed in permitting his testimony, and also that no prejudice resulted to defendants by reason of the procedure pursued in connection with the examination of said Arthur A. Bergman. The case of First National Bank v. De Moulin, 56 Cal.App. 313, 205 P. 92, appears to be authority for the procedure herein adopted. Therein at page 321 of 56 Cal.App. at page 96 of 205 P., it is said: "We do not understand that respondent claims that it was surprised by DeMoulin's testimony. But surprise is not always a necessary element. Such impeaching evidence may be given when the witness to be discredited was put on the stand to prove his own fraud."

[3] It is conceded that if the deeds in question were made without consideration and that thereafter the Bergmans became insolvent, the presumption that said deeds were made with intent to hinder, delay, and defraud creditors, and particularly the plaintiff, would attach. Unquestionably, if the deeds were executed in consideration of the prior indebtedness claimed to be owing from the Bergmans to the Masons, the conveyances would be valid so far as the question of consideration was concerned. Ferguson v. Larson, 139 Cal.App. 133, 135, 33 P.2d 1061; Hart v. Church, 126 Cal. 471, 480, 58 P. 910, 59 P. 296, 77 Am.St.Rep. 195; Frey v. Clifford, 44 Cal. 335.

In connection with the knowledge and fraudulent intent on the part of the defendants to assist the Bergmans in their alleged fraudulent purposes and to hold said lands in a secret trust for the said Bergmans, it appears that the Masons knew of the Fitzpatrick action prior to the execution of the deeds referred to. Fred C. Mason, in his deposition, testified: "We had a letter that suit was pending by Fitzpatrick." Arthur A. Bergman, when asked about the circumstances under which the deed of February 23, 1933, was made, testified: "She (referring to Josephine V. Mason), knew that we have trouble with Fitzpatrick, and she came out here and wanted her money". "What kind of trouble you say she knew about with Fitzpatrick? A. Well, he had a law suit against us."

[4, 5] Many cases presenting facts analogous to those appearing in the instant case have been before the courts of this state and the law applicable to transactions of the kind here involved is well settled. In the case of Borgfeldt v. Curry, 25 Cal.App. 624, at page 625, 144 P. 976, at page 977, it is said:

"The law applicable to the question is found in sections 3439 and 3442 of the Civil

Code. Those sections read, respectively, as follows:

"'Sec. 3439. Every transfer of property or change thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.'

"'Sec. 3442. In all cases arising under section 1227, or under the provisions of this title, except as otherwise provided in section 3440, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.' * * *

"These sections, in common with the remainder of the Code, should be liberally construed with a view to effecting their purpose. That purpose undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach, or, in other words, to compel a person engaging in business to take the hazards and risks thereof as well as the chances for profit. If misfortune should overtake him, he must face it himself, and not attempt to saddle it onto those who have extended him credit and trusted in his commercial integrity."

[6] In the case of Fross v. Wotton, 3 Cal.2d 384, at page 393, 44 P.2d 350, at page 354, it is held: "From the very nature of the action, direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties. Moore v. McDonald, 122 Cal.App. 61, 69, 9 P.2d 556, and cases cited. * * *"

[7-13] In the case of Moore v. McDonald, supra, 122 Cal.App. at page 69, 9 P.2d at page 560, there is found the following: "It is well recognized by all courts that in cases of this kind where the facts and circumstances of a transaction are entirely within the knowledge of the adverse parties, it is often impossible for a plaintiff to secure direct testimony of the real facts of a transaction of the nature of the one here involved. Under such circumstances the trial court is permitted to draw reasonable inferences from the evidence and upon such inferences base its judgment. * * * It would in most cases be extremely difficult, and in many cases absolutely impossible, to procure direct evidence of this nature. In all cases it is permissible to prove fraud by circumstances, and in most cases it is the only evidence available. In aid of the direct facts proved, legitimate inferences are permitted to be indulged to establish others not directly in evidence. Butler v. Collins, 12 Cal. 457; Levy v. Scott, 115 Cal. 39, 46 P. 892." Our duty under these circumstances is set forth in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A.L.R. 123: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45."

[14] Even if it be conceded that there was consideration for the execution of the said deeds, if there was knowledge of the fraudulent intent on the part of the Bergmans and intent upon defendants' part to assist the Bergmans in their fraudulent purpose and to hold said lands as a secret trust

for the said Bergmans, the deeds should be set aside and declared void. Fross v. Wotton, supra; Liuzza v. Brinkerhoff, 3 Cal. App.2d 218, 39 P.2d 283.

[15] It was the province of the trial court to determine the credibility of the witnesses and the weight to be given to the testimony, and from all of the facts and circumstances appearing before it, and from the inferences reasonably to be drawn therefrom, the conclusion to be reached.

[16] Considering the facts as shown by the evidence in this case that the Bergmans were codefendants in the action brought by O. F. Fitzpatrick and their apparent belief that a judgment therein would be rendered against them; Arthur A. Bergman's professed inability to remember the manner of the disposition of the very substantial amounts of money claimed to have been received by him from the Masons; the inconsistencies in his testimony; the method used by Mrs. Mason of carrying the large amounts of money claimed to have been paid to Arthur A. Bergman, in cash, from Chicago to Los Angeles; the fact that the Masons did not appear to be interested enough in their affairs to appear in Los Angeles at the trial of the case to assert their alleged rights, and from which fact the trial court could reasonably draw the inference that they feared to appear at the trial and subject themselves to cross-examination; the fact that the Masons knew of the Fitzpatrick action against the Bergmans; the fact that by the execution and delivery of the deeds in question the Bergmans thereby rendered themselves insolvent; the execution of the authorization to Arthur A. Bergman to collect the rentals from the building and the manner in which such rentals were handled by him; and also all of the other facts and circumstances disclosed by the evidence, many of which it has not seemed necessary to relate; in view of the authorities bearing upon such matters hereinabove set forth, we are satisfied that there is ample evidence in the record, together with the inferences reasonably to be drawn therefrom, to support the findings and judgment of the trial court.

It is not the province of this court, under the circumstances here appearing, to set aside the judgment of the trial court, and it is therefore affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.

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43 Cal.App.2d 737

THOME et al. v. HONCUT DREDGING CO. et al. (J. A. BORBA et al., Interveners).

Civ. 6453.

District Court of Appeal, Third District, California.

March 26, 1941.

1. Waters and water courses ⚷77

In riparian landowners' action to enjoin pollution of streams by dumping of mining slickens therein, judgment enjoining defendants from "materially" polluting streams to extent that "substantial" injury or damage will be caused to plaintiffs or their lands gave them as broad and complete remedy as law entitled them to.

2. Waters and water courses ⚷77

In riparian landowners' suit to enjoin pollution of streams by dumping of mining slickens therein, court properly refrained from enjoining defendants from dumping slickens on their own lands at points so remote from streams as to be harmless or in quantities so insignificantly small that waters would not be polluted thereby to any appreciable extent.

3. Appeal and error ⚷1152

A judgment enjoining deposit of such material amount of mining slickens in or near certain streams as will result in substantial injury or damage to riparian lands fully protected owners thereof, so that no modification of judgment by appellate court is necessary or proper, though some of parties enjoined consent to modification thereof on ground that it is so stringent and broad as absolutely to preclude continuation of their mining enterprises and word "substantial" might properly have been omitted.

4. Waters and water courses ⚷77

In suit to enjoin pollution of streams by dumping mining slickens therein, court did not err in refusing to enjoin three defendants specifically found by court on sufficient evidence to have neither operated nor threatened to operate their mining enterprises for several months.

5. Injunction ⚷1

There is no absolute right to injunctive relief.

6. Injunction ⚷11

When it appears that wrongful acts, which have been completely performed, are likely to be repeated or continued, injunction against performance thereof should issue.

7. Injunction 🔑22

A party injured by another's wrongful act, which has been fully performed, must ordinarily seek redress in action for damages, rather than suit for injunction.

8. Injunction 🔑11

To authorize issuance of injunction, it should appear with reasonable certainty that wrongful acts complained of will be continued or repeated.

9. Waters and water courses 🔑77

In suit against several parties for injunction against and damages for pollution of streams, award of monetary damages was properly refused, in absence of evidence of amount of damages suffered by any particular plaintiff or resulting from any particular defendant's separate acts.

10. Waters and water courses 🔑67

Parties conducting separate mining enterprises and not co-operating in maintenance of their businesses are not jointly liable for monetary damages sustained by riparian landowners as result of such parties' separate pollution of streams by dumping mining slickens therein, as they were not "joint tort-feasors".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tort-Feasors".

11. Waters and water courses 🔑67

One wrongfully polluting stream by conducting mining enterprise thereon is responsible only for actual damages resulting from his own acts and conduct to riparian lands of others and may not be charged with damages resulting from other persons' wrongful pollution of stream independently of his acts.

Appeal from Superior Court, Yuba County; R. M. Rankin, Judge.

Action by M. T. Thome and others against the Honcut Dredging Company and others for an injunction against pollution of streams, in which J. A. Borba and others intervened as parties plaintiff. From a judgment enjoining only material pollution of streams to extent that substantial injury or damage will be caused, plaintiffs and interveners appeal.

Affirmed.

Charles A. Wetmore, Jr., Treadwell & Laughlin, and John Langer, all of San Francisco (A. Thatcher Cook, of San Francisco, of counsel), for appellants.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, George R. Freeman, of Willows, Rich & Weis, of Marysville, Richard H. Fuidge, of San Francisco, Seth Millington, of Gridley, and J. F. Good and Hubert I. Townsend, both of Oroville, for respondents.

THOMPSON, Justice.

The plaintiffs and interveners, who own land riparian to Honcut creek in Yuba county, have appealed from a judgment enjoining the defendants from polluting the waters of that creek and its upper tributary streams, by depositing therein mining slickens or debris in such quantity as will substantially damage the properties of the appellants. The injunction against three of the defendants, namely, Wyandotte Dredging Company, E. A. Kent Incorporated and H. F. England, was denied on the ground that they ceased mining operations in 1936, and have not subsequently threatened to resume those enterprises. Monetary damages were denied for the reason that it is impossible to determine the amount of damages which were inflicted by any particular defendant.

The appellants contend they are entitled to an absolute injunction perpetually restraining each defendant from depositing in the creek any mining slickens or debris whatever, and that the limitation of the judgment to the depositing of refuse which "will result in substantial injury" only, to the property of the appellants, is erroneous and unlawful.

Honcut creek originates in the foothills of Northern Yuba county and flows southwesterly into the Feather river. There are several branches of this creek. For many years gold dredging and mining enterprises have been conducted along these creeks. The plaintiffs, who own land adjacent to these creeks, upon which they operate farming and stock-raising businesses, filed this suit against the defendants for injunction which is couched in sixteen separate causes of action, seeking damages and an order restraining the polluting of the streams by dumping therein the slickens, tailings or debris from upper mining enterprises so as to contaminate the water and render it unfit for domestic or irrigation purposes. By leave of court a complaint in intervention was filed by three other plaintiffs based upon substantially the same facts alleged in the original complaint. The defendants answered these complaints, denying the material allegations thereof. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiffs, except that it was determined three of the defendants, namely, Wyandotte Dredging Company, E. A. Kent Incorporated and H. F. England, abandoned their mining enterprises in 1936, since which time they did not contribute to the pollution of those streams and do not threaten to renew their enterprises. Monetary damages were denied for the reason that it is impossible to estimate the amount of damages contributed by any separate defendant.

The court found that during the rainy seasons of the year, during which the mining enterprises were conducted, the waters of Honcut creek and its tributaries were impregnated with large quantities of earth and debris resulting from flood conditions and natural erosion of the soil adjacent thereto, but that the dredging and mining operations of the defendants have contributed to the pollution of the streams by dumping and washing therein quantities of slickens, tailings, dirt and debris, as a result of which the plaintiffs and interveners have suffered "some substantial damage". The court specifically found that by reason of the combined natural erosion and the mining operations of the defendants the water of the streams became "muddy and unclean during a portion of the year", but that it was not thereby rendered unfit for irrigation purpose nor did it become deleterious to fish inhabiting the streams. Judgment was thereupon rendered, denying monetary damages to the lower property owners for the reason above stated, and refusing to enjoin the conduct of the three defendants who have abandoned their mining enterprises, but restraining "forever" all the other defendants, their representatives, agents and servants "from materially polluting, muddying or rendering unclean the waters of Honcut creek or any of the branches or tributaries thereof to the extent that substantial injury or damage will be caused to the above-mentioned plaintiffs or any of them, and/or from depositing such material amount of mining slickens on said land or in the channel or bed or banks of said Honcut creek [or the tributaries thereof], as results, or which will result in substantial injury or damage to the lands of plaintiffs and interveners or any of them by or through the use or operation of said dredgers".

[1, 2] We are of the opinion the injunction which issued in this proceeding is as broad and complete a remedy as the appellants are entitled to under the law. Clearly, it restrains the defendants from depositing in Honcut creek or any of its tributaries, or on the land adjacent thereto, any "material amount of mining slickens" which will result in "substantial injury or damage" to plaintiffs' property. In construing that language, we may assume the defendants are prohibited from dumping or depositing in the creeks or upon the land adjacent thereto any mining slickens, tailings, dirt or debris which would result in substantially polluting the waters of the streams to any extent which would materially injure or damage the properties of any of the plaintiffs or cross-complainants. The court properly refrained from enjoining the defendants from dumping slickens upon their own properties at points so remote from the streams as to be harmless, or in quantities so insignificantly small that the waters would not be polluted to any appreciable extent. An injunction couched in such broad terms might result in unnecessarily restricting or destroying valuable industries. It is conceivable the mines may continue to operate in such a manner that the waters of the creeks will not be polluted at all. The plaintiffs may complain only if the waters are polluted to such an extent that some substantial injury or damage is inflicted. To that extent they are amply protected by the judgment.

[3] At least some of the defendants concede that the injunction is already so stringent and broad as to absolutely preclude a continuation of their mining enterprises. In their reply brief the Consuelo Mines, Incorporated, and another defendant say in that regard: "The fact of the matter is, that respondents cannot possibly operate their drag line dredgers even under the language as it stands." Those defendants, therefore, consent to the modification of the judgment in that regard in any manner this court may desire. We think, however, the plaintiffs are fully protected and that no modification of the judgment is necessary or proper. Thompson v. Kraft Cheese Company of California, 210 Cal. 171, 291 P. 204, 206.

In the case last cited a decree for injunction was modified on appeal on the ground that it was "too broad in its provision" for the reason that it restrained the defendant from "discharging or permitting to escape 'any dirty water, sour milk slops, refuse, offal'", etc., into the waters of a creek, or upon the land adjacent thereto, or in cesspools which might seep into the creek. The court said in that regard:

"The injunction is too broad in its provision restraining them from discharging or permitting to escape 'any dirty water, sour milk slops, refuse, offal, or other liquid or semi-liquid matter.' The vice of this provision is that it ignores the question of actual injury, and is framed so as to cover the slightest discharge, whether it causes any substantial pollution of the stream or not. It should have been limited to prohibiting such discharge as would cause substantial injury to the party seeking relief."

The decree in the present case has avoided the very vice which was criticised and corrected on appeal in the Thompson case. The defendants are properly enjoined from depositing any "material" amount of slickens in or adjacent to the stream. The court might have properly omitted the word "substantial" with reference to the injury or damage resulting from the prohibited acts, but we think that is immaterial and that the plaintiffs and cross-complainants are amply protected with or without that modifying word.

[4-8] The court did not err in refusing to enjoin the defendants Wyandotte Gold Dredging Company, E. A. Kent Incorporated and H. F. England from polluting the stream. The court specifically found that these three defendants have neither operated their mining enterprises nor threatened to do so since 1936. That finding is amply supported by the evidence. There is no absolute right to injunctive relief. An injunction should issue for wrongful acts which have been completely performed, when it appears they are likely to be repeated or continued. Boggs v. North American B. & M. Co., 6 Cal.2d 523, 58 P.2d 918; 14 Cal.Jur. 209, § 24; 32 C.J. 45, § 24. When the act complained of has been fully performed, the injured party is ordinarily compelled to seek redress in a suit for damages. To authorize the issuing of an injunction it should appear with reasonable certainty that the wrongful acts will be continued or repeated. In the text of 32 C.J. at page 46 it is said in that regard: "Where there is no showing that such action is being continued or repeated, or that defendant is threatening or intending to repeat the injury", the injunction should be denied. Since the three defendants last mentioned have not conducted their mining enterprises for several months, and there is no evidence to indicate they intend to continue to pollute the stream in the manner charged, the court, in the exercise of a sound discretion, was warranted in refusing to apply the injunction against them.

[9-11] The denial of an award of monetary damages against the defendants for polluting the water of Honcut creek was properly refused. We are directed to no evidence of proof of the amount of monetary damages suffered by any particular plaintiff or to the amount of damages resulting from the separate acts of any particular defendant. The defendants were not joint tort feasors. Each conducted separate mining enterprises. They were not cooperating in the maintenance of their businesses. They are, therefore, not jointly liable for monetary damages sustained as a result of their separate pollution of the stream. It is an established rule of law that when one wrongfully pollutes a stream by conducting thereon a mining enterprise, he is responsible only for the actual damages resulting from his own acts and conduct. He may not be charged with damages resulting from the wrongful conduct of other persons who also pollute the stream independently of his acts. Under such circumstances it is almost impossible to determine the amount of damages for which each defendant would become liable. Keyes v. Little York Gold Washing & Water Co., 53 Cal. 724, 730; Little Schuylkill Navigation, etc., Co. v. Richards, 57 Pa. 142, 98 Am.Dec. 209; 1 Sutherland on Damages, 3d Ed., 366, § 141; 39 A.L.R. 908, note; 25 Cal.Law Rev. 436.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

43 Cal.App.2d 486

EUSTACE v. LYNCH et al.

Civ. 12246.

District Court of Appeal, Second District, Division 1, California.

March 17, 1941.

Hearing Denied May 15, 1941.

1. Release ⟹21, 22

Where release of claims against parties who instituted bankruptcy proceedings was executed in consideration of such parties' dismissing the bankruptcy proceedings, and one releasor allegedly gave oral notice of election to rescind the release shortly thereafter, but accepted benefits accruing through subsequent dismissal of the bankruptcy proceedings and restoration of property held by bankruptcy receiver, such conduct amounted to "waiver" by releasor of right to assert that release was invalid because of "duress", and amounted to "ratification" of its terms. Civ.Code, § 1691.

See Words and Phrases, Permanent Edition, for all other definitions of "Duress", "Ratification" and "Waiver".

2. Contracts ⟹270(2)

A person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract or abandon the transaction, and give other party opportunity of rescinding and of restoring both of them to their original position, and is not allowed to go on and derive all possible benefits from the transaction and then claim relief from his own obligation by rescission or refusal to perform. Civ.Code, § 1691.

3. Contracts ⟹97(1)

If, after discovering untruth of representations, party conducts himself with reference to transaction as though it were still subsisting and binding, he thereby "waives" all benefit of and relief from the misrepresentations. Civ.Code, § 1691.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Appeal and error ⟹1041(2)

Refusal of leave to amend complaint so as to substitute specified defendant in the place of "One Doe" was not prejudicial error, where record showed that plaintiff was well acquainted with such defendant, though plaintiff had not made her a party on advice of attorney, and that plaintiff's mother had sued such defendant in an action arising out of same transaction.

5. Appeal and error ⟹782

An attempted appeal from order directing verdict for defendants was dismissed.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by John Eustace, Jr., against E. A. Lynch and others, for trespass and conversion. From an order directing a verdict for defendants, and from judgment entered pursuant thereto, plaintiff appeals.

Appeal from order directing verdict dismissed, and judgment affirmed.

Caryl Warner, of Los Angeles, for appellant.

Baldwin Robertson, of Los Angeles, for respondents Kupfer and Wagner.

Raphael Dechter, of Los Angeles, for respondents Lynch, Oil Tool Exchange, Inc., and Spiers & Meadows.

YORK, Presiding Justice.

This is an action to recover damages for an alleged trespass and conversion of property.

It appears from the record herein that appellant's assignor, John M. Eustace, on September 9, 1934 and for many years theretofore had been engaged in the plumbing business at two locations in the city of Los Angeles under the name of Eustace Plumbing Company; that on August 23, 1934, there was filed by respondent creditors Oil Tool Exchange, Inc., Spiers & Meadows, and A. M. Kupfer, in the District Court of the United States for the Southern District of California, an involuntary petition in bankruptcy directed against the wife of John M. Eustace, to-wit: "Katie M. Eustace * * * doing business as Eustace Plumbing Company"; that on September 7, 1934, pursuant to the petition of respondent Kupfer, said court made its order appointing respondent E. A. Lynch "Receiver of all property of whatsoever nature and wheresoever located, now owned by or in the possession of said bankrupt"; and on September 8th, respondent United States Fidelity & Guaranty Company posted its bond in the sum of $5,000 conditioned upon the faithful performance by the receiver of the duties pertaining to his office.

It is alleged in the complaint that on or about September 7, 1934, said respondents "maliciously, wilfully and with intent to vex, annoy, injure and defraud plaintiff's assignor * * * and to ruin and damage * * * said plumbing business, did cause, assist and procure said defendants E. A. Lynch, individually and as Receiver of the estate of Katie M. Eustace, an alleged bankrupt, to enter upon the said premises of said plumbing business of plaintiff's assignor * * * and to appropriate the same and all of its business, fixtures and property * * * to his and defendants' exclusive use and possession"; that on September 9, 1934, said receiver and respondents wilfully and unlawfully entered the premises of the said plumbing business, and with knowledge of the fact that ownership of the plumbing business "was in plaintiff's assignor, John M. Eustace (and) that the said alleged bankrupt, Katie M. Eustace, at no time possessed any right, title or interest in and to said Eustace Plumbing Company or the properties of said business, and was not in possession thereof", did thereupon dispossess said John M. Eustace and "said defendants and each of them did thereupon remain in the sole and exclusive possession of said plumbing shops and of said plumbing business continuously up to and including the 15th day of May, 1935 * * * without the consent and against the will of plaintiff's assignor; that by reason thereof * * * the said business * * * was ruined and destroyed"; all to the detriment and damage of John M. Eustace, who on July 1, 1937 assigned all his right, title and interest in the aforesaid plumbing business and in the cause of action here sued upon to his son, appellant John Eustace, Jr.

Respondents in their answers set forth denials, justification under the federal court order, and also an affirmative defense of a release of claims, to-wit:

"Los Angeles, Cal.,
"January 29, 1935

"Mr. Raphael Dechter, 825 Stock Exchange Bldg., Los Angeles, California.

"Dear Sir: This will verify the fact that in consideration of your arranging to dismiss the bankruptcy proceedings now pending against Katie M. Eustace in the United States District Court, for this District, No. 23770-C, the undersigned do hereby agree that they will and do hereby release the Oil Tool Exchange, Inc., Spiers & Meadows, and A. M. Kupfer, as well as E. A. Lynch, and yourself and any and all other persons heretofore connected with said bankruptcy proceeding from any claim of any kind whatsoever arising out of said bankruptcy proceedings and hereby agree to forbear from any legal proceedings by virtue of anything done by the above named parties in and about said bankruptcy proceedings.

"Very truly yours,
"Katie M. Eustace
"John M. Eustace
"John Eustace (Jr.)
"J. A. Griffith."

At the trial herein, appellant made several offers of proof: first, he made a long opening statement which he subsequently adopted as an offer of proof after he was placed on notice that the trial court intended to dispose of the case as so presented; he then summarized the material facts of his case in a new and separate offer of proof, and finally made a formal offer to prove all of the allegations of the complaint. With respect to the release which respondents introduced and pleaded as a complete defense to the action, the court in its control of the method of proof directed that such issue be covered first; whereupon appellant made an offer to prove that the signatures of the parties to the release were obtained through threats, menace, duress and fraud which consisted of statements and representations made to them in December, 1934, and in January, 1935, by attorney Raphael Dechter, to the following effect: that unless it was signed, respondents would cause an order to show cause to be issued by the federal court to Katie M. Eustace, citing her for contempt of court for perjury and would send her to jail for such contempt; that they would cause appellant's assignor, John M. Eustace to be cited for contempt of court for changing the lock on the plumbing shop after the receiver took possession thereof; that they would cause Katie M. Eustace and Charles W. Fourl (her attorney) to be cited for contempt of court for the removal of certain property from the receiver's possession and would cause said Katie M. Eustace and Charles W. Fourl to be confined at McNeil's Island for these acts and for obstructing justice; and that they would cause Katie M. Eustace and J. A. Griffith (the latter a bookkeeper for the plumbing business) to be sent to prison for conspiracy to obstruct justice by concealing said Griffith from service of a federal bench warrant.

Because of these threats and representations, appellant contended that he and his assignor were accordingly justified in rescinding the release. Appellant then offered to prove an actual rescission in that shortly after the execution of said release, he in his own behalf and in behalf of his father, John M. Eustace, notified respondents that the release had been secured through fraud, menace, duress and threats, and that he was cancelling the same; that neither he nor the other signers of the release would be bound by its terms; furthermore, that the signers through their attorneys had advised Dechter and the respondents that the release had been obtained through fraud and they would no longer be bound by it. Appellant further offered to prove that there was no valuable consideration passing to anyone for said release and that following its execution an order to show cause was procured from the federal court in bankruptcy ordering all creditors to show cause why the bankruptcy proceeding should not be dismissed, and that in pursuance thereof said proceeding was dismissed in March of 1935.

Following these offers of proof and argument of counsel, the court directed the jury to bring in a verdict in favor of respondents, on the ground that the decisions of the Supreme Court in Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708, and Winstanley v. Ackerman, 110 Cal.App. 641, 294 P. 449, were controlling, and that, as no notice of rescission or offer to restore had been given, as required under section 1691, of the Civil Code, appellant could not escape the effect of said release.

From the order directing the verdict and from the judgment entered pursuant thereto, this appeal is prosecuted.

Section 1691 of the Civil Code reads as follows:

"*Rescission, how effected.* Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"1. He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and

"2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

Appellant urges that (1) compliance with the terms of section 1691, supra, was not a prerequisite to commencement of the instant action; (2) that the release was illegal and void; (3) that where the offers of proof showed that threats were made to secure the release, it was error for the court to take the case from the jury; (4) that the release was for past acts only and did not relieve respondents of liability for acts committed subsequently; (5) the court erred (a) in disallowing the amendment to the complaint as to respondent L. A. Wagner, and (b) in excluding appellant's assignment of the cause of action and the certificate of fictitious name.

In connection with his first point, appellant contends that under the facts of his case no formal notice of rescission was necessary, and even in the event it was required, that he gave respondents sufficient notice thereof; further, that restoration or offer to restore benefits received was not a prerequisite to suit for the reason that nothing of value was received, therefore restoration was impossible.

[1] The weakness of appellant's argument lies in the fact that although he offered to prove that the release in question was executed on January 29, 1935 and that the signers thereof gave oral notice of their election to rescind it "shortly after" its execution upon the ground it was procured through fraud and duress, he apparently lost sight of the fact that the dismissal was not effected until sometime during the month of March, 1935, resulting in the plumbing business being restored to appellant's assignor by the receiver in bankruptcy on May 15, 1935. In other words, having given notice that he would not be bound by the terms of the release, as he claims, he remained passive for something like two months, and thereafter accepted all of the benefits accruing to him through the dismissal of the bankruptcy matter and the restoration to him of the property held by the receiver.

[2, 3] As was so aptly stated in Oppenheimer v. Clunie, 142 Cal. 313, at page 320, 75 P. 899, at page 902, quoting from Pomeroy's Equity Jurisprudence: "'The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it,

and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligation by a rescission or a refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations.' "

Again in Blackburn v. McCoy, 1 Cal. App.2d 648, at page 658, 37 P.2d 153, at page 157, the court quoting from Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54, stated: " 'We do hold that where a party, with full knowledge of all the material facts, does an act which indicates his intention to stand to the contract and waive all right of action for fraud, he cannot maintain an action for the original wrong. * * * Where the affirmance of the contract is equivalent to a ratification, all right of action is gone. * * * Nor are we unmindful of the settled rule that the defrauded party has an election of remedies. * * * We do decide that where a party with full knowledge declines to repudiate a transaction known to him to be fraudulent, and fully and expressly ratifies it, he can neither rescind, nor maintain an action for damages.' "

From the foregoing, it would appear, that the acceptance by appellant and his assignor of the benefits of the contract of release subsequent to the attempted rescission amounted to a waiver of the right to assert the invalidity of the release and constituted a ratification of its terms.

[4] With respect to appellant's point that the court erred in refusing leave to amend the complaint by inserting therein the name of Lotta Wagner as a party defendant in the place of One Doe, it is shown by the testimony of appellant that he had known Lotta Wagner for fifteen years prior to the date of the filing of said complaint, and that he gave as his reason for not naming her a defendant the fact that his attorney had advised him he did not think he had a cause of action against her "due to the fact that she wasn't one of the creditors that closed the business up". Moreover, it is clear from the record not only that appellant was well acquainted with said Lotta Wagner, but that she was a defendant in an action for malicious prosecution brought by appellant's mother, Katie M. Eustace, as result of the bankruptcy proceeding herein referred to. In the circumstances, the refusal of the trial court of leave to amend the complaint did not constitute prejudicial error.

[5] The attempted appeal from the order directing the verdict is dismissed. The judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

43 Cal.App.2d 711

REDMOND v. CITY OF BURBANK.

Civ. 12856.

District Court of Appeal, Second District,
Division 2, California.

March 26, 1941.

Rehearing Denied April 21, 1941.

Hearing Denied May 22, 1941.

1. Appeal and error 🔑1010(1)

If there be substantial evidence to support a finding of fact, it will not be disturbed.

2. Appeal and error 🔑996

That an inference contrary to that deduced by the trial court might have been drawn by another reasonable mind will not justify a reversal.

3. Municipal corporations 🔑800(1)

Negligence of city in permitting dangerous condition in sidewalk to continue was the "proximate cause" of injury sustained by pedestrian during very dark night when she fell on a stone wall approximately 15 inches in height, placed directly across her path and on realty dedicated for sidewalk uses.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

4. Municipal corporations 🔑806(2)

A traveler in the nighttime, in the absence of knowledge to the contrary, has the right to assume that a sidewalk located in a city is in a reasonably safe condition for travel.

5. Municipal corporations 🔑806(2)

A traveler in the nighttime is not bound to anticipate obstructions in a sidewalk in a city.

6. Municipal corporations ⚷777

When a pedestrian in the darkness of night, while exercising ordinary care, falls on a sidewalk over an obstruction existing by reason of the negligence of the city, the city is liable.

7. Municipal corporations ⚷777

A city which permitted a stone wall approximately 15 inches in height to be placed directly across path of pedestrian, and on realty dedicated for sidewalk uses, was guilty of negligence rendering it liable to the pedestrian for injuries sustained when she fell on the stone wall during very dark night.

8. Negligence ⚷134(11)

The rule that a plaintiff must prove in a personal injury action that the negligence of the defendant is the proximate cause of the injury suffered does not require demonstration of the connection between the proved negligence and the resultant injury.

9. Negligence ⚷134(11)

The rule that a plaintiff must prove that the negligence of the defendant is the proximate cause of the injury suffered does not require that an eyewitness be produced to testify directly to the fact, and circumstantial evidence alone, if convincing, is sufficient.

10. Municipal corporations ⚷803(2)

A pedestrian lawfully using a public sidewalk in the darkness is not guilty of contributory negligence where, without notice of its presence, he falls over an obstruction, and he is entitled to recover from city for his injuries.

11. Municipal corporations ⚷803(2)

A pedestrian lawfully using a public sidewalk in a city in the darkness is required to use such caution as an ordinarily prudent person exercises under similar circumstances.

12. Municipal corporations ⚷819(7)

In action by pedestrian against city to recover for personal injuries suffered while walking along sidewalk during very dark night, city's defense of contributory negligence was required to be established affirmatively by a preponderance of the evidence, unless negligence of pedestrian could fairly be inferred from evidence adduced to establish the pedestrian's own case.

13. Municipal corporations ⚷817(3)

In action by pedestrian against city for personal injuries suffered from a fall while she was walking along sidewalk during a very dark night, city, before it could prevent her recovery, was required to show that negligence, if any, of pedestrian contributed directly and proximately to cause her fall over obstruction in walk.

14. Municipal corporations ⚷819(7)

In action by pedestrian against city for injuries suffered when she fell during very dark night on a stone wall approximately 15 inches in height placed directly across her path and on realty dedicated for sidewalk uses, evidence was insufficient to establish that pedestrian's negligence, if any, contributed to the fall.

15. Municipal corporations ⚷819(8)

In personal injury action against city, wherein plaintiff testified that she appeared before a notary public to subscribe and make oath to claim filed with city council, trial court did not err in finding that a proper verified claim was presented to the city council, notwithstanding that plaintiff during the course of a former trial, under cross-examination, stated that she never appeared before a notary public to sign the document. Gen.Laws 1937, art. 5149.

16. Appeal and error ⚷931(1)

All intendments must be resolved in favor of the correctness of the findings of the trial court.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Alice Redmond against the City of Burbank for damages on account of personal injuries suffered by the plaintiff from a fall while walking along a sidewalk in the City of Burbank. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Ralph W. Swagler, City Atty., of Burbank, for appellant.

Fred W. Chase, of Glendale, for respondent.

MOORE, Presiding Justice.

Plaintiff prosecutes this action for damages on account of personal injuries suffered from a fall while walking along and upon a sidewalk in the city of Burbank.

About 9 o'clock p. m., April 28, 1936, while proceeding normally along the south side of 10th street in Burbank, she crossed the 10-foot alley which intersected the sidewalk. In proceeding upon her course and as she was about to step from the alley at a point where the sidewalk should have continued, she fell upon a stone wall approximately 15 inches in height, placed directly across her path and on land dedicated for sidewalk uses. It was a very dark night and plaintiff was wholly unfamiliar with the sidewalk and its obstruction. There were no lights, no guard rails or precautions of any kind to safeguard the pedestrian at that point.

Plaintiff promptly filed with the clerk of the city a claim for damages, which claim was disallowed by the city council on the 21st day of July, 1936.

The city had notice of the continued existence and of the dangerous obstruction and had failed to remedy the defect within a reasonable time after such notice. The court found that by reason of the negligence of the City of Burbank in permitting the wall to be so maintained, plaintiff sustained physical injuries, pain and suffering. From the findings so made, the court concluded that the city was negligent in permitting the defective and dangerous condition to continue without a warning thereof and that such negligence was the proximate cause of plaintiff's injuries.

The questions for our determination are: (1) whether the evidence is sufficient to support the findings that the alleged dangerous condition of the sidewalk was the proximate cause of plaintiff's injuries, and (2) whether a verified claim was filed with the city.

[1, 2] If there be substantial evidence to support a finding of fact, it will not be disturbed by the appellate court. Beck v. Sirota, 42 Cal.App.2d 551, 109 P.2d 419; Restrepo v. Weber Baking Co., 115 Cal. App. 111, 300 P. 980. Because an inference contrary to that deduced by the trial court might have been drawn by another reasonable mind, that will not justify a reversal. Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 86 P.2d 829.

[3-9] The negligence on the part of the city in permitting the dangerous condition in the sidewalk to continue was the proximate cause of the injury. A traveler in the nighttime, in the absence of knowledge to the contrary, has the right to assume that a sidewalk is in a reasonably safe condition for travel. He is not bound to anticipate obstructions on a sidewalk. 43 Cor.Jur. 1095. When a pedestrian, in the darkness of night, while exercising ordinary care falls over an obstruction in a sidewalk existing by reason of the negligence of the city, the municipality is liable. Seward v. Wilmington, 2 Marv. 189, 16 Del. 189, 42 A. 451. Suddenly and without warning, plaintiff encountered the wall in the darkness and fell. In falling she was injured. To state the simple facts fastens the negligence of the city to the injuries of plaintiff. The rule that plaintiff must prove that the negligence is the proximate cause of the injury suffered (Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 P. 480) does not require demonstration of the connection between proved negligence and the resultant injury. It is not necessary that an eyewitness be produced to testify directly to the fact. Circumstantial evidence alone, if convincing, is sufficient. County of Alameda v. Tieslau, 44 Cal.App. 332, 337, 186 P. 398. A consideration of the usual propensities of mankind warrants the inference that the plaintiff would have attempted to avoid colliding with the rock wall and also that if the wall had been lighted her attention would have been directed to it. Id.

[10-14] A pedestrian lawfully using a public sidewalk in the darkness is not guilty of contributory negligence where, without notice of its presence, he falls over an obstruction. 19 Cal.Jur. 147. Under such circumstances, he is required to use such caution as an ordinarily prudent person exercises under similar circumstances. The defense of contributory negligence must be affirmatively established by a preponderance of the evidence unless such negligence of plaintiff can fairly be inferred from evidence adduced to establish plaintiff's own case. Whatever negligence of plaintiff may have been shown, before it can prevent her recovery, it must be shown to have contributed directly and proximately to cause her to fall over the obstruction. Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066. The evidence abundantly supports the decision of the trial court which found as facts that the obstruction complained of was the proximate cause of plaintiff's injuries and that no negligence of plaintiff contributed thereto.

The authorities cited by defendant—Asher v. Pacific E. Elec. Ry. Co., 42 Cal. App. 712, 187 P. 976; Luman v. Golden Ancient Mining Co., 140 Cal. 700, 74 P.

307; Puckhaber v. Southern Pac. Co., supra—do not avail defendant because in all of them but one the evidence was insufficient to convince the trial court that the negligence complained of was the proximate cause of plaintiff's injuries. In the Puckhaber case, the Supreme Court demonstrated that the evidence was wholly insufficient to warrant an inference that the negligence complained of could have been the proximate cause of the death of plaintiff's son.

[15] The contention that a verified claim was never presented to the city council was decided against the defendant upon contradictory evidence. A claim in proper form and content in every respect is found in the record. Act 5149, Deering's General Laws. The plaintiff at one time during the course of a former trial, under cross-examination, stated that she never appeared before a notary public to sign the document. But on the last trial, she testified clearly that she did appear before the notary public to subscribe and make oath to the affidavit. Her testimony satisfied the trial court.

[16] In view of the doctrine that all intendments must be resolved in favor of the correctness of the findings, this court should not interfere.

Judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

43 Cal.App.2d 482

PEOPLE v. ONE 1933 BUICK SEDAN et al.

Civ. 11485.

District Court of Appeal, First District, Division 2, California.
March 17, 1941.

1. Forfeitures 🔑5

In proceeding to forfeit automobile used in illicit traffic in narcotics, evidence that conditional seller of automobile required buyer to execute questionnaire and that persons named therein were thereafter interviewed and spoke favorably of buyer's moral responsibility, character and reputation, except that he had been a card dealer in a tavern, established that reasonable investigation had been made before making sale by seller and finance corporation claiming automobile. St.1939, p. 767, § 11610 et seq.; p. 768, § 11620.

2. Forfeitures 🔑5

In proceeding to forfeit automobile for use in illicit traffic in narcotics, wherein finance corporation claimed interest in automobile, no presumption or inference against buyer of automobile could be predicated on fact that he had been a card dealer in a tavern. St.1939, p. 768, § 11620.

3. Forfeitures 🔑5

In proceeding for forfeiture of automobile, it was for trial court to weigh facts relating to finance corporation's claim to automobile. St.1939, p. 768, § 11620.

4. Forfeitures 🔑3

The fact that conditional seller's investigation of purchaser of automobile disclosed that purchaser was a card dealer did not constitute "constructive notice" to seller and finance corporation that automobile, which the People sought to forfeit, was intended to be used in unlawful transportation of narcotics. St.1939, p. 767, § 11610 et seq.; p. 768, § 11620; Civ.Code, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

5. Notice 🔑6

To charge one with "notice" the facts must be such as ordinarily to excite inquiry with reference to the particular fact which inquiry is designed to elicit. Civ.Code, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

6. Forfeitures 🔑3

Although the fact that purchaser of an automobile has been a card dealer might arouse a suspicion that automobile was to be used in illicit traffic in narcotics, a mere suspicion is insufficient basis for denying claim of conditional seller, or finance company in proceeding for forfeiture of automobile. St.1939, p. 767, § 11610 et seq.; p. 768, § 11620; Civ.Code, § 19.

7. Forfeitures 🔑5

Whether conditional seller of automobile and finance corporation claiming interest in automobile in proceeding for forfeiture thereof had knowledge at time of sale that automobile was intended to be used in unlawful transportation of narcotics was a question of fact, and determination of trier of facts was controlling on appeal. St.1939, p. 767, § 11610 et seq.; p. 768, § 11620.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by the People against One 1933 Buick Sedan, Engine No. 2849843, to obtain a judgment of forfeiture for unlawful use of automobile in transportation of narcotics, wherein the General Motors Acceptance Corporation filed a claim. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Robert G. Partridge, and Leo M. Cook, both of San Francisco, for claimant and respondent.

STURTEVANT, Justice.

The plaintiff brought this action under the provisions of division X, chapter 7, article I of the Health and Safety Code, St. 1939, p. 767, to obtain a judgment of forfeiture. The action was tried by the trial court sitting without a jury. Later it made findings against the plaintiff and from the judgment entered on the findings the plaintiff appealed. The findings included the following:

"V. That it is true that the said H. E. Hauger and the said General Motors Acceptance Corporation at the time of said sale and the creation of said conditional sales contract had no knowledge that the said automobile was intended to be used or would be used thereafter in the unlawful transportation of narcotics.

"VI. That it is true that said conditional sales contract was signed and entered into by H. E. Hauger after a reasonable investigation by the said H. E. Hauger and General Motors Acceptance Corporation of the moral responsibility, character and reputation of the purchaser thereof, towit, the said William Steele."

[1] All parties concede that the substantive law, on the subject of forfeiture, has been settled. But the case presents questions of practice and procedure. The plaintiff contends that those two findings are not sustained by the evidence and that the judgment should be reversed. In section 11620 it is provided: "The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged." In brief said statute imposes on the claimant who would resist a forfeiture to prove that his title "* * * was created (1) after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, (2) and without knowledge that the vehicle was being, or was to be, used for the purpose charged." (Parentheses ours.)

William Steele was the purchaser. At Klamath Falls in Oregon he bought the car from H. E. Hauger, who is engaged in dealing in second-hand automobiles. After Hauger had negotiated a conditional sales contract he assigned his contract to General Motors Acceptance Corporation, the intervener.

[2, 3] Before making the sale Hauger caused Steele to execute a questionnaire or statement regarding his prior activities, employments, and acquaintances. Later Hauger interviewed the persons named. The persons named who were in San Francisco were interviewed by the agents of General Motors Acceptance Corporation. Hauger interviewed C. A. McCleery, Harry Mozier, Sub Ebinger, Frank Carey, Mel Thurston, Jess Knighton, Wiley Knighten, Paul Williams, Shorty Cleek, and Chester N. Weaver, and the keepers of records of crimes and traffic offenses at Klamath Falls. Said persons included Steele's taxi drivers, employees, boarding house keeper and known associates. The population of Klamath Falls does not appear. There is no showing that the persons interviewed were not representative of the neighborhood in which Steele lived. Each of the said persons spoke favorably of the moral responsibility, character, and reputation of Steele except as follows. Both in the written statement Steele made, and in the interviews Hauger made, it transpired that Steele had been a card dealer in a tavern. That fact considered, together with other

testimony, raised a conflict in the evidence. Not every card dealer is a man of bad moral character. No presumption or inference against him may be predicated on that fact. Furthermore, it was for the trial court to weigh the facts. We are unable to say that finding VI was not sustained by the evidence.

[4-7] After Steele had purchased the 1933 Buick it was registered in Oregon and was licensed in that state. Later it was brought into this state. While here and while being operated by one Conboy the act of illegal use was performed. Who Conboy is, what his relations to Steele may or may not be, the record is wholly silent. Under all of the foregoing facts the trial court made finding V. The plaintiff also attacks it. The plaintiff stresses the fact that when Hauger was making the investigation above mentioned he was informed that at times the purchaser, Steele, had been a "card dealer"—that such was his occupation at the time he purchased the car. The plaintiff then earnestly contends that such fact was constructive notice from which it necessarily follows that Hauger and General Motors Acceptance Corporation had implied knowledge and that therefore said finding is not sustained by the evidence. We find no merit in that contention. To invoke the principle contended for the record must show some fact or facts, inquiry about which will be relevant to knowledge of the fact which is to be elicited. Civ. Code § 19. "To charge one with notice 'the facts must be such as ordinarily to excite inquiry with reference to the particular fact which the inquiry is designed to elicit.'" Zeller v. Milligan, 71 Cal.App. 617, 624, 236 P. 349, 352. On the mere fact that one has been a card dealer it may not be assumed, as a matter of law, that if he buys an automobile it will be used in illicit traffic in narcotics. The most that could be said would be that a suspicion might be aroused, but a suspicion is not enough. Vassault v. Austin, 36 Cal. 691, 698; Goodman v. Simonds, 61 U.S. 343, 363, 20 How. 343, 15 L.Ed. 934. The question is primarily one of fact and the determination of the trier of the facts is controlling in this court. Merrill v. Pacific Transfer Co., 131 Cal. 582, 587–589, 63 P. 915.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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43 Cal.App.2d 541

FESLER v. RAWLINS et al.

Civ. 12797.

District Court of Appeal, Second District, Division 1, California.

March 18, 1941.

1. Quieting title ⟹44(2)

In suit to quiet title to oil well derrick and drilling equipment, exclusion of evidence that defendants were in possession of and were using the property was proper, since operation of well did not tend to establish ownership of property. Code Civ.Proc. § 738.

2. Evidence ⟹471(2)

Objections to questions asked witness as to whether defendants operated their business under a fictitious name were properly sustained, since questions called for a conclusion of the witness.

3. Quieting title ⟹44(2)

In suit to quiet title to oil well derrick and drilling equipment, testimony sought to be elicited as to whether witness owned an overriding royalty in production of well was not relevant to prove ownership of property. Code Civ.Proc. § 738.

4. Principal and agent ⟹22(1)

In suit to quiet title to property purchased by plaintiff at execution sale, where defendants claimed that judgment debtor was their agent, testimony that judgment debtor stated to witness that he was acting as agent in purchase of property was inadmissible, since agency cannot be established by agent's declarations not under oath or in presence of principal.

5. Appeal and error ⟹1058(2)

In suit to quiet title to oil well derrick and drilling equipment, there was no prejudicial error in alleged refusal of court to permit one of defendants to testify to his ownership of property, where record indicated that witness had testified that he was owner of personalty at oil well and that motion to strike was made, but did not show that motion had been granted. Code Civ. Proc. § 738.

6. Evidence ⟹471(26)

In suit to quiet title to personal property, court properly refused to permit witness testifying as to his interest in property, to give his opinion or conclusion as to ownership of remaining interest.

7. Execution ⟹283

Evidence relating to ownership of oil well equipment which plaintiff had purchased at execution sale justified judgment for plaintiff in suit to quiet title against defendants who claimed that purchase of equipment by judgment debtor had been made by him as their agent with funds furnished by them. Code Civ.Proc. § 738.

◆

Appeal from Superior Court, Santa Barbara County; C. Douglas Smith, Judge.

Suit by John Fesler against George Rawlins and others to quiet title to an oil well derrick and drilling equipment. Judgment for the plaintiff, and the defendants appeal.

Judgment affirmed.

M. R. Van Wormer, of San Luis Obispo, for appellants.

Fred A. Shaeffer, of Santa Maria, for respondent.

WHITE, Justice.

The plaintiff and respondent herein, being the holder of a judgment against Pima Drilling Company and Frederick Libby, caused a writ of execution to be issued and a levy to be made upon an oil well derrick and drilling equipment located at a well being operated by the judgment debtors in Santa Barbara County. Following such levy, and on April 27, 1938, the property was duly sold at an execution sale to the plaintiff, the highest bidder. At such sale counsel for appellants appeared and informed plaintiff's counsel that title to said property was claimed by appellants, but no third party claim was filed in their behalf. Upon receiving the constable's certificate of sale, plaintiff commenced the present action, pursuant to section 738 of the Code of Civil Procedure, to quiet his title to the property against the claims of defendants and appellants herein, who appeared and by their answer admitted that they claimed some interest in the property adverse to plaintiff and denied that plaintiff had any title thereto. After trial before the court without a jury, judgment was rendered for the plaintiff, from which judgment defendants prosecute this appeal.

Evidence was adduced by plaintiff at the trial that most of the property involved had been sold under a conditional sales contract dated March 1, 1938, between one Wilson as seller and "Pima Drilling Company, by Frederick Libby" (the judgment debtors), as buyer, and several invoices dated from December, 1937, to April, 1938, indicating the sale of other oil well equipment to Pima Drilling Company, were introduced in evidence. It was further shown that other of the equipment had been sold to Pima Drilling Company by the Gilmore Oil Company, and a contract of purchase in the form of a letter was introduced in evidence. This contract was executed by "Pima Drilling Company, by Frederick Libby, by E. Taylor, Frederick Libby and R. B. Rawlins", and affixed thereto was the corporate seal of Pima Drilling Company. The plaintiff thereupon rested.

[1, 2] The defense relied upon by appellants at the trial was that the judgment debtor Libby was their agent, operating the well on their behalf, and that the property involved was purchased by him as their agent with funds furnished by them. The alleged errors upon which appellants rely for reversal relate to the rejection of evidence offered by them in connection with this defense. Their first assignment of error is that the court "refused to hear evidence tending to prove that the defendants were in possession"; that "evidence of the possession and use of personal property is relevant evidence of the ownership thereof". In connection with this assignment of error, appellants point to the action of the trial court in sustaining objections to the proffered testimony of the witness Mrs. Dollie Adams, who, after testifying that she commenced to operate the well in question during the summer of 1938 and that in connection therewith she dealt with defendants Mead, Rawlins, Cusick and O'Neill, whom she met in Arizona, was prevented by objection from testifying that after such negotiations in Arizona she commenced the operation of the well. In sustaining objection to this line of testimony the trial court was correct, because the operation of the well did not tend to establish ownership of the personal property here in question. Objections to further interrogatories propounded to the witness as to whether the defendants whom she met in Arizona operated their business under a fictitious name were properly sustained. These questions clearly called for a conclusion on the part of the witness.

[3, 4] Neither was the testimony sought to be elicited from the witness L. T. Thompson as to whether he owned an over-

riding royalty in the production of the well competent or relevant to prove ownership of the property involved in this litigation. Equally inadmissible was the evidence by which appellants sought to establish the fact that in conversations with the witness Thompson, Frederick Libby, one of the judgment debtors in the original judgment obtained by plaintiff herein, had stated that in the purchase of the personal property he, Libby, was acting merely as an agent for other persons. It is axiomatic that agency cannot be established by the declarations of the agent not under oath or in the presence of the principal. As stated in 1 Cal. Jur. 698, "if the rule were otherwise any rogue could use the name of an honest man to facilitate his roguery".

[5, 6] Finally, appellants assert that the court committed prejudicial error in not permitting E. T. Cusick, one of the defendants, to testify to his ownership of the personal property. In this connection, as we read the record, we find that the court did permit this witness to testify that he was the owner of a 5½% interest in both the well and in "the personal property situate at the well and described in the complaint in this case". True, a motion was made to strike this testimony from the record, and a ruling thereon was reserved by the trial court. However, nowhere does it appear that such motion to strike was granted. It requires no citation of authority for the statement that the court was correct in its rulings by which this witness was precluded from giving his opinion or conclusion as to who owned the remaining interests in the personal property. Furthermore, the witness Dollie Adams was permitted to and did testify that Frederick Libby never claimed any ownership in the personal property, and also that Libby had stated to such witness that "Ben O'Neill, Mr. Cusick, Gregory Rawlins, with Mr. Verch (defendant Burch) and two other men, had put up all the money to do the work. That he (Libby) operated the Pima Drilling Company only as a drilling concern and did the superintending of the work for those men. Mr. J. B. Mead acted as trustee and disbursed all the money. The money was sent to Mr. Libby, with which he paid the bills as he incurred them around Santa Maria for supplies."

[7] There being present in the record substantial evidence showing that the personal property sold by the constable was owned by Pima Drilling Company and Frederick Libby, and finding no prejudicial error in the rulings of the trial court, the judgment appealed from must be affirmed. It is so ordered.

We concur: YORK, P. J.; DORAN, J.

HALL v. CITY OF LOS ANGELES.

Civ. 12815.

District Court of Appeal, Second District, Division 2, California.

March 17, 1941.

Hearing Granted May 16, 1941.

1. Municipal corporations ⇨812(2)

Compliance with statute relating to claims for personal injuries against municipalities is "mandatory" and there must be at least a substantial compliance with its provisions before a suit for damages for personal injuries resulting from a defective sidewalk or street may be maintained against a city. Gen.Laws 1937, Acts 5149, 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Municipal corporations ⇨812(7)

Under statute relating to claims for personal injuries against municipalities, claim for injuries allegedly resulting from defective condition of sidewalk was fatally defective where it did not state place of accident, and the "substantial compliance" doctrine was not applicable. Gen.Laws 1937, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Compliance".

3. Municipal corporations ⇨812(7)

The entire failure to designate in claim against city for personal injuries allegedly resulting from defective condition of sidewalk the place where the accident occurred precluded maintenance of personal injury action against city. Gen.Laws 1937, Act 5149, § 1.

4. Municipal corporations ⚷812(5)

Where claim against city for personal injuries allegedly resulting from defective condition of sidewalk did not designate place where accident occurred, the city's action in investigating and rejecting the claim did not operate as a "waiver" of defect in the claim. Gen.Laws 1937, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

5. Municipal corporations ⚷741(3)

A city is powerless to waive a compliance with the statute relating to claims for personal injuries against municipalities. Gen. Laws 1937, Act 5149.

6. Municipal corporations ⚷741(1)

Actual knowledge on part of city officials of facts required to be stated in claim against city for personal injuries does not dispense with the filing of a proper claim. Gen.Laws 1937, Act 5149.

7. Municipal corporations ⚷816(7)

In action against city for damages for personal injuries allegedly resulting from defective condition of sidewalk, the city was not "estopped" from raising defense of insufficiency of claim because of city's failure to specially plead such defense in its answer, since sufficiency of plaintiff's claim was placed in issue by city's general denial of plaintiff's allegation that she had filed her claim with city. Gen.Laws 1937, Acts 5149, 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

8. Municipal corporations ⚷817(1)

In pedestrian's action against city for personal injuries allegedly resulting from defective condition of sidewalk, the pedestrian had burden of proving compliance with statute relating to claims for personal injuries against municipalities. Gen.Laws 1937, Acts 5149, 5619.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Personal injury action by Mary E. Hall against the City of Los Angeles. From an adverse judgment, plaintiff appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., Norman Brand, Deputy City Atty., and Louis A. Babior, Deputy City Atty., all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff has appealed from a judgment of dismissal entered in her action to recover damages for personal injuries alleged to have resulted from the defective condition of a sidewalk under the control of the defendant city.

Plaintiff suffered her injuries on September 14, 1938, when she slipped on some mud or other slippery substance which was covered with leaves or debris. She seeks to recover damages under the provisions of the Public Liability Act of 1923. Deering's Gen.Laws, Act 5619. The complaint contains the allegations usual in such actions and in particular it is alleged that the accident occurred on the sidewalk at the corner of Union drive and Sixth street in the city of Los Angeles and that plaintiff had regularly filed her claim for damages with the defendant city. In its answer defendant denies all of the material allegations of the complaint. Upon the issue as to the regularity of the claim filed with defendant plaintiff proved that on November 9, 1938, the following verified claim for damages was filed with defendant: "To Mrs. Mary E. Hall Address c/o Porter C. Blackburn 1314 Washington Bldg., Los Angeles Sept. 14, 1938 Personal injuries received from slipping on sidewalk which was covered with mud, leaves and debris, resulting in injury and fracture to spinal column: Damages: Medical Expenses 500 Permanent Injury 5000 Loss Of Earnings 2500—$8000.00".

Defendant objected to the introduction of any further evidence on behalf of plaintiff on the ground that the foregoing claim failed to state the place where the accident happened and therefore did not comply with the provisions of the 1931 statute, Deering's Gen.Laws, Act 5149, relating to claims for personal injuries against municipalities. Prior to a ruling by the court on such objection plaintiff offered in evidence the following letter which she had received from the city clerk of defendant city about two weeks before the present action was commenced: "Greetings: At the meeting of the Council held this day, the following report of the Finance Committee, was adopted: 'In the matter of the claim of Mary E. Hall, in the amount of $8,000.00, for damages because of personal injuries alleged to have been received when she slipped on a muddy sidewalk at the corner of Union Drive and Sixth Street, on September 14, 1938: The City Attorney reports that after making a complete investigation of this matter, he is of the opinion that there is no municipal liability involved, and recommends that the claim be denied. We recommend in view of the City Attorney's report that said claim be denied and the matter filed.'" The court sustained defendant's objection and thereafter entered the judgment of dismissal from which the appeal is taken.

We are called upon to decide whether or not the claim filed by plaintiff sufficiently complies with the provisions of Deering's General Laws, Act 5149, to enable her to maintain this action. Section 1 of this act provides: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." Defendant contends that the failure of plaintiff to specify the place of the accident in the claim is fatal to her right to maintain the present action.

[1] Compliance with the statute referred to is mandatory and there must be at least a substantial compliance with its provisions before a suit for damages for personal injuries resulting from a defective sidewalk or street may be maintained against the city. Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216.

[2] It is contended by plaintiff that the notice in question substantially complied with the requirements of the act and that since the city officials actually investigated and discovered the place where the accident occurred, the city was not misled by her failure to designate the place of the accident in the claim. In support of this proposition plaintiff relies principally upon Sandstoe v. Atchison, T. & S. F. Ry. Co., supra, and Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29. In the Sandstoe case this court held that a claim (apparently complete and regular on its face) which was filed in duplicate with the city controller and the city clerk at the same time substantially complied with the requirement of the city charter that the claim must be filed with the legislative body within 30 days after rejection by the city controller. The claim under consideration in the Kelso case met the statutory requirements in all respects except that it was verified by plaintiff's father instead of by the minor plaintiff and it was held that a substantial compliance with the requirements of the statute had been made. It will be noted that in each of these cases the legal requirements relating to the manner in which the claim must be presented and the form thereof were complied with, although defectively in one respect. In the present case there is an entire failure on the part of plaintiff to comply with the important mandate of the statute which requires the place of the accident to be specified in the claim.

The doctrine of substantial compliance is not applicable to the present situation, which is governed by the principles enunciated in Cooper v. County of Butte, supra, and Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320. In each of these cases it was held that the filing of an unverified claim is not a substantial compliance with the requirements of the statute. The failure to state the place of the accident is as serious a defect as is the failure to verify the claim. Indeed no part of the claim can be of more importance to the city officials than that part which gives them information to enable them to locate the point where the alleged accident occurred and to make proper investigation of the condition of the premises. In a number of jurisdictions it has been held that a claim is fatally defective if it fails to designate the place of the accident in such manner as to enable the officials to locate it. Atkinson v. City of Indianapolis, 101 Ind.App. 620, 199 N.E. 157; Cronin v. City of Boston, 135 Mass. 110; Village of Dawson v. Estrop, 243 Ill.App. 552; Benson v. City of Madison, 101 Wis. 312, 77 N.W. 161; Reichert v. City of Chicago, 169 Ill. App. 493, and Purdy v. City of New York, 193 N.Y. 521, 86 N.E. 560, 561.

[3] We must therefore hold that the entire failure to designate in the claim the place where the accident occurred constituted such a failure to comply with the statutory requirements as to preclude plaintiff from maintaining the present action.

[4-6] Plaintiff's contention that defendant by investigating and rejecting the claim waived any defects therein cannot be sustained. In the Spencer case, supra, an unverified claim was filed with the city and after investigation the city made an offer of compromise which plaintiff rejected. At no time did the city object to the defective form of plaintiff's claim. In holding that the city was not estopped to assert the defense of failure to comply with the statutory requirements relative to the claim the court observed that the city was powerless to waive compliance with the statutory provisions. The holding of the Spencer case was expressly approved by the Supreme Court in Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353, and was declared to be the law in all cases coming within its purview. Since the city is powerless to waive a compliance with the statute, actual knowledge on the part of the city officials of the facts required to be stated in the claim does not dispense with the filing of a proper claim. Kline v. San Francisco Unified School District, Cal. App., 104 P.2d 661.

[7, 8] Plaintiff's final contention is that defendant is estopped to raise the defense of the insufficiency of the claim because of its failure to specially plead such defense in the answer. This proposition must be rejected for the question as to the sufficiency of plaintiff's claim was placed in issue by defendant's general denial of plaintiff's allegation that she had filed her claim with the city. Since the statutory requirements are mandatory and compliance therewith is a prerequisite to the maintenance of a suit for the damages claimed (Cooper v. County of Butte, supra, and Sandstoe v. Atchison, T. & S. F. Ry. Co., supra), the burden of proof of such compliance was on plaintiff. Since plaintiff failed to sustain this burden the court properly entered the judgment of dismissal.

The judgment is affirmed.

MOORE, Presiding Justice (concurring).

I concur.

It is earnestly contended that, because plaintiff was advised by the City Clerk that the Council had by resolution rejected her claim "after making a complete investigation", she should prevail notwithstanding the requirement of the statute to the effect that the "claim shall specify the date and place of the accident". In support of that contention, plaintiff cites numerous extra-California authorities. The reasoning of those decisions is interesting and intriguing. They appeal to one's sense of justice and fair dealing because we are accustomed to consider the application of the doctrines of equity and the principles of humanity in our treatment of one individual or corporation as against another. But in actions against a sovereignty or against any arm of it, we are met with the silent force not present in litigation among private parties, namely, the immunity of the sovereignty from tort actions save where they have been specifically authorized. When they are allowed, the permissive statute lays down the procedure which must be followed. It is a familiar rule that in making demands upon a municipality, pursuant to a statute which authorizes legal action on account of the defective condition of public places or property, compliance with the statute to the extent of including each item specified in the requirements is essential to the maintenance of an action. Officers of a municipality cannot by express writing waive these requirements. Osburn v. Stone, 170 Cal. 480, 150 P. 367. Though the city council had witnessed the accident of plaintiff and conveyed her from the scene, they would have been powerless to forego the inclusion in her demand of the date and place of the accident. If such omission be allowed in one case, the precedent will be followed in other cases.

The authorities cited to the effect that "substantial compliance with the statute is sufficient" in no case say that the omission of one of the particulars required by the statute in the statement of the claim will be condoned. The leading case cited by appellant (Bowles v. City of Richmond, 147 Va. 720, 129 S.E. 489, 133 S.E. 593) in support of her contention, held that the verification of the claim was not sacrosanct in view of the fact that the city investigated the claim and determined that it was not liable. But even in that case, the Virginia court of appeal said: "had the notice wholly failed to state where the accident occurred that omission could not be so remedied". The rule declared by the

Virginia court seems to have been generally followed in those instances where the legislative body of the city investigated an unverified claim and later rejected it. Hunter v. Village of Durand, 137 Mich. 53, 100 N.W. 191; Bowman v. Ogden City, 33 Utah 196, 93 P. 561; Lindley v. City of Detroit, 131 Mich. 8, 90 N.W. 665. In the case of Greenberg v. City of Waterbury, 117 Conn. 67, 167 A. 83, it was held that although the description of the place in the notice of claim is indefinite, it is a sufficient compliance if the city was not, because of the inaccuracy, prevented from protecting itself. It has long been the rule in this state that statutory or charter provisions, specifying particular requirements to be inserted in a claim against a municipality, must be strictly complied with. Spencer v. City of Calipatria, 9 Cal. App.2d 267, 268, 49 P.2d 320; Crescent Wharf & Warehouse Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028; Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345; Thompson v. County of Los Angeles, 140 Cal.App. 73, 78, 35 P.2d 185; Myers v. Hopland U. E. School District, 6 Cal.App.2d 590, 44 P.2d 654; Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516.

The rule with respect to substantial compliance urged by appellant may be stated as follows: Where an attempt is made to include within a claim for damages against a municipality all of the facts required specifically by the statute, some imperfection in the statement of any particular will not invalidate the claim. However, the rule established by the courts of this state seems to be that where there is a total failure to include one of the specified requirements, the defect in the form and content of the claim is fatal.

McCOMB, Justice (dissenting).

I dissent:

There are two rules supported by respectable authority which in my view are controlling in the present case.

First: Substantial compliance with the requirements of section 1 of Act 5149, Deering's General Laws (1937), is sufficient to permit an injured person to maintain an action against a municipality. (Kelso v. Board of Education, 42 Cal.App. 2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 220, 82 P.2d 216.)

Second: When a claim has been filed with a municipality, full investigation made thereof and the claim rejected for some reason not connected with the form of notice or its contents, the notice has performed its function and defects therein can no longer be relied upon to prevent a recovery. (Bowles v. City of Richmond, 147 Va. 720, 129 S.E. 489, 133 S.E. 593, 595; Bowman v. Ogden City, 33 Utah 196, 93 P. 561, 564; Nevala v. City of Ironwood, 232 Mich. 316, 205 N.W. 93, 94, 50 A.L.R. 1189; Greenberg v. City of Waterbury, 117 Conn. 67, 167 A. 83, 84; Lindley v. City of Detroit, 131 Mich. 8, 90 N.W. 665; Hunter v. Village of Durand, 137 Mich. 53, 100 N.W. 191, 192.)

Applying the foregoing rules to the facts of the present case, we find, as stated by this court in Sandstoe v. Atchison, T. & S. F. Ry. Co., supra, 28 Cal.App.2d at page 223, 82 P.2d at page 221, that "the purpose of filing a claim against the city is to enable city officials to make proper investigation concerning the merits of the claim and to settle it without the expense of a lawsuit if settlement should be shown to be proper". That such is the purpose underlying the requirement is clear. (Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377; Wagner v. City of Seattle, 84 Wash. 275, 146 P. 621, Ann.Cas.1916E, 720.)

From the statements contained in the letter in the present case from respondent's clerk notifying plaintiff of denial of her claim, it is apparent that respondent was not misled by failure of the claim to specify the place where the accident took place. The letter describes the precise place where the accident occurred and refers to a "complete investigation" of the matter by the city attorney. The purpose of the statute in requiring the filing of a claim was therefore in fact accomplished although the claim itself was defective. There is no evidence of any intention on the part of plaintiff to mislead defendant by filing a defective claim. So far as the record discloses, plaintiff filed such claim in a bona fide attempt to comply with the statutory requirements. Under such circumstances where, as here, there is no evidence that such claim did in fact mislead the municipality, it will be deemed sufficient to enable plaintiff to maintain an action against the city following the rejection of such claim. (Kelso v. Board of Education, supra; Sandstoe v. Atchison, T. & S. F. Ry. Co., supra.)

The principle underlying the rule is well stated in Decker v. City of Seattle, 80 Wash. 137, 141 P. 338, 339, at page 339, where it is said (quoting from Hammock v. Tacoma, 40 Wash. 539, 82 P. 893):

> "* * * where there has been a bona fide effort to comply with the statute, and there has been *no intention to mislead*, it is a sound and just rule which opens the door of the court to an inquiry whether the notice *did in fact mislead*. If it did not in fact mislead, but if its deficiencies or mistakes were helped out by other information given to the proper officers, or by other knowledge on their [the city's] part, no matter how acquired, then it would turn the statute into a mere trap for the ignorant and unskillful, to deprive them of a right of action because of failing to do something which caused the municipality no injury and put it to no disadvantage."

In addition, the case clearly falls within provisions of the second rule above stated to wit, that, where the municipality has, as in the present case, received a defective claim, made full investigation of the accident, and then rejected it for reasons other than a defect in the form of notice or its contents, the city is estopped from relying upon a defect in the notice of claim to prevent recovery in an action subsequently brought. (See numerous cases above cited.)

For the foregoing reasons in my opinion the judgment of the trial court should be reversed.

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43 Cal.App.2d 706

BRIGHT v. ZABLER et al.

Civ. 12837.

District Court of Appeal, Second District, Division 2, California.

March 26, 1941.

1. Appeal and error 🔑756

Where headings in appellant's opening brief did not show that propositions of law were presented, headings did not comply with court rule that brief or petition must present each point separately under an appropriate heading showing nature of question to be presented, or point to be made. Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2.

2. Appeal and error 🔑766

Although District Court of Appeal could not dismiss appeal because of failure of headings in briefs to disclose that propositions of law were presented, court could require briefs to be amended or supplementary briefs to be filed in order to cure defects. Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2.

3. Appeal and error 🔑931(1)

Where evidence in automobile accident case was conflicting, trial court was bound to resolve conflict, and on appeal District Court of Appeal was bound to assume that conflict was resolved in favor of prevailing party in trial court.

4. Appeal and error 🔑1011(1)

On defendants' appeal after judgment for plaintiff in action wherein evidence was conflicting, if there was competent evidence to support trial court's findings of fact, disregarding all conflicts and considering evidence most favorable to plaintiff, District Court of Appeal was bound to sustain findings.

5. Appeal and error 🔑996

On appeal from judgment in action wherein evidence was conflicting, District Court of Appeal was bound to accredit to trial court's findings of fact every reasonable inference from evidence, and the fact that some inference other than that which trial court drew might have been drawn from evidence would not justify interference with findings by District Court of Appeal.

6. Automobiles 🔑244(6, 36, 54)

In action for injuries sustained when plaintiff was struck by defendants' automobile while standing on shoulder of highway, evidence sustained finding that defendant driver was negligent, and that as a proximate result of such negligence plaintiff was injured, and that plaintiff was free from contributory negligence.

7. Automobiles 🔑244(59)

The "last clear chance" doctrine, which presupposes a situation where plaintiff has been negligent, and the "imminent peril" doctrine were not applicable in action for injuries sustained when plaintiff was struck by defendants' automobile while standing near edge of highway where evidence supported finding that plaintiff was free from contributory negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Imminent Peril" and "Last Clear Chance".

8. Automobiles 🔑244(40)

Evidence *held* not to sustain defendants' contention that injuries sustained when plaintiff was struck by defendants' automobile while standing near edge of highway were result of an unavoidable accident.

9. Damages 🔑130(3)

$2,100 was not excessive under the evidence for injuries consisting of fractures of right shoulder joint and of spine of scapula and injuries to head and abdomen.

◆

Appeal from Superior Court, Santa Barbara County; C. Douglas Smith, Judge.

Action by Harry F. Bright against Fred W. Zabler and another for injuries which plaintiff received when he was struck by defendants' automobile. From a judgment for plaintiff, defendants appeal.

Affirmed.

Joseph Seymour, of Riverside, for appellants.

Smith & Delwiche, of Santa Barbara, for respondent.

MOORE, Presiding Justice.

This is an appeal from a judgment in favor of plaintiff for $2,100 for personal injuries received when he was struck by an automobile driven by defendant, Fred W. Zabler. The judgment went against Alvina Zabler also because she was the owner of the automobile operated by her husband with her permission.

The collision of defendant's car with plaintiff occurred at four o'clock in the afternoon of July 27, 1939. At the time plaintiff was standing on the shoulder, just off the traveled portion of the state highway No. 101, at a point near Carpenteria in Santa Barbara county. He was engaged in conversation with one Willibrandt, the driver of a truck which was parked on the shoulder of the northerly side of the highway but off the traveled concrete portion thereof. Mr. Zabler was driving his car in excess of 35 miles per hour westerly on the concrete portion and within an area zoned for speed not to exceed 25 miles per hour. For some distance both east and west of the point where plaintiff stood the highway has three concrete lanes, each ten feet in width. Commencing at a line adjacent to the north lane, the asphalt shoulder extends out from the concrete seven or eight feet.

During his conversation with Willibrandt, plaintiff stood on the asphalt about one foot north of the pavement with his back to the highway. About 350 feet east of the same spot was a bridge. After crossing the bridge, defendant observed the truck parked on the asphalt. When he arrived at about 75 feet east of the parked truck, he saw plaintiff standing on the shoulder at the side of and facing the parked truck. After seeing plaintiff, Zabler had ample room to pass him and there was then nothing to prevent his driving upon any portion of the three lanes of pavement. However, defendant continued in his general westerly course in the north lane, and without giving any warning or without applying his brakes, veered sufficiently to strike plaintiff. At no time after defendant first observed plaintiff did the latter change his position until the Zabler car struck him. Neither the driver nor the injured man witnessed the impact but the evidence leaves no doubt and the court found that the Zabler car struck plaintiff causing him severe physical injuries, to-wit, fractures of the right shoulder joint and of the spine of the scapula and injuries to the head and abdomen.

[1, 2] Before discussing the merits of the appeal, we are constrained to impart some reflections upon the indisposition of counsel, which appears all too frequently, to follow the requirements of the court rules. Section 2 of Rule VIII of the Supreme Court and District Courts of Appeal provides: "The brief or petition must present each point separately under an appropriate heading showing the nature of the question to be presented or the point to be made." Although defendants attempted to assign a number of errors, they are not presented separately or under appropriate headings. Defendants' opening brief contains the following headings: "Statement of Questions Involved"; "Introductory Statement Regarding Facts"; "Theories Upon Which Case Was Tried"; "Points on Appeal"; "Observations"; "Factual Discussion"; "Comment"; and "Discussion of the Law and Citation of Authorities." No comment of this court is necessary

as to the inadequacy of the quoted phrases to comply with the court rules. Plaintiff's reply brief and defendants' closing brief in the same respect are likewise defective. None of them indicates that a proposition of law is in the offing. None discloses a disposition to comply with the rules or to minimize the labors of the court. While we may not dismiss an appeal because of such mechanical poverty of the briefs, those of the legal profession who are not habituated to the art of appellate procedure are reminded that under the section mentioned, as amended in 1937, we may require the brief to be amended or a supplementary brief to be filed in order to cure the defect. However, since the points discussed were not difficult of solution, we have abstained from penalizing the litigants by requiring a strict compliance with the rule.

We are to determine: (1) whether the proof supported the findings; (2) whether the plaintiff was guilty of contributory negligence; (3) whether the doctrine of the last clear chance and of imminent peril are applicable, and (4) whether the amount of the judgment is excessive.

[3-5] Although the finding is that Mr. Zabler so negligently operated his automobile that he caused it to strike plaintiff and that as a proximate result of such negligence plaintiff received his injuries and that plaintiff was free from contributory negligence, yet defendants contend that the court failed to find with respect to plaintiff's negligence. Contributory negligence was affirmatively pleaded in the answer and the court found that such allegations were untrue. Defendants also fervently argue that such findings are not supported by the evidence. They refer to portions of the testimony of various witnesses only to succeed in demonstrating that the evidence as to the manner in which the accident happened was conflicting in many respects. Under such circumstances it was the duty of the trial court to resolve the conflict and on appeal it must be assumed that the conflict was resolved in favor of the prevailing party. Cleveland v. Estate of Edwards, 16 Cal.App.2d 388, 60 P.2d 540. If there is competent evidence to support the findings of fact in question, disregarding all conflicts and considering the evidence most favorable to plaintiff, then they must be sustained. Wickman v. Lowenstein, 136 Cal.App.279, 28 P.2d 681. Every reasonable inference from the evidence must be accredited to the findings of fact. The fact that some inference other than that which the trial court drew may be drawn from the evidence will not justify this court's interference with the findings. Hamilton v. P. E. Ry. Co., 12 Cal.2d 598, 86 P.2d 829; Beck v. Sirota, 42 Cal.App.2d 551, 109 P.2d 419.

[6] The facts found are stated above and they are generously supported by the evidence. While plaintiff was standing off the traveled portion of the boulevard in broad daylight, he was struck without warning by the automobile driven by Zabler, who had a thirty foot concrete highway on which to operate his car. There is no paucity of evidence bearing upon any material issue. Wilson v. Kestenholz, 113 Cal.App. 13, 297 P. 954. Under the circumstances disclosed by the record, the court could hardly have made any other finding than that plaintiff was free from contributory negligence.

[7] Defendants correctly maintain that the doctrine of the last clear chance is not applicable to the facts of this case. That doctrine presupposes the situation where plaintiff has been negligent. Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915. The finding that plaintiff was free from negligence is based upon substantial evidence and negatives the possibility of applying such doctrine. Likewise, for similar reasons, the doctrine of imminent peril is not applicable to the facts of this case.

[8] Defendants argue that the facts disclose an unavoidable accident and that, therefore, the judgment is contrary to law. Their argument is based upon the circumstances disclosed by Mr. Zabler's testimony. As he was crossing the bridge another automobile passed him. From this fact, it is argued that Zabler's view was obstructed by the car which passed him and that plaintiff must have stepped back into the path of defendants' automobile. But to us it appears that the trial court justifiably believed that defendants' car, at all times after leaving the bridge, traveled in the north lane of the highway and that plaintiff was at all times standing on the asphalt shoulder. Just after Zabler crossed the bridge he saw the parked truck. When he was still 75 feet away, he saw that plaintiff did not move from his position until after the accident. There is, therefore, no support for defendants' contention on this point. Under such circumstances, together with the fact of the wide, unobstructed highway open to him, there is nothing upon which

to base a claim of unavoidable accident, for the conclusion is inescapable that Zabler was not exercising reasonable care.

[9] It is suggested, although defendants failed to argue the point, that the damages of $2,100 awarded by the court are excessive. The evidence of injury is abundant to support this judgment. Not only did plaintiff sustain the injuries described above but he must have suffered a shock and loss of time and incurred expense for physician's fees and in purchasing medicines.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

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43 Cal.App.2d 532

HELVEY v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASS'N.

Civ. 2630.

District Court of Appeal, Fourth District, California.

March 18, 1941.

Hearing Denied May 15, 1941.

1. Judgment 🔑752

A judgment lien, created by recordation of abstract of judgment, on judgment debtor's realty, is purely statutory, since no such right existed under common law. Code Civ. Proc. § 674.

2. Judgment 🔑780(1)

A judgment lien attaches only to vested interest of judgment debtor in real property. Code Civ.Proc. § 674.

3. Judgment 🔑779(1)

A judgment lien attaches only to real property actually owned by judgment debtor when judgment was docketed or thereafter acquired by him. Code Civ.Proc. § 674.

4. Taxation 🔑679(3)

A deed conveying realty to state as result of owner's failure to pay taxes thereon for five years removes all liens thereon, with stated exceptions, and state thereafter holds legal title to realty, while previous owner has merely right to redeem. Pol.Code, §§ 3780, 3787.

5. Judgment 🔑780(4)

A judgment lien does not attach to real property owner's right of redemption after tax sale and conveyance of property to state. Code Civ.Proc. § 674; Pol.Code, §§ 3780, 3787.

6. Taxation 🔑679(3)

The fact that statute, providing that deed conveying to state realty not redeemed from tax sale within five years, conveys absolute title thereto, free of all incumbrances, except specified liens, does not require state to give notice of its resale of property after such period to former lienholders of record, shows that Legislature never intended that prior lien for debt should create cloud on title. Pol.Code, §§ 3780, 3787.

7. Taxation 🔑732

On state's resale of realty, conveyed to it as result of previous owner's failure to redeem it from tax sale within five years, purchaser takes it free and clear of all incumbrances. Pol.Code, §§ 3780, 3787.

8. Judgment 🔑780(4)

The right of owner of land sold for taxes to redeem it carries no "vested interest" in land, so that lien of judgment on debtor's realty, conveyed to state as result of debtor's failure to redeem it from tax sale within five years, does not attach to debtor's right to redeem it before state's resale thereof. Code Civ.Proc. § 674; Pol.Code, §§ 3780, 3787.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Interest".

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by K. F. Helvey against the Bank of America National Trust & Savings Association to quiet title to realty. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

Geo. N. Foster, of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson, G. L. Berrey, and Howard D. Hanson, all of Los Angeles, for respondent.

CONWAY, Justice pro tem.

This is an appeal from a judgment for the defendant in an action by plaintiff to quiet title to real property in Los Angeles county.

The appeal is heard upon the judgment roll, to which is appended the certified written stipulation of facts. The real property in question was owned by Robert E. Hopkins & Company and was deeded to the state of California for nonpayment of state and county taxes on July 3, 1916. The owner never exercised his right of redemption and on May 28, 1935, respondent Bank of America National Trust & Savings Association recorded in the official records of Los Angeles county an abstract of judgment against said Robert E. Hopkins & Company for $13,694.35. Thereafter, and on the 24th day of May, 1938, Robert E. Hopkins & Company conveyed said real property by a quitclaim deed, unrecorded, to appellant herein, who brought suit to quiet title against respondent. It is stipulated that at all times since the recordation of the abstract of judgment and date of delivery of the quitclaim deed, Robert E. Hopkins & Company was the legal owner of the right to redeem said property. The trial court held that the recordation of the abstract of judgment in favor of respondent created a valid and subsisting lien on said real property prior and superior to any interest appellant may have therein by virtue of his quitclaim deed.

Appellant contends the right of a judgment debtor to redeem real property which has been deeded to the state of California after the five-year period provided by our codes cannot be made the subject of a judgment lien. Section 3780 of our Political Code gives the owner a right to redeem from the state within five years after the sale of the property, or at any time prior to the entry by the state on said property or the sale of it by the state. Section 3787 of the same code provides that the deed conveys to the state the "absolute title to the property described therein, free of all encumbrances", except certain liens therein provided in said statute and which, admittedly, are not relative to the question under discussion here.

It is admitted that the owner's right to redeem from the sale to the state had not been terminated at the time the abstract of judgment was recorded or at the date of delivery of the deed to appellant.

[1] The judgment lien created by the recordation of an abstract of judgment is purely statutory, since no such right existed under the common law. Ackley v. Chamberlain, 16 Cal. 181, 76 Am.Dec. 516; Lean v. Givens, 146 Cal. 739, 81 P. 128, 106 Am.St.Rep. 79. No California cases have been cited by either party deciding the specific question as to whether the right of the owner, or his successor in interest, to redeem real property after deed to the state is such an interest in real property to which a judgment lien will attach.

[2] The courts of this state have on many occasions passed upon the extent or limitation of a judgment lien under section 671 (now 674) of the Code of Civil Procedure, which provides that upon the recordation of an abstract of judgment with the county recorder "the judgment or decree becomes a lien upon all the real property of the judgment debtor * * * in such county, owned by him at the time, or which he may afterwards * * * acquire". In People v. Irwin, 14 Cal. 428, our Supreme Court, in discussing the extent of the lien of a judgment, said: "It is undoubtedly true that the statutory lien of a judgment upon the real estate of the judgment debtor, can attach only upon property in which such debtor has a vested legal interest." This case has been repeatedly cited by the courts of this state, establishing the legal proposition that a judgment lien will not attach except to a vested interest of the judgment debtor in the real property.

[3] In the case of Belieu v. Power, 54 Cal.App. 244, 201 P. 620, 621, the court discussed the question of limitation of judgment liens very fully. That was an action to restrain an execution and declare defendant judgment debtor had no lien on certain property which plaintiff was buying on contract. The sheriff was enjoined by the lower court and the judgment on appeal was affirmed. The court, in considering the effect of recordation of the contract to purchase under section 671 (now 674) of the Code of Civil Procedure, said:

"An examination of the authorities discloses a vast difference in the classes of property and interests therein that will support judgment liens, homesteads, and levies under execution. Section 671 of the Code of Civil Procedure provides that a docketed judgment becomes a lien upon 'all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire.' Property interests of any and every kind, whether real or personal, and every interest therein are subject to seizure under attachment or levy on execution, unless exempt from execution. Sections 542 and 688, Code Civ.Proc. While many classes of property may be taken on execution, only two classes are subject to the lien of a judgment—real property owned by the debtor at the time of docketing and real property that he may afterwards acquire.

"While any interest in real property, legal or equitable, may be seized and sold under execution, only real property actually owned by the judgment debtor will support a judgment lien. That a mere equitable interest in real property acquired under a contract of purchase and sale is not such ownership as is contemplated by Section 671 was clearly decided in the early history of the state. The case of People v. Irwin, 14 Cal. 428, was a case identical in all essential respects with the one involved in this appeal. An attempt was made to assert a judgment lien against the interest of a vendee under a contract substantially similar to the one now before the court. The court, in that case, says: 'It is undoubtedly true that the statutory lien of a judgment upon the real estate of the judgment debtor, can attach only upon property in which [the] debtor has a vested interest.' The Irwin case has been cited a number of times in later decisions and, if sound, conclusively disposes of the present appeal adversely to the contentions of appellants."

It has been held that an estate for years in real property is not such an interest as will carry a judgment lien. Summerville v. Stockton Mill Co., 142 Cal. 529, 76 P. 243. In the case of Poindexter v. Los Angeles Stone Co., 60 Cal.App. 686, 214 P. 241, the court expressly held that a judgment lien under section 671 (now 674) of the Code of Civil Procedure did not attach to an equitable interest in real property. It only applied to a legal interest therein. In that action the court held that a judgment lien would not attach to the interest of a cestui que trust. These cases clearly define the limitations of a judgment lien under our statutes and definitely decide that in California the judgment lien attaches only to real property actually owned by the debtor or thereafter acquired by him, and no case has been cited showing that this plain statutory declaration has been extended beyond the plain wording of the statute.

[4] In view of the fact that the extent of the judgment lien acquired by the recording of an abstract of judgment is purely statutory, different rules prevail under the particular statutes of the various states, though in some states the legislature has expressly made legal and equitable interests in the lands subject to the lien. If this were a case where property had been sold but not deeded to the state a different rule undoubtedly would apply, for in such case the state would have merely a lien and the assessed owner would own the legal title; but, this is a case where the property was deeded to the state after the five-year period and every encumbrance of record was wiped out and the state held the legal title and the owner merely possessed the right to redeem.

The effect of a deed of real property to the state, resulting from the failure of the owner to pay taxes for a five-year period, removes all liens upon said property as provided in section 3787 of the Political Code. This section reads as follows: "Such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment of the assessor, inclusive, up to the execution of the deed. Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances, except any lien for taxes levied for municipal, or for irrigation * * * district purposes, * * * and except when the land is owned by the United States or this state, in which case it is prima facie evidence of the right of possession accrued as of the date of the deed to the state * * *."

In Dougherty v. Henarie, 47 Cal. 9, in discussing the matter of certain city improvement assessments, the court, at page 14 of the opinion, said: "The general rule is that a sale and conveyance in due form, for taxes, extinguishes all prior liens, whether for taxes or otherwise. The necessity of collecting revenue for the support of the Government imperatively requires that the lien for taxes shall take precedence over all other liens; and that a tax sale, followed by a proper conveyance, shall transfer the title discharged of prior tax liens. If the rule were otherwise, purchasers at tax sales would be deterred from bidding, and a large portion of the revenue would remain uncollected. * * * More explicit and comprehensive language could not well have been employed to define the nature of the title which passes by the tax deed. It 'shall convey to the grantee the absolute title to the land, * * * free and clear of all incumbrances, liens, claims, rights, titles and interests of every kind, of any person or persons, corporation or corporations, * * *.' This language is so explicit as to require no interpretation and to leave no room for construction."

In the case of Fox v. Wright, 152 Cal. 59, 91 P. 1005, 1007, the plaintiff brought an action to quiet title derived under a tax deed. The court said: "It is to be noted, then, in considering this, that the delinquent owner is given process of law in the notice of the sale to the state of which he is advised by publication. It is to be noted, moreover, that the liberal period of redemption of full five years is accorded him as an absolute right. At the end of this five years the deed to the state is made, and the title of the state becomes absolute. We are unable to discover any constitutional objection which interposes and invalidates the state's title, and none has been pointed out. We are unable to see why the state may not obtain a title free from all equities in the former owner at the expiration of five years as may a private citizen after foreclosure upon the mortgage when the period of redemption following such foreclosure has passed."

[5] The respondent admits that there is no California decision directly on this point, but points to the case of Shipley v. Browning, 114 W.Va. 409, 172 S.E. 149, 91 A.L.R. 643, as authority for the proposition that a judgment lien attaches to the owner's right of redemption after a sale of property to the state. With reference to this decision the judicial construction of the statutes of California, involved in this litigation, by the courts of this state is directly contrary to the rule announced in this West Virginia case. The respondent also cites the case of Stetson v. Sheehan, 52 Cal.App. 353, 200 P. 387. In that case, it is clear that the vested legal title was in the judgment debtor at the time of the recordation of the lien. However, in the present case the legal title was in the state of California and under the plain provisions of our codes the state held such title free and clear of any and all encumbrances.

[6-8] The fact that our law contains no provision requiring the state to give notice upon resale of properties deeded to it after the five-year period to the former lien holders of record shows that the legislature never intended that a prior lien for debt should create a cloud upon the title. Upon a resale of the property here in question by the state it is undoubtedly true that the purchaser would take it free and clear of all encumbrances. That the right to redeem carries no vested interest in land is clearly determined in the case of South San Joaquin Irrigation District v. Neumiller, 2 Cal.2d 485, 42 P.2d 64. In view of the fact that this appeal is heard upon agreed stipulation of facts, a retrial of the issues could not change the result.

It is therefore ordered that the judgment be reversed with directions to the trial court to enter a judgment in favor of the plaintiff, quieting title against the purported lien of the defendant herein.

We concur: BARNARD, P. J.; MARKS, J.

43 Cal.App.2d 545

PEOPLE v. KARPINSKI.

Cr. 3427.

District Court of Appeal, Second District, Division 1, California.

March 18, 1941.

1. **Criminal law** 🔑1144(13)

On appeal from judgment of conviction, the reviewing court was required to state the evidence in light most favorable to the prosecution.

2. **Infants** 🔑20
Sodomy 🔑6

In prosecution for commission of crime against nature and commission of lascivious acts on a child, corroboration of the testimony of the child was not necessary. Pen. Code, §§ 286, 288.

3. Infants ⚷20
Sodomy ⚷6

Evidence sustained conviction of commission of crime against nature and commission of lascivious acts on a child. Pen.Code, §§ 286, 288.

4. Criminal law ⚷1159(2)

Where there was substantial evidence in the record considered in connection with such inferences as jury might reasonably have drawn therefrom to sustain allegations of information under which accused was convicted, reviewing court was without power to disturb the conclusion reached by the jury.

5. Criminal law ⚷302(4)

Where trial court advised prospective jurors on voir dire examination of nature of offense charged in count, charging attempt to commit crime against nature, which was subsequently dismissed, accused, who made no objection to form of motion to dismiss and did not request instruction in reference to dismissal, was not prejudiced by dismissal which was granted in open court, on ground that attention of jury was brought to existence of the charge contained in the dismissed count. Pen.Code, § 286.

6. Criminal law ⚷1167(2)

Accused who was convicted of crime against nature and of lascivious acts on a child could not complain because he was relieved from prosecution upon another count charging attempt to commit crime against nature, which was dismissed by the prosecution. Pen.Code, §§ 286, 288.

7. Criminal law ⚷369(1)

Where child on whom accused was alleged to have attempted to commit crime against nature was merely sworn and before he testified he was dismissed from the stand and the charge in connection with which he was called was dismissed, accused, who was convicted of committing crime against nature on another boy and committing lascivious acts upon him, could not complain on ground that his substantial rights suffered by reason of admission of evidence of offense of attempt to commit crime against nature. Pen. Code, §§ 286, 288.

8. Infants ⚷20

Where it appeared that actions of accused subsequent to his commission of crime against nature on child did not constitute an attempt to commit, or an act in violation of statute relating to crime against nature, the jury was free to convict accused of offense of committing lascivious acts on a child. Pen.Code, §§ 286, 288.

9. Criminal law ⚷770(1)

Where there was evidence of acts and conduct on part of accused which showed violation of statute relating to lascivious acts on a child as distinguished from violation of statute relating to crime against nature, and jury was fairly instructed on provisions of the statutes, and instructed that the offenses were separate and required separate verdicts, refusal of instruction that jury could not find accused guilty of violation of both statutes arising from the same act and that, should jury believe accused guilty, it would then become its duty to elect between conviction under either one of the statutes, was not error. Pen.Code, §§ 286, 288.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Louis Karpinski was convicted of commission of the crime against nature and commission of lascivious acts on a child, under Penal Code §§ 286, 288, and he appeals.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney, defendant was accused of three felonies. Count 1 charged violation of section 288 of the Penal Code; count 2 set forth a violation of section 286 of the Penal Code; while count 3 alleged an attempt by defendant to commit the act charged in count 2. During the progress of the trial count 3 was dismissed on motion of the district attorney. By its verdicts the jury found defendant guilty as charged in counts 1 and 2. From the judgments of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

[1] Stating the evidence in the light most favorable to the prosecution, as we are required to do following verdicts of guilty, we find in the record testimony that on Sunday evening, June 16, 1940, defendant accosted the complainant, a schoolboy nine years of age, while the latter was walking alongside defendant on Main

street. At this time defendant asked the boy if he wanted a hot dog. Upon receiving an acquiescent answer, defendant purchased a hot dog and a glass of root beer for the boy after which he took him to his hotel. Upon arrival at his room, appellant removed the boy's trousers and placed him face down over the edge of the bed, whereupon, according to the facts testified to by the victim, the defendant committed upon him the infamous crime against nature.

After admonishing the boy not to say anything to anybody, defendant gave him a dollar in change. The boy went home, and the next day at school the teacher made inquiry concerning his possession of the money, whereupon the boy told her of the manner in which he had obtained it. When police officers came to the school, the boy led them to appellant's room. After sending the boy away, the officers waited for the return of appellant, and about 11:30 that night observed him coming up the stairs of the rooming house with another young boy directly behind him. After arresting the defendant, the officers searched him and found a tube of vaseline, part of which had been removed. The tube of vaseline was introduced in evidence and was identified by the boy as being similar to that which the defendant had in his possession and used at the time of the alleged assault. In response to interrogatories propounded by the officers, defendant stated that on the day in question he had gone to a picnic where he had been drinking all day; that in the early evening after leaving the picnic he went to Chinatown, where he consumed more liquor and became very much intoxicated, and did not remember anything more. He stated to the officers that he did not remember doing anything to any boy in his room, because he was too drunk. When asked by the officers why he had a boy with him at the time of his arrest defendant stated that he was taking the boy to his room to give him a book or magazine. At the trial defendant produced two witnesses who stated that he was at the picnic in question and was last seen about 6 o'clock in Chinatown and that he appeared to have been drinking quite a bit. Testifying in his own behalf, the defendant denied having had the complainant or any other boy in his room on the night in question. He testified that after coming from the picnic he did some drinking in Chinatown and in another bar, and then went home and to bed about 9 o'clock that evening. In explanation of his possession of the vaseline, he said he used it for cuts on his fingers in his work as a metal polisher and also upon his hair and scalp.

[2-4] Upon this state of the evidence, appellant first contends that it is insufficient to support the verdicts; that the testimony of the victim is inherently improbable, and is bereft of any corroboration to support the story. This contention is without merit, when we consider that on the day following the offense the boy showed his teacher the money appellant had given him and told the teacher where he had obtained it. He led the police officers to the hotel where he claimed the offense took place. Possession of the tube of vaseline which the victim testified was used at the time the offenses were committed upon him was also a circumstance tending to corroborate the story told by the minor. Also at the trial appellant failed to account for his whereabouts from the time he was last seen in Chinatown about 6 o'clock and the time when he claims he entered his hotel and went to bed around nine. While in cases of this type corroboration admittedly is not necessary, the record here furnishes no small amount of the same. Under the facts of this case as herein narrated, the cases of People v. McCullough, 38 Cal.App.2d 387, 101 P.2d 531, and People v. Adams, 14 Cal.2d 154, 93 P.2d 146, are not applicable. When, as here, there is substantial evidence in the record, considered in connection with such inferences as the jury may reasonably have drawn therefrom, to sustain the material allegations of the information upon which the verdicts of guilty were predicated, we are without power to disturb the conclusion reached by the triers of fact. For a painstaking and exhaustive review of the rights of an appellate tribunal under the circumstances here present, see People v. Haydon, 18 Cal.App. 543, 555, 123 P. 1102, 1114.

[5-7] Appellant next contends that the manner in which the district attorney dismissed count 3 in open court constitutes prejudicial error. From the record it appears that during the trial the district attorney produced as a witness another boy, eleven years old, who was the alleged victim in the offense charged by count 3 of the information. After this witness had been sworn, defendant's counsel objected to his testifying on the ground that the defendant had not had a preliminary examination in accordance with law in connection with the allegations contained in count 3. The record then discloses that following this ob-

jection counsel approached the bench and a discussion took place outside the presence of the jury, in the course of which the transcript of the testimony that was actually taken at the preliminary examination was submitted to the trial judge. At the session of court next following such conference, and at which time the jury was present, the deputy district attorney stated: "At this time, before proceeding, I think, following our conference last night, at this time the People will move the dismissal of count three of the information, which charges the attempt to commit the violation of section 286, and for that reason we will not recall the youngster who was on the stand, and will not use the youngster that was last brought as a witness, . . ." Thereupon the court granted the motion and the deputy district attorney announced, "That will leave only two counts." First of all, it should be noted that appellant made no objection to the form of the People's motion to dismiss at the time it was made, nor was any instruction asked of the court by appellant in reference to this dismissal. Appellant's claim that by reason of the proceedings had in court with reference to count 3 the rights of the defendant were prejudiced by bringing to the attention of the jury the existence of such other charge in the information is without merit, because at the very beginning of the trial in the voir dire examination of the jury, the court advised prospective jurors of the nature of the offense charged in count 3. Certainly the jurors had the right to be informed of the dismissal of that charge and to be advised that they were not required to render a verdict thereon. Manifestly defendant is in no position to complain because he was relieved from prosecution upon count 3. People v. Danford, 14 Cal.App. 442, 450, 112 P. 474. Appellant's claim that his substantial rights suffered by reason of the admission of evidence of other offenses is equally without merit, because no evidence was taken from the alleged victim mentioned in count 3. He was merely sworn, and before he testified at all he was dismissed from the stand and the charge in connection with which he was called was dismissed.

[8, 9] Finally, appellant contends that the court erred in refusing to give the jury a proffered instruction to the effect that it could not find the defendant guilty of a violation of section 288 and of section 286 of the Penal Code arising from the same act, and that should the jury believe the defendant guilty it would then become its duty to "elect between a conviction of violation of section 288 of the Penal Code and a violation of section 286 of the Penal Code". Appellant is in error when he claims that there was no evidence of a violation of section 288 of the Penal Code apart from the evidence of a violation of section 286 of the same code. There is contained in the record evidence of acts and conduct on the part of appellant which, if true, and it was for the jury to determine the verity thereof, constituted a clear violation of section 288 of the Penal Code as distinguished from the offense set forth in section 286. The acts which we have just referred to as constituting a distinct violation of section 288 of the Penal Code occurred following the perpetration of the crime of sodomy. Where, as here, it appears that when the actions of appellant subsequent to his violation of section 286 did not constitute an attempt to commit or an act in violation of that section, the jury was free to convict appellant of the offense of violation of section 288 of the Penal Code as charged in count 1 of the information. People v. Lind, 68 Cal.App. 575, 229 P. 990; People v. Parker, 74 Cal.App. 540, 548, 241 P. 401. Furthermore, the jury was clearly and fairly instructed on the provisions of Penal Code section 288 and also upon the provisions of section 286 of the same code, and was further instructed that the offenses were separate and distinct and required separate verdicts of conviction or acquittal. Under the facts and circumstances of the instant case the instruction requested by appellant, requiring an election of offenses, was properly refused.

The judgments and the order denying the motion for a new trial are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

PEOPLE v. STANGLER.*

Cr. 3436.

District Court of Appeal, Second District,
Division 1, California.

March 20, 1941.

Hearing Granted April 17, 1941.

1. Criminal law 🔑1159(5)

In absence of evidence to contrary, appellate court was bound to assume that conclusions and inferences drawn by jury in prosecution for statutory rape respecting physical possibility of acts being consummated in manner described by prosecutrix supported verdicts finding defendant guilty.

2. Criminal law 🔑1159(4)

An appellate court can reject positive testimony of a witness only when such testimony is inherently improbable, and it is not sufficient that testimony may disclose circumstances which are unusual.

3. Criminal law 🔑1159(4)

The appellate court does not sit as a jury to determine issues of fact upon credibility of testimony of witnesses.

4. Criminal law 🔑1159(4)

An appellant who in appellate court attacks testimony as being unusual or improbable must show that testimony is inherently improbable or that it was incompetent or not legal evidence upon which jury could rely.

5. Criminal law 🔑1159(5)

Testimony of prosecutrix in statutory rape prosecution respecting manner in which acts were committed was not so inherently improbable as to authorize conclusion by appellate court that testimony was per se unbelievable and that jury was bound to disregard it and accept defendant's denial of wrongdoing.

6. Criminal law 🔑1159(4)

A statement by a witness, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve a claim that something has been done that it would not seem possible could be done under circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do.

7. Rape 🔑52(1)

Evidence sustained conviction for statutory rape as against contention that it would have been physically impossible for acts to have been accomplished in manner described by prosecutrix.

8. Criminal law 🔑878(4)

In prosecution under information containing two counts charging statutory rape and two counts charging violation of statute respecting crimes against children under 14 years of age, verdicts finding defendant guilty on counts charging statutory rape and not guilty on counts charging violation of statute were not inconsistent, and verdicts did not show that they were "compromise verdicts", in view of prosecutrix' testimony. Pen.Code, § 288.

> See Words and Phrases, Permanent Edition, for all other definitions of "Compromise Verdict".

9. Infants 🔑13

Where defendant's conduct with reference to removal of ten-year-old girl's clothing could have been considered by jury as preliminary acts tending toward accomplishment of statutory rape, and girl testified that defendant took no liberties with her body apart from committing acts of rape, defendant's conduct was not punishable under statute respecting crimes against children under 14 years of age. Pen.Code, § 288.

10. Rape 🔑54(1)

One may be convicted of rape upon uncorroborated testimony of prosecutrix, if jury believes her testimony.

11. Criminal law 🔑635

The constitutional requirement of a "public trial" for persons charged with crime is for benefit of accused so that the public may see that he is fairly dealt with and not unjustly condemned. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

> See Words and Phrases, Permanent Edition, for all other definitions of "Public Trial".

12. Criminal law 🔑635

The constitutional requirement of a "public trial" for persons charged with crime is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is allowed to attend trial, notwithstanding that those persons whose presence could be of no service to accused, and who would only be drawn to trial by a prurient curiosity, are excluded. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

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*Subsequent opinion 117 P.2d 321.

13. Criminal law ⚿633(1)

A defendant charged with crime is entitled to certain rights under the constitution, and to deprive him of any one of such rights is to deny defendant that fair and impartial trial which is his right. Const. Cal. art. 1, § 13.

14. Criminal law ⚿635

A criminal trial should be "public" in ordinary common sense acceptation of the term, and doors of courtroom are expected to be kept open, the public are entitled to be admitted, and trial is to be public in all respects, with due regard to size of courtroom, conveniences of court, the right to exclude objectionable characters and youths of tender years, and to do other things which may facilitate proper conduct of trial. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

15. Criminal law ⚿1166½(12)

In prosecution for statutory rape, remarks of trial judge, in presence of jury, showing a purpose to exclude all spectators from courtroom during trial, did not require reversal of conviction on ground that defendant was denied right to a "public trial" guaranteed by the constitution, where judge did not make an order excluding spectators, and jury convicted defendant but imposed mild punishment. U.S.C.A.Const. Amend. 6; Const.Cal. art. 1, § 13.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Rudolph Stangler was convicted of statutory rape, and he appeals.

Affirmed.

Walter C. Harbert and S. C. Stoner, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Dept. Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county, defendant was charged with two counts of statutory rape and two counts of violation of section 288 of the Penal Code. Following his plea of not guilty a jury by its verdict found defendant guilty of the two charges of rape and recommended punishment in both cases by imprisonment in the county jail. Acquittal verdicts were returned as to both counts charging violation of section 288 of the Penal Code. Following denial of defendant's motion for a new trial, sentence was pronounced against him in accordance with the jury's recommendation. From both judgments of conviction and from the order denying his motion for a new trial, defendant prosecutes this appeal.

The main ground upon which a reversal is urged is that the evidence is insufficient to justify the verdicts. The victim of defendant's alleged felonious assaults was a young girl of the age of ten years. It is not claimed that the testimony of the prosecutrix, if capable of belief, is not alone sufficient to support the verdicts, but in this regard it is earnestly urged that the testimony of the victim as to the manner in which the assaults were accomplished, coupled with contradictions appearing in her evidence, must be held by this court to be so inherently unbelievable as to amount to no evidence at all.

Epitomized, the facts testified to by the complaining witness are that the act of illicit intercourse charged in count 1 of the information took place on or about July 1, 1940. That several days prior to July 4th the prosecutrix went to the residence of defendant, which was situated across the street from where she lived. Upon this occasion defendant gave her some old clothing which she took home to her mother. About three days later the girl again visited the home of defendant, at which time the latter was on the front porch. Defendant invited the complainant to come into the house and escorted her into the bedroom. According to the testimony of the victim, the act of intercourse was accomplished while she was lying on the bed with her legs up on the shoulders of defendant and while the latter was "standing up, kind of bent over". After being admonished by defendant not to tell her mother, and receiving from him a five-cent piece, the girl returned home.

Concerning the facts upon which count 2 was predicated, the prosecutrix testified that on the Friday before the fall term of school commenced, which latter date was agreed to be September 9, 1940, she again visited defendant's home, when he invited her into the house to see his new rugs. This time defendant shoved her through the front door and took her into the same bedroom, whereupon he accomplished an act of sexual intercourse upon her in the same manner as on the previous occasion. Although the prosecutrix testified that the defendant had intercourse with her some ten or eleven times, it is conceded that at no time did she make complaint to her mother or any member of her family, but that she did relate the occurrences to a youthful girl friend. Defendant stoutly maintained his innocence, both to the arresting officers and as a witness in his own behalf at the trial, and produced several witnesses who testified to his previous good character. Defendant admitted knowing the complainant for about a year and that she and other young girls came to his home from time to time, and further, that he gave them different articles of small value, but denied that the victim was inside his home at any time. The examining physician from Juvenile Hall testified that upon examination made September 24, 1940, she found the hymen of the prosecutrix ruptured and dilated; that in her opinion the rupture was not of recent origin and would permit sexual penetration.

[1-4] Appellant vigorously asserts that it would have been physically impossible for the acts of sexual intercourse to have been accomplished in the manner described by the complaining witness. Nowhere in the record do we find any evidence as to the height, weight or build of either appellant or his alleged victim. In this regard it must be borne in mind that the jury had an opportunity to observe both appellant and the prosecutrix and to determine from such observation the physical possibility of the acts being consummated in the manner described by the girl. In the absence of evidence to the contrary, it must be assumed that the conclusions and inferences drawn by the jury in this regard give support to the verdicts rendered. As was said in People v. Burnette, 39 Cal.App.2d 215, 102 P.2d 799, 804, "In almost every appeal in a sex case involving abnormal actions on the part of the accused it is contended that such abnormality is beyond belief. It is, of course, not normal behavior for a man to seize a woman by the throat on a well-lighted street, to beat her, to transport her to a rock quarry, to then forcibly rape her, and then to wait until daylight before leaving. But criminal behavior is seldom normal." Appellant's claim that the testimony of the prosecutrix is most unusual is answered by the following quotation from the case of People v. Collier, 111 Cal.App. 215, 226, 295 P. 898, 902:

"* * * We understand that an appellate court can reject the positive testimony of a witness only when that testimony is 'inherently improbable'. *It is not sufficient that the testimony may disclose circumstances which are unusual.* Where the testimony is such that within the knowledge of reasonable men it cannot be true the appellate court might assume that knowledge and hold the testimony legally insufficient, but to do so the court must act on what is equivalent to judicial notice. * * * Let it be said here that the appellate court does not sit as a jury to determine the issues of fact upon the credibility of the testimony of the witnesses but, when the attack is made on these grounds, it is necessary for the appellant to go further and show that the testimony which we are asked to reject is inherently improbable or that it was incompetent, or for some other reason, not legal evidence upon which the jury could rely." (Italics added.)

[5-7] While the girl's testimony as to the manner in which the lustful acts were accomplished, coupled with alleged variances or claimed inconsistencies or contradictions appearing in her evidence, undoubtedly afforded an opportunity for a persuasive argument to the jury against the reliability of her testimony, we find nothing therein from which a reviewing court could justly conclude that her entire testimony is per se unbelievable and that it was therefore the jury's duty not only to disregard it but to accept the defendant's denial of any wrongdoing on his part. As was said by this court in People v. Loehr, 35 Cal.App.2d 1, 4, 94 P.2d 390, 392, "* * * Obviously reviewing judges are in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. It is undoubtedly for such reasons that our Constitution provides that appellate courts are not authorized to review evidence except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1108, 1114. With reference to when testimony may be strictured by an appellate court as unbelievable per se, it was said in the last-cited case: 'A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely

to do.' * * *" Even though we were to concede that a mere reading of the transcript in this case might leave one in some doubt on the question of defendant's guilt, there is certainly enough in the evidence to sustain the verdicts of the jury, which saw and heard the various witnesses and was in a much better position to determine the truth than a court that does not possess such an advantage.

[8, 9] It is next contended by appellant that the verdicts finding him guilty of rape and not guilty of violations of section 288 of the Penal Code are inconsistent and compromise verdicts. This claim is without merit. Under careful and minute examination the prosecutrix repeatedly testified that defendant neither caressed nor fondled her, and that he took no liberties with her body apart from committing the acts of rape charged against him. What appellant did with reference to removal of certain of the girl's clothing might well have been considered by the jury as preliminary acts tending toward the accomplishment of the crime of rape and therefore constituting the commencement of its consummation. Consequently, under the facts of the instant case, such conduct and acts were not punishable under section 288 of the Penal Code. People v. Parker, 74 Cal.App. 540, 547, 241 P. 401. Neither does the fact that the appellant was convicted of two counts of rape and acquitted of a like number of counts charging violation of section 288 mean that the verdicts of the jury were arrived at by way of compromise. People v. Christensen, 32 Cal.App.2d 380, 382, 89 P.2d 1095.

[10] While one may be convicted of rape upon the uncorroborated testimony of the prosecutrix if the jury believes her testimony, nevertheless, in the instant case the prosecutrix was corroborated, for there was present evidence of several proclivities on the part of appellant toward the complainant and other children of immature years that are commonly found in the behavior and conduct of men charged with sex crimes upon children. We refer to their presence in the home of appellant and his giving them gifts of clothing, delicacies and money.

Finally, appellant charges prejudicial error in certain comments made by the trial judge relative to the exclusion of spectators from the courtroom during the trial. In this connection, the record discloses that in the presence of the jury the following proceedings transpired:

"The Court: People versus Stangler. Let the record show the defendant and his counsel are present. Will you stipulate, gentlemen, that the jury is all present?

"Mr. Visel (Defendant's counsel): Yes, we stipulate.

"Mr. Loucks (Deputy District Attorney): We stipulate.

"The Court: How about the exclusion of spectators?

"Mr. Visel: No, your Honor, there are no motions made.

"The Court: You mean that you want these people who have long ears and who want to hear something smutty sitting in here? Our rule is that we will have to go to a room too small to let them in, if that is your desire.

"Mr. Visel: I resent your remarks. I think they are error. May we approach the bench?"

Thereupon certain proceedings not here germane were had outside the presence of the jury, after which the trial proceeded without any order excluding spectators.

Appellant earnestly contends that the comments of the court tended to create in the minds of the jury a feeling of prejudice against him because of the insinuation therein contained that defendant sought, in violation of a court rule, to inflict upon the young prosecutrix the mental anguish and humiliation attendant upon her recital before courtroom spectators of the sordid details contained in her testimony.

[11, 12] The sixth amendment to the Constitution of the United States and section 13 of article I of the California state Constitution guarantee to every person charged with crime the right to a public trial. As was said by Judge Cooley in his work upon constitutional limitations, at page 383: "The requirement of a public trial is for the benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn hither by a prurient curiosity, are excluded altogether."

[13, 14] In the case at bar the vice of the trial judge's remarks lies in the fact that he did not thereby evince a desire to exclude only those people who were in attendance because of morbid curiosity, but clearly indicated that under the rule followed by him it was his purpose to exclude all spectators. Had he put into effect his declared intention and excluded all spectators, his action in so doing would have been in direct violation of the provision of the Constitution which says that a party accused of crime has a right to a public trial, and would have required a reversal of the judgment. People v. Hartman, 103 Cal. 242, 37 P. 153, 42 Am.St.Rep. 108. A defendant charged with crime is entitled to certain rights under the Constitution, and to deprive him of any one of them is to deny him that fair and impartial trial which is his right. In People v. Hartman, supra, 103 Cal. at page 245, 37 P. at page 154, 42 Am.St.Rep. 108, we find the following pertinent and expressive language: "The trial should be 'public,' in the ordinary common-sense acceptation of the term. The doors of the court room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the court room, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial." Being without power to order the exclusion of spectators in the absence of defendant's approval, the propriety of suggesting it is open to serious question. Indeed, in conceivable circumstances, such a suggestion could be highly prejudicial.

[15] In the case now under consideration the order of exclusion was not made, but we must nevertheless determine whether the substantial rights of the defendant were prejudiced by the remarks made by the court in giving expression to his views concerning the exclusion of spectators from the courtroom. When we consider the testimony of the prosecutrix that she was the victim of appellant's lust on ten or eleven different occasions; that the jury believed her testimony and convicted appellant on all counts of rape charged against him and then determined that as punishment he be confined in the county jail rather than the penitentiary, we are forced to conclude that the deliberations of the jury and the verdicts arrived at by it were not motivated or influenced by any bias, prejudice or inflamed state of mind toward appellant on the part of the triers of fact. Such being the case, coupled with the fact that the trial proceeded with the doors of the courtroom open to the public, a reversal of the judgments is not warranted.

For the reasons herein stated, the judgments and the order denying the motion for a new trial are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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43 Cal.App.2d 571

HUTCHINSON v. CALIFORNIA TRUST CO.

Civ. 12862.

District Court of Appeal, Second District,
Division 2, California.

March 20, 1941.

1. Appeal and error 🔑931(1)

In determining whether trial court's findings were supported by substantial evidence, reviewing court must resolve all conflicts in the evidence in favor of the prevailing party, and must indulge all reasonable inferences in support of the findings.

2. Husband and wife 🔑264

Conflicting evidence sustained finding that husband had given money, which had constituted community property of husband and wife, to wife as her separate property, thereby converting it from community property to separate property of wife to which husband's only claim after wife's death would be as heir or legatee.

3. Evidence 🔑269(3)

Intention of husband to make a gift to his wife may be proved by evidence of husband's declarations to that effect, whether made before or after the actual transaction.

4. Courts 🔑475(2)

In husband's action against administrator of deceased wife's estate to recover money claimed to have been community property of husband and wife, superior court in finding that property in controversy had been the separate property of wife had no jurisdiction to enter judgment directing distribution of estate in accordance with agreement entered into between husband and two sons in connection with probate of will, since probate court had jurisdiction of matters involving distribution of estate, especially where the two sons were not parties to the action in superior court.

5. Judgment ⚷243

A judgment may not be rendered either against or in favor of one who is not a party to the action.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by John Hutchinson against the California Trust Company, etc., to recover a sum of money claimed to be the community property of the plaintiff and his deceased wife. From a judgment in favor of defendant, plaintiff appeals.

Judgment modified and, as modified, affirmed.

Edgar K. Brown and Leo B. George, both of Los Angeles, for appellant.

Clark & Morgan and V. A. Morgan, all of Alhambra, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover from defendant a sum of money claimed to be the community property of the plaintiff and his deceased wife. He prosecutes this appeal from a judgment in favor of defendant.

Plaintiff's wife, Victoria Hutchinson, died on February 11, 1934. She left a will in which she gave to plaintiff all of her estate with the exception of $20. Peter Hutchinson, a son of decedent, contested plaintiff's petition for probate of the will and for letters testamentary. A written agreement was made by plaintiff, Peter Hutchinson and another son, Tony Hutchinson, in which it was provided that after payment of certain administration expenses the net proceeds of the estate should be divided equally between Peter and Tony. Following the making of this agreement the will was admitted to probate and letters testamentary were granted to plaintiff. The inventory and appraisement showed the only asset of the estate to be a parcel of real property of the value of $1,250. For a long period plaintiff took no steps in the administration of the estate and in 1938 he was removed as executor and William J. Clark was appointed special administrator. Thereafter Clark discovered an account in the head office of the California bank in the sum of $17,289.62 in the name of decedent alone. He filed a supplemental inventory showing this sum as an asset of the estate. The special administrator was discharged and the California Trust Company, defendant herein, was appointed administrator with the will annexed. Defendant filed its final account showing the sum of $13,873.84 on hand for distribution, with a petition that this sum be distributed in accordance with the terms of the written agreement of plaintiff and Peter and Tony Hutchinson. To this petition plaintiff filed objections, claiming that the sum held by defendant was not the separate property of decedent but at the time of decedent's death was community property. The probate court refused to try the issues presented on the ground that it was without jurisdiction to try title to the property. Plaintiff commenced the present action on December 9, 1939, to have the sum of $13,873.84, less the amount necessary to carry the will into effect, be declared community property and delivered to him as surviving spouse.

The trial court found that plaintiff "made a gift of all the said money and his property to his wife, Victoria Hutchinson, and that said money became the separate money of Victoria Hutchinson by said gift". Plaintiff contends that this finding is not supported by the evidence. It appears from the evidence that prior to October 27, 1930, plaintiff had in an account standing in his name alone in the Alhambra branch of the California bank the sum of $14,488.11. On the date just mentioned decedent opened a savings account in the sum of $14,488.11 in the Alhambra branch of the California bank in her name alone and the pass book was delivered to her. This sum had been withdrawn by plaintiff from his account and was placed in decedent's name with his knowledge and consent. From time to time additional sums were deposited in decedent's account and on July 1, 1932, decedent withdrew $15,727.98 with the knowledge of plaintiff. On February 10, 1933, this sum was deposited by decedent in her name alone in an account in the head office of the California bank. At the time this account was discovered by the special administrator and claimed for the estate it amounted to $17,289.62. It is conceded that all of the money which plaintiff had in his own account in the Alhambra branch of the California bank was community property prior to the opening of the account by decedent in the branch bank.

Plaintiff is a foreigner with a limited knowledge of the English language. Concerning the placing of the money in his wife's name in the branch bank he testified: "I am afraid they might have me on a trip on the road and kill me and I want her to get some of that money. * * * She goes with me to the bank to transfer and let her save it for me. * * * I said (to my wife) 'you save it; sometimes I get killed when I was in the country with the truck. I am afraid myself I might get killed. * * * I didn't give it to her, just to save it for me." Plaintiff further testified that he knew that decedent had withdrawn the money from the Alhambra branch of the bank and that she had told him that she had done so because she was afraid of the bank. Several months later, according to plaintiff's testimony, decedent informed him that all the money had been lost or stolen. Plaintiff denied any knowledge of the existence of the account in the head office of the California bank until after its discovery in June, 1939, by the special administrator and also denied ever having been in the head office of the California bank.

It was proved on behalf of defendant that the two sons, Peter and Tony, had filed an action against plaintiff and decedent during the lifetime of decedent for the purpose of dissolving a partnership in a grocery business and had obtained a judgment against their parents in the sum of $4,029.48. In that case plaintiff was brought before the court for examination as a judgment debtor on October 20, 1932, on January 19, 1933, and on September 26, 1933. On each of these three occasions plaintiff stated under oath that he had no interest in any property and that he had given all of his property to his wife. Plaintiff's testimony that he had no knowledge of the bank account at the head office of the California bank until 1939 and that he had never been in that bank was directly contradicted by an officer of the bank, who testified that in February, 1934, plaintiff and his son came to his desk and informed him that plaintiff's wife was dead; that plaintiff at that time presented the pass book for the account in decedent's name and demanded the money on deposit but was told that it would be necessary to probate the estate first. Subsequently in 1934 and 1936 the pass book was presented to the bank for the purpose of having the interest posted.

[1-3] In determining whether there is substantial evidence to support the finding under attack the reviewing court must resolve all conflicts in the evidence in favor of defendant, the prevailing party in the trial court, and must indulge all reasonable inferences in support of the finding. Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660. Considered in the light of this rule the evidence is sufficient to support the finding of a gift of the money to decedent. By placing the money in her account plaintiff gave his wife absolute dominion and control over it. He made no effort to retain any control over the money although it would have been a simple matter to do so. He knew of the existence of the later account in the head office of the bank but did not assert any rights of ownership over it and made no claim to it for over five years after his wife's death. The inference is entirely reasonable that plaintiff's conduct is inconsistent with his claim of ownership. On three separate occasions he declared under oath that he had given all of his property to his wife. The intention of a husband to make a gift to his wife may be proved by evidence of his declarations to that effect, whether made before or after the actual transaction. Ruiz v. Dow, 113 Cal. 490, 45 P. 867.

[4, 5] The gift of the money by plaintiff to decedent had the effect of converting it from community property into the separate property of decedent. Collins v. Sword, 4 Cal.App.2d 437, 41 P.2d 170. Plaintiff's rights in decedent's estate, if any, must be asserted as an heir or as a legatee under the will, and not in the present action. The probate court has jurisdiction to determine the rights of the plaintiff and his two sons in the estate. In re Estate of Dobbins, 36 Cal.App.2d 536, 97 P.2d 1051. An additional reason for holding that the court erred in ordering that the entire estate be distributed equally to Peter and Tony Hutchinson in accordance with the agreement with their father may be found in the fact that Peter and Tony Hutchinson are not parties to the present action, which was commenced for the purpose of determining ownership of the bank account as between plaintiff and defendant administrator. A judgment may not be rendered either against or in favor of one who is not a party to the action. Overell v. Overell, 18 Cal.App.2d 499, 64 P.2d 483; Samter v.

Klopstock Realty Co., 31 Cal.App.2d 532, 88 P.2d 250.

The remaining points raised by plaintiff are based upon the contention that the court erred in finding that a gift of the money had been made by plaintiff to decedent. Our conclusion that the finding is supported by the evidence makes it unnecessary to discuss them.

It is therefore ordered that the findings, conclusions and judgment be modified in the following particulars: By striking from paragraph II of the findings the words "and that after the administration expenses had been deducted, that the net proceeds would be divided equally between Peter Hutchinson and Tony Hutchinson"; by striking from paragraph IX of the findings the words "and for the purpose of carrying out the agreement of the plaintiff, Peter Hutchinson and Tony Hutchinson filed in the probate proceeding at the time the will was admitted to probate"; by striking from the conclusion of law the words "and that the distribution of the estate should be in accordance with the stipulation of the parties filed at the time the will was admitted to probate"; and by striking from the judgment the words "It Is Further Ordered, Adjudged And Decreed that the estate is to be distributed to Peter Hutchinson and Tony Hutchinson in equal shares after deducting the expenses of administration". As so modified the judgment is affirmed, defendant to recover costs on appeal.

We concur: MOORE, P. J.; McCOMB, J.

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43 Cal.App.2d 609

LENTZ v. HARTMAN et al.

Civ. 2632.

District Court of Appeal, Fourth District, California.

March 21, 1941.

1. Appeal and error 🔑931(1)

On appeal from judgment in action tried without a jury, every substantial conflict in the testimony must be resolved in support of findings of the trial court.

2. Appeal and error 🔑931(1)

All evidence tending to establish correctness of findings of trial court must be accepted as true on appeal and the prevailing party must be given the benefit of all inferences which might reasonably have been drawn by the trial court.

3. Mortgages 🔑25(6)

In action for cancellation of written assignment of note and mortgage and foreclosure of mortgage, evidence sustained finding that note and mortgage were supported by consideration, consisting of loans made by the mortgagee.

4. Mortgages 🔑270, 463

Evidence sustained judgment decreeing cancellation of written assignment of note and mortgage and foreclosure of the mortgage which was executed to secure loan made by the mortgagee to the mortgagor who was a very close friend of the mortgagee with whom mortgagor had apparently discussed marriage, on ground that because of "confidential relation" between the parties, the mortgagee relied on false representations of the mortgagor at time of execution of assignment of note and mortgage to effect that mortgagor would concurrently execute a new note and mortgage upon other property.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relation".

5. Appeal and error 🔑193(1)
Mortgages 🔑265

Complaint alleging that mortgagor stated to mortgagee that mortgagor desired to substitute note and mortgage for a new note and mortgage on other property, that mortgagee in reliance thereon executed assignment of note and mortgage, that representations were made with intent of procuring assignment without paying consideration and without intent to carry out the representations, and that in reliance on the statements, assignment was executed, stated cause of action for the cancellation of assignment for fraud, and was not subject to attack on appeal, especially where evidence was admitted without objection in all material respects.

6. Trial 🔑29(4)

Record established that case was fairly presented upon its merits and that the trial court was not prejudiced or biased in any respect.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Emyt L. Lentz against Martha M. Hartman and another for cancellation of assignment of note and mortgage, and foreclosure of the mortgage. From an adverse judgment, the defendants appeal.

Affirmed.

Donald Kolts and Wm. J. Clark, both of Los Angeles, for appellants.

John M. Dvorin, of Los Angeles, for respondent.

CONWAY, Justice pro tem.

This is an appeal from a judgment decreeing cancellation of a written assignment of a promissory note and mortgage on real property and foreclosing said mortgage in favor of plaintiff and against defendants.

The action was tried by the court without a jury. The third count in the complaint sets forth a cause of action for declaratory relief and was dismissed at the time of trial.

The appellants prosecute this appeal upon the grounds of insufficiency of the evidence to support the findings of fraud by the trial court, and specify errors in procedure which they claim affected their substantial rights. The facts which find ample support in the evidence are as follows:

Emyt L. Lentz and Martha M. Hartman, for 16 years immediately prior to 1935, were on friendly terms, and for the last six years prior to 1935 they were on cordial terms and relations of intimate friendship and had contemplated marriage. Mrs. Hartman had marital differences with her husband, whom she feared might assert a lien against her property and she maintains that this fear on her part, alone, was the reason for her executing the notes and mortgages as hereinafter set forth. Respondent advanced various sums of money to Mrs. Hartman and made payments of certain obligations for her which totaled the sum of $1,500, and in 1933, she executed and delivered to him a promissory note in the sum of $1,500 secured by a mortgage on real property, which mortgage was never recorded. The reason given for the nonrecordation of the mortgage was the desire on the part of Mrs. Hartman to renew a first mortgage on her property which was about to become due and that she desired to conceal the existence of the $1,500 mortgage given to respondent from the owner of the first mortgage. Respondent continued making monetary advances to and for the benefit of Mrs. Hartman and on September 10, 1935, the $1,500 note and mortgage was cancelled and she executed and delivered to him a new note and mortgage in the sum of $3,000 secured by a mortgage on the same real property. This latter mortgage was recorded April 8, 1936, in the official records of Los Angeles county.

On July 20, 1936, respondent, who was the owner of different business enterprises, was en route to Burbank about 9:30 a. m. and called on Mrs. Hartman requesting her to accompany him on the trip. While in her home she asked him to execute a release of the latter note and mortgage, which release she had evidently theretofore caused to be prepared, and promised in lieu thereof to give him a mortgage on five crypts which she then owned in the Glendale cemetery. Respondent was familiar with the cemetery property and was absolutely satisfied with new security. Mrs. Hartman handed him a form of assignment of the $3,000 note and mortgage which was made out to William A. Cope who was a brother of Mrs. Hartman. While in Mrs. Hartman's home, one A. H. Buie was "on the telephone line" and she requested respondent to talk to him. Respondent had never known Buie but held a conversation with him over the telephone and Buie asked him if he "knew what he was doing" in executing the release of the note and mortgage. It appears that Buie acknowledged respondent's signature on the assignment before it was actually signed. However, respondent signed the assignment and delivered it to Mrs. Hartman, relying, he claimed, solely upon her promise to give him in lieu thereof another mortgage on the cemetery property. Within a short time thereafter he called on her requesting the execution of the note and mortgage on the cemetery crypts and she put him off by saying, "Pretty soon". The record shows that respondent repeatedly requested her to execute this new note and mortgage and that she repeatedly made excuses of family troubles, which she claimed pressed her, but she continually promised to execute the note and mortgage. He called upon her fifteen or twenty times in a fruitless effort to persuade her to give him the new security, and finally he sent one Grace Brouwer to see her with reference to the matter, and Mrs. Hartman told Grace Brouwer that now that she had the other note and mortgage back Lentz "could whistle for it". She never delivered the new note and mortgage, and, according to her testimony, denied she ever promised a new note or mortgage.

The transcript of the evidence shows cash advancements by respondent which total the principal sum of $3,000, although Mrs. Hartman denied that she owed any sum at any time to respondent. One Roy C. Keiser, attorney at law, testified he prepared the note and mortgage in his office, and that Mrs. Hartman stated to him at that time that she desired to raise the loan to $3,000, and that she also told him respondent had "loaned her money". The witness further testified that at the time of the execution of the mortgage in his presence respondent paid to Mrs. Hartman considerable money, the exact amount being unknown to him, but there was "quite a bundle of bills".

The foregoing skeletonized summary of facts is supported by ample evidence and the trial court before whom the witness testified, and who had an opportunity to observe their demeanor, made findings of fact substantially in accordance with the foregoing statement of facts.

[1, 2] Appellants contend that the finding of the trial court that consideration was paid for the note and mortgage was contrary to the evidence. There is a direct conflict in the testimony given by Mrs. Hartman and that of respondent and we find many corroborating circumstances and testimony of various witnesses which corroborate respondent's position. In this connection it may be pointed out that appellants have not attacked the testimony of corroborating witnesses in any respect and the findings, therefore, are not predicated upon the unsupported testimony of respondent but find ample corroboration from independent witnesses. Under the rule which has always prevailed in appellate courts every substantial conflict in the testimony must be resolved in favor of supporting the findings of the trial court. In the case of Patten & Davies Lumber Co. v. McConville, 219 Cal. 161, at page 164, 25 P.2d 429, at page 430, our Supreme Court states the rule as follows:

"The findings of the court having been in favor of the plaintiff, the evidence must be construed most strongly against the appellant and in favor of the respondent. All evidence tending to establish the correctness of the findings as made must be accepted as true and the prevailing party must be given the benefit of all inferences which might reasonably have been drawn by the trial court. Every substantial conflict in the evidence must, under the rule which has always prevailed in this court, be resolved in favor of the finding. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157."

[3] Appellants recognize this rule but claim that the instant case falls within the rule announced in cases like People v. Benson, 6 Cal. 221, 65 Am.Dec. 506, and Lind v. Closs, 88 Cal. 6, 25 P. 972, where the testimony was so inherently improbable that it was utterly inconsistent with known facts. However, we have carefully reviewed the entire transcript and find nothing which would indicate that the rule announced in these cases would apply to the facts of the instant case. The record indicates that the trial court asked many questions of witnesses during the trial and we are satisfied that his findings were completely in harmony with the evidence.

[4] Appellants contend that the evidence is insufficient to support the finding of the trial court to the effect that respondent believed and relied upon the statements and promises made by Mrs. Hartman at the time of the execution of the assignment of the note and mortgage to the effect that she would concurrently execute a new note and mortgage upon the cemetery property. The question of reliance upon fraudulent promises and representations depends largely here upon the fiduciary relationship of the parties. The evidence discloses the closest friendship between them for six years immediately prior to the execution of the note and mortgage, and apparently the question of marriage was discussed between them. At one time she carried sums amounting to $2,000, belonging to respondent, upon her person; that the confidence reposed in each other was mutual may be inferred from Mrs. Hartman's testimony with reference to the giving of the note and mortgage which may be found on page 117 of the transcript, as follows:

"Q. That is why you made it out to Mr. Lentz? A. Yes.

"Q. You trusted him? A. I trusted him at the time.

"Q. Implicitly? A. Yes, I trusted him.

"Q. You had faith in his integrity that he would carry out your object, is that correct? A. Yes."

It is true that she contends she gave the note and mortgage to respondent in order to defeat any claim her husband might assert against her, but it was within the province of the trial court to disbelieve her contention in this respect and adopt the view supporting the business transactions between the parties as bona fide. In discussing the question of confidential relationship and the power of the trial court to draw inferences from proven circumstances, this court in the case of Mathewson v. Naylor, 18 Cal. App.2d 741, at page 744, 64 P.2d 979, at page 981, says:

"While the general rule is that deceptions as to matters of law do not amount to fraud, the exception is recognized that they may, where the parties occupy confidential relations. Bank of America v. Sanchez, (1934) 3 Cal.App.2d 238, 242, 38 P.2d 787, and cases cited. A renewed understanding that they were to marry each other was reached by the parties to this action at the time the $3,000 loan was made. From this fact no indisputable presumption arises, it is true, but an inference might reasonably have been drawn that the plaintiff and the defendant bore a confidential relation one to the other. Kelly v. McCarthy (1936) [6 Cal.2d 347], 57 P.2d 118. It was not essential to her case that the plaintiff should testify in so many words: 'I relied upon his promises and statements.' Where, as in this case, the evidence justifies it, an inference of reliance may be drawn from the circumstances which are shown. Hunter v. McKenzie (1925) 197 Cal. 176, 185, 239 P. 1090."

Circumstances may and often have a more persuasive effect upon the trial judge than the declaration of an interested party litigant that he did or did not rely upon representations or promises. Again in the case of Hunter v. McKenzie, 197 Cal. 176, at page 185, 239 P. 1090, at page 1094, we find this language:

"Of course it is incumbent upon the party seeking to recover in an action for deceit, founded upon false representations, to show that he relied upon and was influenced by them. True, there is no direct evidence showing that Mrs. Hunter relied and acted upon the alleged and found false representations, still it was not essential to a cause of action in her behalf to produce direct evidence that she relied upon such false representations. The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect."

The District Court of Appeal in Troy, etc., Co. v. Drivers' etc., Co., 14 Cal.App. 152, on page 155, 111 P. 121, on page 123, hearing in Supreme Court denied, quotes with approval from Clark on Contracts, as follows:

"A false representation, to constitute fraud, must actually deceive; that is, it must be relied upon by the other party, and must induce him to act to his prejudice. If it is not believed, or the party disregards it and makes inquires for himself, there is no fraud. * * * If the representation was one calculated to induce the other party to make the contract, the presumption is that he was influenced by it; and in order to take away his right to relief on the ground of fraud it must be shown that he did not rely upon it."

We feel there was satisfactory evidence to show that respondent relied upon the promises of Mrs. Hartman and was actually deceived by them, and that the evidence was amply sufficient to support the trial court's conclusion in this respect.

Appellants' reply brief was filed July 11, 1939. On February 9, 1940, they filed a supplemental brief herein prepared by counsel who did not participate in the trial of the action. This supplemental brief questions the sufficiency of the complaint to state a cause of action.

[5] The complaint alleges that defendant Hartman stated to plaintiff that she was the owner of the cemetery property, and, in order to assist her in the maintenance of the property herein involved, she desired to substitute the note and mortgage by giving a new note and mortgage on the cemetery property. Paragraph VI of the complaint alleges that respondent believed and relied upon such representation and promise and that in reliance upon the same executed the assignment. Paragraph VII of the complaint alleges that such promises and representations on her part were made for the purpose and with the intent of procuring the assignment without paying the consideration therefor and without any intent on her part to carry out the same. It also alleges that she did not intend to make or execute any new note or mortgage. Paragraph IX alleges reliance on her statements, and that the assignment was executed and delivered in complete reliance upon these representations. Perhaps the complaint could have been more carefully prepared but we believe it contains all of the necessary allegations to show fraud, and considered in its entirety, it

alleges sufficient grounds for cancellation for fraud. Also, the transcript testimony shows that the evidence was admitted without objection in all material respects.

In appellants' supplemental brief, under the caption of "questions involved", appellants state:

"The testimony of the plaintiff is so inherently improbable and so utterly inconsistent with known facts and its falsity is so apparent that it is not conceivable that a *mind uninfluenced by some hidden prejudice* could place reliance upon it; and the judgment must be attributed to *something other* than the calm and unbiased consideration of the evidence which is the right of every litigant and without which a trial is mockery and the hope of justice a delusion." (Italics ours.)

[6] In respect to this very drastic and unwarranted pronouncement, the record discloses that the case was fairly presented upon its merits and there is not the slightest evidence in the record that the trial court was prejudiced or biased in any respect.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

* * *

43 Cal.App.2d 551

In re SWENDSEN'S ESTATE.

EARNEST v. BROWN.

Civ. 12963.

District Court of Appeal, Second District, Division 2, California.

March 19, 1941.

1. Wills 🔑133

To uphold the validity of a holographic will, it is not necessary that testator's signature be placed at the end thereof.

2. Wills 🔑130

In determining the validity of a holographic will, the circumstances surrounding the execution of the will may be considered.

3. Wills 🔑130

A valid holographic will may be made on several pieces of paper which need not be fastened together, and an addition to such a will may be made on a date subsequent to the date on which the will itself was signed.

4. Wills 🔑302(6)

Where will offered for probate consisted of two sheets of paper, one of which contained provision, written with ink in testator's handwriting, for disposition of property and signatures of testator and witnesses, one of whom was not present when will was executed and attested by other witness, and other sheet, which was of a different kind of paper, contained provision, also in testator's handwriting, but written in pencil and unsigned, nominating sole beneficiary as executrix without bond, both papers together constituted testator's holographic "will", under evidence clearly disclosing that testator intended that both papers should constitute his will.

See Words and Phrases, Permanent Edition, for all other definitions of "Will".

5. Wills 🔑302(6)

Where evidence clearly disclosed decedent's intention that writings in his handwriting on two separate sheets of paper should be taken together and constitute his will, fact that sheets were of different kinds of paper and that one bore writing in ink, the other in pencil would not preclude admission to probate of both papers as constituting decedent's holographic will.

◆

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Proceeding in the matter of the estate of Hans P. Swendsen, deceased, wherein Clara E. Earnest filed a petition asking to be appointed executrix of the will of deceased. From an order appointing Ben H. Brown, public administrator of Los Angeles County, administrator with the will annexed, Clara E. Earnest appeals.

Order reversed.

Charles A. Thomasset, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Wm. E. Lamoreaux, Deputy Co. Counsel, both of Los Angeles, for respondent.

WOOD, Justice.

Hans B. Swendsen died on March 23, 1940, leaving a holographic will in which all of his property, which brings in an annual income of approximately $500, is given to Mrs. K. K. Earnest. Mrs. Earnest filed a petition asking to be appointed executrix of the will, claiming that she was named therein as executrix. The probate court admitted the will to probate but granted the petition of the public administrator of Los Angeles county to be appointed administrator with the will annexed. From the order making this appointment Mrs. Earnest has appealed.

Mrs. Earnest presented as the will of Mr. Swendsen two pieces of paper. On one of the papers the following appears: "Marts 9-1940 This is my last wish I hereby give to Mrs. K. K. Earnest of 2938 Wellington Road, L. A. Cal, my house and lot at 1019 South Kern Ave, my one acre with improvement, at 3301-3305 Delta Str San Gabriel Cal, also my personal property, and money I may have coming from Superior Oil, Co, The one acre on Delta I owe to her as well as my Car for an old debt, that would amount to around 4000 00/00 Dollars. Signed H. P. Swendsen 3305 Delta Str Cal San Gabriel D. A. Mitchell 909 Sierra Bonita St San Gabriel Cal. Witness this 10 of Marts 1940 Witness This 10th Day of March 1940 Walter Fore 3301 South Delta Street San Gabriel, Calif." The writing on this paper is in ink and with the exception of the names and address of the witnesses it is in the handwriting of decedent. On the other paper the following appears: "P. S. Mrs. K. K. Earnest is to act as her own Executrix widt out Bonds of any kind This is my wish". The writing on this paper is in pencil and it also is in the handwriting of decedent. Concerning the two papers the court found that the "document" written in pencil is older in appearance than the other and is of a different type of paper, having been torn from a larger sheet; that an intention on the part of decedent that both documents constitute his will is not ascertainable from the documents themselves; that decedent called a witness to his house, "produced both of said documents, stated that they were his will, and affixed his signature to the document written in ink".

There appears to be no conflict in the evidence. D. A. Mitchell testified that decedent, who was his neighbor, called the witness to decedent's home on March 10, 1940, and stated to the witness that he, the decedent, wanted the witness to act as a witness to decedent's will; that decedent then produced in the presence of the witness the two pieces of paper above referred to and stated to the witness (quoting from the bill of exceptions) "that the documents were his will, and in the presence of the witness the decedent affixed his signature to the document written in ink; that the decedent, after affixing his signature as aforesaid, then gave both documents to the witness who thereupon read both of the said documents, that is to say, the document above set forth written in ink and the document above set forth written in pencil, and at the request of the decedent, and in the presence of the decedent, the witness affixed his signature to the document written in ink, immediately below the signature of the decedent". Walter Fore testified that he also was called by decedent to act as a witness to the will, that he arrived just as Mr. Mitchell was leaving; that decedent presented to the witness "the two documents above set forth, the document written in ink and the document written in pencil, and stated to said Walter Fore that the said documents were the will of decedent and requested said Walter Fore to act as a witness thereto; that at said time the signature of said Hans P. Swendsen had already been affixed, out of the presence of the witness, to the said document written in ink as the same appears thereon". Mrs. Earnest testified that while decedent was in the hospital he gave to her on March 17, 1940, an envelope on which her name was written in decedent's handwriting; that decedent then stated to the witness that the contents of the envelope were for her and that he was giving her everything. The envelope contained the two pieces of paper which Mrs. Earnest now claims constitutes the will of decedent.

Respondent contends that the paper which bears the signature of decedent alone constitutes the will and that since the other paper is not incorporated by reference it must be considered as an extrinsic document and not as part of the will.

Appellant asserts that the two papers together constitute a single instrument and cites In re Estate of Olssen, 42 Cal.App. 656, 184 P. 22, 23, in support of his contention that the circumstances under which the instrument was drawn may be shown to aid in the determination of the issue. In that case the testator while in a hospital made a holographic will which he dated and signed. Below his signature he wrote another sentence and again attached his signature but did not write in the date. The reviewing court in construing the document as a single instrument held that the question "must be determined by the circumstances under which the instrument was drawn, as revealed by the testimony in the case * * *".

In Re Estate of Merryfield, 167 Cal. 729, 141 P. 259, the testatrix wrote upon three separate sheets of paper but the last one only contained the elements necessary to constitute a holographic will. The three sheets of paper, which had been arranged and folded together in proper sequence, were found on the day before the death of the testatrix in a locked drawer with other papers. The court held that the three papers constituted one instrument, which was admitted as the last will of the decedent. In affirming the order of the probate court the reviewing court held that the fact that the will was made upon more than one sheet of paper was immaterial and that it was not necessary that the several detached pieces of paper be fastened together by mechanical or other device.

In Re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149, the testator executed a holographic will and on a later date made certain interlineations therein. In holding that the interlineations should be given effect as part of the will the court at page 600 of 3 Cal.2d, at page 156 of 46 P.2d, quoted from Page on Wills, volume 1, 2d Ed., section 500, page 822: "If witnesses are not necessary to the validity of a will, as under the ecclesiastical law, interlineations made by a testator after he has executed his will, are a part thereof; since by his act of making such interlineations, intending them to be a part of his testament, testator has re-executed his testament in such form as would have been sufficient for the original execution thereof".

[1] To uphold the validity of a holographic will it is not necessary that the signature be placed at its end. In re Estate of Morgan, 200 Cal. 400, 253 P. 702.

[2-4] From the cases above referred to it is apparent that on the present appeal these rules are applicable; (a) the circumstances surrounding the execution of the will may be taken into consideration (In re Estate of Olssen, supra); (b) the will may be made on several pieces of paper which need not be fastened together (In re Estate of Merryfield, supra); (c) an addition to the will may be made on a date subsequent to the date on which it was signed (In re Estate of Finkler, supra); (d) the signature does not necessarily have to be at the end of the will (In re Estate of Morgan, supra). The application of these rules to the facts of the present case leads unerringly to the conclusion that the two pieces of paper together constitute one instrument, the last will of decedent. The writings on the two papers unquestionably are complementary to each other and together they constitute a rounded out will. When decedent wrote upon the paper bearing his signature he made a will giving all of his property to Mrs. Earnest, who was not a blood relation, and it was entirely reasonable for him to name her executrix without bond, a course usually followed by those making wills under similar circumstances. On the other hand it would have been very unreasonable for him to leave the administration of his small estate to a stranger, a public officer who would place in the public treasury the administration fees which ordinarily go to the sole beneficiary.

[5] In its finding that the second piece of paper was not a part of the will the probate court appears to have been influenced by the fact that the two pieces of paper were of different types and that the writing on one of the pieces was in ink while the other was in pencil. As against these physical facts we have the uncontradicted and clear-cut testimony of two witnesses (found by the court to be true) that decedent at the time he requested them to act as witnesses stated that both pieces of paper constituted his will and the additional testimony of Mrs. Earnest that both pieces of paper were in the envelope which decedent gave to her with the statement that the contents of the envelope were for her and that he was giving her everything. If the two pieces of paper had been of the same kind and both had been written in ink it could not be successfully argued they would not together constitute a single instrument and the court unquestionably would be required to receive them together as the will of decedent. The only evidence before the court establishes that decedent considered the two pieces of paper to be his will and desired that they be acted upon as such.

The circumstances that the pieces of paper are of different kinds and that one of the papers bears writing in pencil are not of sufficient importance to support a ruling that the penciled paper is of no effect.

The order is reversed, the appellant to recover costs on appeal from the respondent.

We concur: MOORE, P. J.; McCOMB, J.

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43 Cal.App.2d 525

KEKICH v. BLUM et al.

Civ. 2596.

District Court of Appeal, Fourth District, California.

March 18, 1941.

1. Damages 🔑85

Provision of contract for liquidated damages is void unless it is shown that the case comes within statutory exception. Civ.Code, §§ 1670, 1671.

2. Damages 🔑157(3)

One claiming liquidated damages under contract must plead and prove facts from which the court can say as a matter of law that the contract for liquidated damages is valid because from nature of case it would be impracticable or extremely difficult to fix actual damage, and mere stipulations of contract are insufficient for that purpose. Civ. Code, §§ 1670, 1671.

3. Patents 🔑214

Where patentee revoked license granted to owner of smelter, without legal cause or ground, licensee was authorized to treat contractual obligations of the parties as terminated and to fail to erect additional smelter using the patented device as provided by the license contract.

4. Contracts 🔑313(1)

Rule that unilateral renunciation of contract, even though unauthorized, does not ipso facto result in breach of contract applies only where adverse party fails to acquiesce in notice of rescission.

5. Appeal and error 🔑690(4), 758(3)

On appeal from judgment cancelling note and mortgage on ground that they were executed to secure contractual obligation in violation of statute prohibiting contract for liquidated damages for breach of an obligation, wherein a copy of amended complaint which had been filed by respondents in another action and which was offered for purpose of showing that respondents alleged in the amended complaint that note and mortgage were given as principal consideration for contract was not fully set forth in transcript or briefs, appellate court could not say that trial court erred in sustaining objection to amended petition and excluding it on ground that it was immaterial. Civ.Code, §§ 1670, 1671.

6. Appeal and error 🔑690(5)

On appeal from judgment for owner of smelter in action on note and mortgage executed by owner in connection with license contract between owner and patentee, wherein an issue was whether owner's obligation to construct additional smelter using the patented device was excused by patentee's unwarranted revocation of license, appellate court could not say that trial court erred in excluding complaint filed in an action brought subsequent to delivery of notice of revocation of license, which was offered to show that owner then considered license agreement to be in effect, in absence of specific information concerning exact contents of the complaint.

7. Patents 🔑214

In action on note and mortgage executed by owner of smelter in connection with contract between owner and patentee granting to owner exclusive use of patented device, wherein cross-complaint was filed for cancellation of note and mortgage on ground of fraud and failure of patentee to perform his part of contract, evidence sustained finding that fraudulent representations were made by patentee which induced execution of the contract and that patented device installed in smelter was worthless.

8. Appeal and error 🔑1012(1)

Weight of evidence is peculiarly within province of trial court and its conclusions, which had ample support in the evidence, would not be disturbed.

9. New trial 🔑85

Fact that illness of patentee, who brought action on note and mortgage executed by owner of smelter in connection with contract with patentee granting owner exclusive use of patented process, precluded investigation of conduct of owner after date of service by patentee of notice of cancellation of license, with reference to ascertaining whether the owner acquiesced in cancellation of the license, did not authorize granting of new trial to patentee.

10. Patents ⚷214

In action on note and mortgage executed by owner of smelter to secure obligation of owner under contract with patentee granting to owner exclusive use of patented process, to erect additional smelter using the process, record established that owner did not exert any control over patented process after receiving notice of rescission of license by patentee so that owner could rely on patentee's breach of contract as excuse for failure of owner to erect additional smelter.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Thomas M. Kekich against Israel Blum and others on a note and for foreclosure of mortgage, wherein defendants filed a cross-complaint to cancel the note and mortgage. From a judgment for defendants on their cross-complaint, the plaintiff appeals. After filing of appeal bond, Thomas M. Kekich died, and Ellen Kekich, as executrix of the last will and testament of Thomas M. Kekich, deceased, was substituted as appellant.

Affirmed.

Irl D. Brett, of Los Angeles, for appellant.

Harvey, Johnston & Baker, of Bakersfield, for respondents.

CONWAY, Justice, pro tem.

This is an appeal from a judgment in favor of defendants on their cross-complaint cancelling a note in the sum of $10,000 secured by a mortgage on real property which Thomas M. Kekich sought to foreclose. Thomas M. Kekich, the original plaintiff and appellant herein, died testate since the filing of this appeal and Ellen Kekich, his wife, was substituted herein, as executrix of his last will and testament, on March 3, 1941.

On the 23rd day of July, 1935, Thomas M. Kekich was the sole owner of letters patent covering the process and "a method of treating liquid matter" for use in smelting operations. The defendant Israel Blum was the owner and proprietor of the Mojave smelter and on said date the parties entered into a written contract wherein Kekich granted to Blum the exclusive right to use said invention for a term of two years upon smelters thereafter built in California, and expressly permitting the use of the patented process in the smelter belonging to Blum near Mojave. The contract further provided that Kekich, the patentee, was obligated to "blow in" the Mojave smelter and to act as superintendent thereof for a thirty-day period. At the time of the execution of the written contract Blum and his wife executed a $10,000 note payable to Kekich, secured by a mortgage on real property in Kern County, conditioned upon the performance of the obligation of Blum under the contract to erect at least one additional smelter in California using the invention and process covered by the patent.

Kekich, alleging default in the payment of the promissory note, brought suit to foreclose the mortgage and defendants filed a cross-complaint to cancel said note and mortgage alleging fraud and failure of Kekich to perform his part of the agreement. The court sitting without a jury rendered judgment for the defendants and cross-complainants, and plaintiff, after denial of a motion for new trial, has appealed from the judgment.

[1, 2] Appellant first contends that the court erred in concluding that the penalty provided in the contract was void as provided by sections 1670 and 1671 of the Civil Code. She argues that the contract was unambiguous and certain and upon its face was consistent only with the construction that the note and mortgage were given as consideration for the license and that it was the duty of the trial court to sustain its validity. Supporting this contention she cites the case of Burns v. Peters, 5 Cal. 2d 619, 55 P.2d 1182, and other similar authorities. All of these cases affirm the general principle that the construction placed upon an instrument by the parties themselves is most persuasive except in those instances where a contrary "conclusion is inescapable from a very reading of the instrument". However, these cases cited by appellant do not discuss the question of void penalties but rather are concerned with ambiguities in language or expression, matters with which we are not here concerned. Our Supreme Court in

Robert Marsh & Co., Inc., v. Tremper, 210 Cal. 572, 292 P. 950, 952, states the rule applicable to cases of the character under consideration here as follows:

"The law is that the 'liquidated damage' clause is void unless it is made to appear that the case comes within the exception provided by section 1671, supra. The burden rests upon the person who seeks to bring himself within the exception. Upon the face of the complaint and agreement itself the provision which provides for the payment of liquidated damages is void. * * *

"'Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because "from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. The mere stipulations of the contract are insufficient for that purpose."'"

In Kelly v. McDonald, 98 Cal.App. 121, 276 P. 404, the court had under consideration a contract wherein failure to begin actual drilling operations until a specified time provided a penalty against lessee as liquidated damages. The court said, at page 124 of 98 Cal.App., at page 406 of 276 P.: "Damages may or may not result from the breach of a contract. Hence the wisdom of the rule which requires the pleader to allege not only that he has been damaged, but also facts from which it may be ascertained that the claim presents a proper case for stipulated damages."

[3] The trial court found from the evidence that the note and mortgage was given to secure the contractual obligation of Blum to build an additional smelter in California using the Kekich invention and that the penalty provided in the instrument was void in contravention of the Civil Code sections and the decisions heretofore cited. The failure of Blum to erect any additional smelters in California using the Kekich patent is excused by the actions of appellant in serving upon Blum an unwarranted cancellation of the contract as early as December 26, 1935. In this connection it was stipulated at the trial that on said last date appellant served upon respondent a notice of "revocation of license" specifying the specific defaults in performance by the latter. It was stipulated in open court at the time of the trial that "plaintiff had no legal cause or ground to revoke defendants' license and none of the grounds stated in said notice were true". The evidence introduced at the trial was amply sufficient to warrant the trial court in finding that respondents acted upon the false notice of revocation of license served upon them by appellant and thereafter considered the contract cancelled. After receiving the false notice of rescission respondents acquiesced in the cancellation of the contract and did nothing further towards performance of the same.

[4] Appellant cites numerous authorities to the effect that a unilateral renunciation, even though unauthorized, does not ipso facto result in a breach of the contract. This, of course, is true where the adverse party fails to acquiesce in the notice of rescission. But in the case before us the evidence conclusively shows that the respondents treated the contractual obligations of the parties as terminated.

Appellant's second contention is that he offered in evidence a copy of a first amended complaint verified by these respondents, in a former proceeding between the same parties, for the purpose of showing that respondents in the said amended complaint alleged that the note and mortgage was given as a principal consideration for the exclusive use of said patent. The trial judge sustained an objection to the offer on the ground that it was incompetent, irrelevant and immaterial. Appellant now claims that this ruling was reversible error and that the judgment should be reversed.

[5] The license contract itself specifically provides that the note and mortgage were given for the performance of respondents' obligation to build an additional smelter using appellant's invention, and it would seem to be immaterial whether or not respondents had theretofore verified a pleading reciting practically such facts as were not inconsistent with the position taken by them in the instant proceeding. In any event, the declaration would be only cumulative and was considered by the trial judge, who had the entire original proceeding befor him, to be immaterial. In view of the fact that a copy of the amended complaint is not fully set forth in the transcript or briefs, we cannot say that the trial court erred in sustaining the objection.

As a third point, counsel for appellant admits that his client delivered an unwarranted revocation of license to respondents and that all of the alleged specifications therein contained were false and untrue. Nevertheless he maintains that as a legal proposition respondents were obligated to fulfill their part of the conrtact. As we have heretofore pointed out, respondents acquiesced in the revocation which was served after it was apparent that appellant was unable or unwilling to perform his part of the contract. It was admitted that appellant failed and neglected to "blow in" the Mojave Smelter although it was fully equipped with his invention and was ready to "blow in" at the time of the execution of the contract on July 23, 1935. The evidence shows that appellant voluntarily abandoned further operations of the smelter and that it never "blew in", and that at the time he delivered his notice of cancellation on December 26, 1940, he was admittedly in default in the performance of the conditions imposed upon him under the contract.

[6] Appellant's fourth complaint is that he offered in evidence a verified amended complaint by the respondents in an action filed subsequent to the delivery of the notice of revocation of license, in which respondents sought damages against appellant for breach of contract and for declaratory relief. The court sustained an objection to its admissibility (it appearing that a nonsuit had been granted thereon in Los Angeles County). Appellant claims prejudicial error resulted from the ruling. Appellant claims that the allegations of the refused pleading would tend to show that respondents, at the time of the filing of the same, considered the license agreement to be at that time in full force and effect. The trial court had the opportunity of scrutinizing the entire pleading offered and in the absence of more specific information as to its exact contents we cannot say that error resulted from the ruling. It is entirely conceivable that respondents might attempt to predicate an action for damages and declaratory relief upon the course of conduct pursued by appellant when he wilfully and admittedly and without just cause served upon respondents a fraudulent notice of revocation of license. In other words, an attempt to allege a cause of action for damages and declaratory relief might be made even though the contractual obligations of the parties had been terminated.

[7, 8] The fifth argument of appellant is that the findings of the trial court that appellant made false and fraudulent representations which were known to be untrue and that the finding of the trial court that the smelting patent equipment was entirely worthless, were not supported by the evidence. In this connection it was conceded that respondents, although the owners of the Mojave Smelter, were totally unfamiliar with smelting operations and knew nothing whatever of the processes necessary to carry on the operation of the smelter under the patented process. The evidence shows further that appellant made various representations as to his ability and former experience in smelting operations and in reference to the efficacy of the patented process in smelting. Appellant was given actual charge of the smelter which was ready to "blow in" for a thirty-day period and it is admitted that he was never able to put the plan into operation. He repeatedly stated: "It is no use, the smelter won't work". The evidence in the record shows that he abandoned the project and refused to return. In this connection he stated that his refusal was based upon the failure of respondents to pay moneys which appellant claimed they owed. However, upon the trial it is admitted that such claim was false and that respondents never owed appellant anything and the trial court in our judgment was perfectly justified in finding not only that false and fraudulent representations were made by appellant which induced the execution of the contract, but also that the patented process installed in the Mojave smelter was worthless. It is true that there was a conflict in the testimony in this respect but the weight of evidence was peculiarly within the province of the trial court and its decision will not be disturbed where we find as here that its conclusions had ample support in the evidence.

[9] Lastly, counsel for appellant contends that the trial court should have granted a new trial, stressing among other grounds, the illness of his client and his client's consequent inability to investigate the conduct of respondents after the date of the service of the false notice of cancellation of license with reference to ascertaining whether or not respondents acquiesced in the cancellation of the contract. It is of course regrettable that appellant's illness precluded this investigation but this scarcely can be made the basis for the granting of a new trial.

[10] Appellant contends that respondents entered into certain options which, had they been satisfactorily investigated, would have shown that respondents considered the contract in full force and effect. Respondents, however, satisfactorily

answered these contentions in counteraffidavits served and filed at the time of the hearing of the motion for new trial from which it appeared that all of respondents' actions with reference to any of the property concerned their own individual personal property in the Mojave smelter and had nothing whatever to do with the patented process installed in the smelter. It is apparent from the record that respondents never after the serving of the false notice of rescission exerted any dominion or control over any of the patented process and we are satisfied that the judgment should be affirmed.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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43 Cal.App.2d 643

HANSON et al. v. REEDLEY JOINT UNION HIGH SCHOOL DIST. et al.

Civ. 2562.

District Court of Appeal, Fourth District, California.

March 24, 1941.

Hearing Denied May 22, 1941.

1. Schools and school districts 🔑89

Where regular school credit was given for participation on junior college tennis team, school district had authority to furnish transportation to students who participated therein, and district, in defending action for death of one student and injury to another in automobile accident while riding home from tennis practice with another student as directed by teacher in charge of practice, could not rely on defense that no bid for furnishing transportation was called for as required by statute. School Code, § 1.70.

2. Schools and school districts 🔑89

Regardless of whether it was school district's duty to furnish transportation to students participating on junior college tennis team, which was a class conducted for regular school credit, district was liable for any negligence of its employees in handling such school activity. School Code, § 2.801.

3. Schools and school districts 🔑89

Where one student was killed and another injured in automobile accident while riding home with another student from practice of junior college tennis team, as directed by teacher in charge of practice, the basic question in determining liability of school district was whether district and its employees, in conducting tennis team, used ordinary care under circumstances in view of general situation and knowledge of parties. School Code, § 2.801.

4. Schools and school districts 🔑89

Regardless of whether teacher in charge of junior college tennis team was authorized to provide transportation to their homes for students participating therein, if teacher undertook to do so as part of his conduct of the class and as a thing essential to continuance of class, it was his duty to use such ordinary care in connection therewith as would have been exercised by a reasonably prudent person under the circumstances, and, if he failed to do so, he would be guilty of negligence for which district would be liable. School Code, § 2.801.

5. Schools and school districts 🔑122

Where one student was killed and another injured in an automobile accident while riding home with another student from practice of junior college tennis team, as directed by teacher in charge of practice, evidence that teacher knew that automobile of student with whom he arranged to have other students ride was in an unsafe condition and that driver thereof had tendency toward recklessness, and that accident occurred as result of condition of automobile and recklessness of driver, presented questions for jury as to whether teacher was negligent, and as to whether such negligence was "proximate cause" of accident, so as to authorize recovery against school district. School Code, § 2.801.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

6. Trial 🔑191(7), 296(9)

In action against school district for death of one student and injury to another as result of automobile accident while riding home with another student from practice of junior college tennis team, as directed by teacher in charge of practice, instruction setting forth plaintiffs' allegation that district furnished automobile driven by student was not erroneous as assuming a fact in dispute, especially where trial court also gave instruction that mere fact that school district did not provide bus transportation for tennis team could not be made basis of liability on behalf of district, as school district had no obligation so to do.

7. Appeal and error ⟹1170(9)
Trial ⟹251(8)

In action against school district for death of one student and injury to another as result of automobile accident while riding home with another student from practice of junior college tennis team, as directed by teacher in charge of practice, instruction on statutory duty of teacher to hold students to account for their conduct on way to and from school was improper as in no way related to issues, but did not constitute reversible error, where it did not result in any miscarriage of justice. School Code, § 5.543; Const. art. 6, § 4½.

8. Appeal and error ⟹205

In action against school district for death of one student and injury to another as result of automobile accident while riding home with another student from practice of junior college tennis team, as directed by teacher in charge of practice, refusal to permit district to introduce testimony that driver of other automobile involved in accident made payments to plaintiffs on covenant not to sue did not constitute reversible error, even if evidence was admissible, where it did not appear that any offer of proof in such connection was made, or that anything was said to call trial court's attention to the alleged payment.

Appeal from Superior Court, of Fresno County; H. Z. Austin, Judge.

Action by Alfred Hanson and others against the Reedley Joint Union High School District and others, for damages based upon the death of Ruth Hanson, and injury suffered by Lucile Ledbetter, as result of automobile accident. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Chester O. Hansen, of Fresno, and Bronson, Bronson & McKinnon, of San Francisco, for appellant.

W. H. Stammer and Galen McKnight, both of Fresno, and Carlson & Lones, of Kingsburg, for respondents.

BARNARD, Presiding Justice.

This is an action for damages based upon the death of Ruth Hanson and injuries suffered by Lucile Ledbetter, both resulting from the same automobile accident. Both girls were students in the Reedley Junior College, which was operated by the defendant high school district. The trustees of this district were made defendants, but a nonsuit was granted in their favor. A jury returned a verdict of $5,000 on account of the death of Ruth Hanson, and $1,500 for the injuries to Lucile Ledbetter. From the judgment entered the defendant high school district has appealed.

All students of the Reedley Junior College were required to take some form of physical education, but were permitted to select and participate in one of certain major sports, including tennis, as fulfilling this requirement. Ruth Hanson, Lucile Ledbetter, Theodore Eschwig and certain other students accordingly chose tennis and were members of a tennis team. From early in February, 1938, until May 4, 1938, these students practiced tennis on the school grounds from three to five afternoons a week, under the direction of a teacher assigned for that purpose by the principal of the junior college. These practice sessions lasted about an hour, beginning about 4:15 p.m., and the students received one unit of credit therefor during that semester.

Ruth Hanson lived seven or eight miles and Lucile Ledbetter some ten miles from the school. The bus provided by the school district for transporting these students from and to their homes left the school shortly after four o'clock each afternoon. This left these girls and some of the other students without a way to go home on the nights they played tennis. Since 1933, it had been the practice for the teacher in charge to make an arrangement with certain students, who thus played tennis and who had automobiles, to take other students to their homes. The students thus using their cars were given a gallon of gasoline for each ten miles traveled, the gasoline being taken from the school pump and the board of trustees being later reimbursed for the gasoline out of the funds of the student body organization. This taking of gasoline from the school pump and this use of student body funds was accomplished by a system of requisition cards and checks which required the signatures of the teacher in charge of the tennis practice, of another teacher, of the principal and vice principal of the junior college, and of the county superintendent of schools. Accounts of the student body funds were reported each month to the board of trustees of the district, copies of the accounts being given to each member of the board.

At the start of the tennis season in February, 1938, Ruth Hanson and Lucile Ledbetter asked the teacher in charge how they were to get home after tennis practice. This teacher, in accordance with the practice that had been followed for several years, arranged with Theodore Eschwig, another player on the tennis team, to use his automobile for that purpose, telling him that he would receive one gallon of gasoline for every ten miles so traveled. He then directed Lucile Ledbetter and Ruth Hanson to ride home after tennis practice with Theodore Eschwig in his automobile. This they did most of the time until May, 1938, making approximately fifty trips in that manner, Eschwig receiving the promised gasoline.

Theodore Eschwig's car was a 1930 Ford sport roadster, stripped down to what is commonly known as a "bug". It was equipped with special carburetor and a high compression head in order to give it more speed and power. It had no fenders, no running board, no top and no horn. It had faulty lights, the speedometer was about twelve miles slow, the tires were worn and smooth, and the steering wheel was so loose that it was necessary to spin it a quarter of the way around before it took effect. The seat had been so lowered that the heads of the occupants came just above the doors, and when three people were in the front seat their knees stuck up so that it was practically impossible for the driver to reach the emergency brake. There is testimony that the brakes were faulty to the extent that when the car was traveling at high speeds "you might just as well not put them on".

On May 4, 1938, Theodore Eschwig started home from tennis practice with Ruth Hanson, Lucile Ledbetter and three other students in this automobile, three in the front seat and three in the rumble seat. There is evidence that while he was proceeding along a highway at a speed of about 55 miles an hour he overtook another automobile traveling in the same direction and driven by a man named Buhler at a speed of ten or fifteen miles an hour. As Eschwig was attempting to pass the other car, without slackening his own speed or sounding any horn, Buhler started to turn to his left across the highway toward the driveway of his own home. Eschwig swerved to his left off of the highway, the two cars came together about opposite the Buhler driveway, and the Eschwig automobile flew into the air landing upside down some fifty feet beyond the point of impact. One of its tires was found to be flat after the accident. As a result of this accident Ruth Hanson died and Lucile Ledbetter received the injuries here in question. The appellant suggests that Buhler was entirely responsible for this accident and that "the evidence actually reveals little, if any, negligence on the part of Eschwig". This suggestion requires little consideration. The evidence discloses that Eschwig was at the time violating at least eight sections of the Vehicle Code and indicates that several of these violations had a direct and important bearing on the happening of the accident. The evidence amply supports the inference that Eschwig's negligence was at least one of the proximate causes of the accident.

The appellant contends that Eschwig was not its agent since he had not been hired by its board of trustees; that the teacher in charge of this tennis practice had no authority under the school law to furnish transportation to pupils; that the district itself had no such authority since this was not a regular school class; that the district did not, in fact, furnish this transportation since it had not made the arrangement with Eschwig and had not directly authorized the teacher to do so; and that if the district did furnish this transportation it had no right to do so since it had not called for bids, as required by section 1.70 of the School Code. It is further argued that the evidence discloses no negligence on the part of the teacher in charge of this tennis practice, that if Eschwig was partly to blame it was his own fault in traveling too fast in view of the condition of his car and the number of people therein, and that his doing such an act was something which neither the teacher nor the district could have anticipated.

[1] The statement that Eschwig was not the agent of the appellant might well be questioned in view of the existing arrangement and the knowledge brought

home to the board of trustees. It is not necessary, however, to decide that question under the view we take of other elements in the case. The district had authority under the code sections to furnish transportation to these students since this was a school class within the meaning of sections of the School Code, regular school credit being given for participation therein. The provision that in furnishing transportation the board must call for bids where a contract was to be let may not have been followed, but the board is hardly in a position to take advantage of its own wrong in that respect as a defense to a charge of negligence in other respects. The real questions here are whether the evidence supports a finding that an agent of the appellant, while acting within the scope of his employment, was guilty of negligence which was a proximate cause of these injuries. If so, the appellant is responsible for the results of that negligence.

[2, 3] Under section 2.801 of the School Code the appellant is liable for the negligence of its employees. The teacher in charge of this tennis practice was such an employee and since such practice was a class for which credit was given, such work was within the scope of his employment. Irrespective of whether or not it was the appellant's duty to furnish transportation to students engaged in such a class leading to school credit it was liable for any negligence of its employees in handling such a school activity. Bates v. Escondido U. H. School Dist., 133 Cal. App. 725, 24 P.2d 884. The basic question here is whether the appellant and its employees, in carrying on this school activity, used ordinary care under the circumstances here appearing in view of the general situation and the knowledge of the parties. Bellman v. San Francisco H. S. District, 11 Cal.2d 576, 81 P.2d 894, 898. In that case, in approving a rule stated in Goodman v. Pasadena City H. S. District, 4 Cal.App.2d 65, 40 P.2d 854, the court said: "* * * a plaintiff may recover by proving either the existence of a danger known to the authorities who neglected to guard the pupils against it or that there was an unknown peril which by the exercise of ordinary care under the same circumstances a reasonably prudent person would have discovered." In Taylor v. Oakland Scavenger Co., Cal.Sup., 110 P.2d 1044, the court said: "It is not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities in order to establish that their failure to provide additional safeguards constituted negligence. Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of such safeguards."

[4] Whether or not the teacher in charge of this class was authorized to provide transportation to their homes for the pupils participating therein, if he undertook to do so as a part of his conduct of the class and as a thing essential to the continuance of the class it was his duty to use such ordinary care in connection therewith as would have been exercised by a reasonably prudent person under the circumstances, and if he failed to do this he would be guilty of negligence.

The teacher in charge of this class testified that he had seen Eschwig's car on many occasions, that it was usually parked near the place where the tennis was played, that he knew it had no top or fenders, and that the seat "had been dropped down." When asked where the heads of persons sitting in the car would come "in reference to the top of the sides and windshield" he replied, "Pretty low down. Their heads—oh, the heads would be just so you could see their heads." He testified that Eschwig had told him "several times about driving down out of the mountains in which he skidded around corners". He testified that he did not always see Eschwig start out with his passengers after the tennis practice periods but that he did see this a few times, and that "a few of the times he started up fast enough so that the wheels spun and kicked the dirt". He further testified: "I would say he was a harum-scarum driver." When asked what he meant by harum-scarum he replied: "Harum-scarum—a tendency toward recklessness, perhaps." With this much knowledge of this car this employee testified that he made no further examination of it, although the car was close at hand during the practice periods. Even a slight examination would have shown that the car had no horn, and might well have disclosed its other defects. With such knowledge of the condition of the car as might well have caused a reasonable person to avail himself of the continuing opportunity to make an examination as to its actual condition, and with knowledge that the driver of the car at least had a tendency toward recklessness, this employee, without further examination and without even cautioning the driver, so far as the record shows, arranged to have this car and driver used for a purpose essential to the class, and not only permitted his students to ride therein but directed the two students here in question to do so.

[5] Whether a reasonable person, in charge of such a class, presented with such a problem of getting his students home, and possessing such knowledge would, without further examination or provision for their safety, direct his students to ride in such a car with six nearly grown persons crowded therein, and with a driver who was known to have a tendency toward recklessness, is to say the least, a question of fact. It cannot be held as a matter of law that the conduct of this employee, in this connection and under these circumstances, was not negligent.

The evidence justifies the inference that the condition of this car and the manner in which it was being driven by Eschwig at the time played a large part in the happening of this accident. It also justifies the inference that a reasonably prudent person would have foreseen that an accident of this type would be likely to happen if such a car, thus overloaded, and with such a driver, was used for this purpose. In view of these facts and under the rules above cited it cannot be held as a matter of law that the negligence, if any, of appellant's employee was not, under these circumstances, one of the proximate causes of this accident. This was also a question of fact for the jury and both questions have been resolved in favor of the respondents by the verdict. The evidence supports the implied findings of the jury and it cannot be held, as a matter of law, that the appellant and its agent were free from any negligence which was a proximate cause of these injuries.

[6] The appellant next contends that an instruction given was prejudicially erroneous in that one portion thereof "assumes a fact in dispute, to wit, that the school district did furnish the automobile driven by Mr. Eschwig" and that this portion "advises the jury that negligence could be predicated because the school district did not furnish transportation". This instruction assumed nothing, but merely set forth certain things as having been alleged by the respondents, followed by this statement: "It is for you as jurors to determine from the evidence and from the law as given to you by the court whether or not these things are true, and whether or not the plaintiffs are entitled to recover against the defendant in this case." Moreover, the court also gave an instruction: "You are instructed that the mere fact that the school district did not provide bus transportation for the tennis team cannot be made the basis of liability on behalf of the school district as the school district had no obligation so to do." We find no error in this connection, prejudicial or otherwise.

[7] It is further contended that the court erred in giving the following instruction: "Every teacher in the public schools must hold pupils to a strict account for their conduct on the way to and from school." While this instruction was based on section 5.543 of the School Code, the same was in no way related to the issues in this case and this instruction should not have been given. However, the issues in this case were entirely related to the powers, duties and responsibilities of the appellant and its employees in connection with furnishing this particular transportation and directing these students to ride in this car, and there was no evidence of any further or additional negligence in not following or watching these students after the trip started and during its progress. While the instruction should not have been given it could not have misled the jury in view of the clear issues submitted to it. It would be unreasonable to believe that it affected the result and we are not convinced that it resulted in any miscarriage of justice. The error in question is, therefore, not reversible under section 4½ of article VI of the Constitution.

[8] The only other point raised is that the court erred in refusing to permit the appellant to introduce testimony to the effect that Mr. Buhler, the driver of the other car involved in this accident, made payments to the respondents on a covenant not to sue, to the end that any amount so paid should be applied in mitigation of damages. The only record in support of this contention is that while one of respondents' attorneys was on the witness stand, having been called in behalf of the appellant, the attorney for the appellant asked the witness whether it was not a fact that he "represented Mr. Buhler out

of the claim arising out of this accident". An objection to this question having been sustained the attorney for appellant said: "That is all." Assuming that any such evidence was otherwise admissible, there is no evidence of any payments having been made by Mr. Buhler, no offer of proof in that connection was made, and nothing was said to in any way call the court's attention to the fact, if it was a fact, that such a payment had been made or to any desire on the part of counsel to introduce any evidence in such a connection.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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43 Cal.App.2d 641

STEVENSON et al. v. FLEMING.
RUBIDOUX v. SAME.

Civ. 2487, 2488.

District Court of Appeal, Fourth District, California.

March 24, 1941.

1. Appeal and error 🔑659(3)

Motion for diminution of record by incorporating therein a certified copy of one of defendant's instructions, which quoted basic speed law, stated that violation thereof is negligence, and that violation of law is of no consequence unless it is proximate cause of injury, was granted in order that record might show that instruction as proposed was in proper form, where reporter's transcript contained identical instruction, except that word "maximum" was used instead of "proximate". Code Civ.Proc. § 953; Vehicle Code, § 510, St.1935, p. 176; Rules of the Supreme Court and District Courts of Appeal, rules 14, 25.

2. Appeal and error 🔑648

Where a transcript, as certified by the reporter and trial judge, does not contain a correct transcription of instruction as actually given to the jury, the trial court has power to correct the transcript so as to make it speak the truth, even though an appeal from the judgment is pending. Code Civ. Proc. § 953.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Separate actions by Geraldine Stevenson and others and by Lucinda Rubidoux against Grant M. Fleming. From the judgments, plaintiffs appeal. On motion for diminution of the record on appeal by incorporating therein a certified copy of defendant's instruction No. 30.

Motion granted.

Gibson, Dunn & Crutcher, Philip C. Sterry, Taylor, Kollinger & Bolton, and Joseph D. Taylor, all of Los Angeles, for appellants.

Kelley & Hews and Loyal C. Kelley, all of Riverside, for respondent.

MARKS, Justice.

This is a motion for diminution of the record by incorporating therein a duly certified copy of defendant's instruction No. 30. This instruction, as proposed, is not contained in the record. It contains, among other things, a quotation of the basic speed law as set forth in section 510 of the Vehicle Code, St.1935, p. 176, a statement that a violation of this basic rule is negligence, and the further statement that violation of law is of no consequence unless it be the proximate cause of the injury.

An identical instruction is set forth in the reporter's transcript except that the word "maximum" is used instead of the word "proximate".

Section 953 of the Code of Civil Procedure permits diminution of the record, "if it appear that there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal". See, also, Rules 14 and 25, Rules of the Supreme Court and District Courts of Appeal. It has been held that these provisions should be liberally construed. Fritsche v. McCue, 34 Cal.App.2d 46, 92 P.2d 928.

[1] It has been held that a motion for diminution of the record should be granted

where it is proposed to show at whose request instructions were given to the jury. Brandes v. Rucker Fuller Desk Co., 100 Cal.App. 512, 280 P. 379. Under this holding we are inclined to grant the motion as the record will then show that the instruction as proposed was in proper form. If, when the case is submitted on the merits, it should develop that this instruction, as proposed, has no proper bearing on the case, it can be disregarded. Carter v. Carr, 136 Cal.App. 60, 27 P.2d 940.

[2] If it is the purpose of counsel to impeach or correct the record contained in the reporter's transcript we doubt that it can be done in this manner. If the transcript, as certified by the reporter and the trial judge, does not contain a correct transcription of instruction thirty as actually given to the jury, power to correct it and to make the transcript speak the truth still rests in the trial court even though an appeal from the judgment is pending. Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715; In re Silva, 213 Cal. 446, 2 P.2d 341.

The motion for diminution of the record is granted and the certified copy of defendant's instruction No. 30 is ordered filed as a part of the record on this appeal.

We concur: BARNARD, P. J.; GRIFFIN, J.

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43 Cal.App.2d 561

PETRUCCI et al. v. HEIDENREICH.

Civ. 12879.

District Court of Appeal, Second District, Division 2, California.

March 19, 1941.

Rehearing Denied April 10, 1941.

Hearing Denied May 15, 1941.

1. Limitation of actions 🔑55(1)

Generally, statute of limitations governing tort action commences to run from date of act causing injury.

2. Limitation of actions 🔑55(3)

Where a physician and surgeon, performing operation in negligent manner, continues to treat patient thereafter, statute of limitations governing malpractice action does not commence to run during continuance of relationship of physician and surgeon, unless patient has discovered, or, through use of reasonable diligence, should have discovered, injury. Code Civ.Proc. § 340, subd. 3.

3. Limitation of actions 🔑55(3), 95(1)
Pleading 🔑428(4)

A malpractice action, wherein complaint was filed within year after plaintiff discovered injury to her because of defendant surgeon's negligent performance of operation and within year after termination of relationship of physician and surgeon, was not barred by statute of limitations, and defendant's objection to introduction of evidence on ground that complaint showed on its face that cause of action was barred by such statute should have been overruled. Code Civ.Proc. § 340, subd. 3.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Frank Petrucci and another against Harry H. Heidenreich, a physician and surgeon, for malpractice. Judgment for defendant, and plaintiffs appeal.

Reversed.

Walley & Davis, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment, in favor of defendant after trial before the court without a jury, predicated upon the sustaining of an objection by defendant to the introduction of any evidence on the ground that the complaint showed on its face that plaintiffs' cause of action was barred by the Statute of Limitations (subd. 3, sec. 340, Code Civ. Proc.), in an action to recover damages for malpractice, plaintiffs appeal.

It is alleged in the complaint filed October 20, 1939, that on or about July 25, 1937, defendant, a physician and surgeon, performed a cervical cauterization of plaintiff Flora Petrucci's uterus and that from said date until on or about April 1, 1939, defendant continued to treat said plaintiff in connection with the cauterization. It is also alleged that the cauterization was carelessly and negligently performed in that defendant over-cauterized the cervical tissues of the uterus and cauterized the entire uterine canal of said plaintiff, as a result of which an obstruction developed in her uterine canal.

In addition to the usual statement of damages, the complaint alleged: "That from the date of said cauterization and up to the early part of April, 1939, plaintiff, Flora Petrucci, was under the exclusive care of defendant, and plaintiffs relied solely upon defendant for information regarding plaintiff Flora Petrucci's physical condition and her failure to regain her health, and plaintiffs had no knowledge of the cause of plaintiff Flora Petrucci's failure to regain her health from the date of the said cauterization and during the time said plaintiff was under the care and counsel of defendant."

[1,2] Plaintiffs rely for reversal of the judgment on this proposition: *In an action to recover damages for malpractice due to the negligent performance of an operation by a physician and surgeon, where the physician and surgeon continues to treat the patient subsequent to the operation, the Statute of Limitations commences to run from the date the patient discovers or from the use of reasonable diligence should have discovered that the operation had been negligently performed, and the Statute of Limitations does not commence to run from the date of the operation.*

This proposition is tenable. It is the general rule that in tort actions the Statute of Limitations commences to run from the date of the act causing the injury (Wetzel v. Pius, 78 Cal.App. 104, 107, 248 P. 288). There is a recognized exception to this rule in California in malpractice cases, which is: That, if a physician and surgeon performs an operation in a negligent manner and continues thereafter to treat the patient, the Statute of Limitations does not commence to run during the continuance of the relationship of physician and patient, unless the patient has discovered the injury or through the use of reasonable diligence should have discovered it. (Huysman v. Kirsch, 6 Cal.2d 302, 312, 57 P.2d 908; Trombley v. Kolts, 29 Cal.App.2d 699, 707, 85 P.2d 541.)

One of the reasons for the foregoing rule is aptly stated in Huysman v. Kirsch, supra, where at page 309 of 6 Cal.2d, 57 P.2d at page 911, Mr. Justice Curtis quotes from Gillette v. Tucker (67 Ohio St. 106, 65 N.E. 865, 871, 93 Am.St.Rep. 639) thus: "'* * * It would be trifling with the law and the courts to exact compliance with such a rule, in order to have a standing in court for the vindication of her rights. It would impose upon her an improper burden to hold that, in order to prevent the statute from running against her right of action, she must sue while she was following the advice of the surgeon, and upon which she all the time relied.'"

[3] Since the complaint in the instant case was filed within a year after plaintiff Flora Petrucci had discovered the injury and within a year after the relationship of physician and surgeon had terminated, the complaint on its face was not barred by the Statute of Limitations and the objection to the introduction of evidence on this ground should have been overruled.

For the foregoing reasons the judgment is reversed.

We concur: MOORE, P. J.; WOOD, J.

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43 Cal.App.2d 652

COCA-COLA BOTTLING CO. v. FELICIANO et al.

Civ. 2637.

District Court of Appeal, Fourth District, California.

March 24, 1941.

Fraudulent conveyances 🔑**298(1)**

In action to cancel mortgage, evidence *held* sufficient to sustain trial court's findings that mortgage was given with intent to defraud and hinder plaintiff and prevent collection of mortgagor's debt to plaintiff.

◆

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by the Coca-Cola Bottling Company against Frank Feliciano and others to cancel a mortgage. Judgment for plaintiff, and defendants appeal.

Affirmed.

See, also, 32 Cal.App.2d 351, 89 P.2d 686.

Fred A. Shaeffer, of Santa Maria, for appellants.

C. Douglas Smith and Marion A. Smith, both of Santa Maria, for respondent.

BARNARD, Presiding Justice.

This is an action to cancel a mortgage as having been given with intent to defraud the plaintiff and prevent it from collecting a debt owed to it by the mortgagor.

The mortgage, executed on December 28, 1937, by Frank Feliciano, who was a liquor merchant, purported to cover all of the mortgagor's stock and fixtures and also four automobile trucks used in connection with the business, as security for a note for $3,500 of the same date payable to M. Nahmens. The answer admits that at the time of the execution of the mortgage Feliciano was indebted to the plaintiff in the sum of $7,434.20, but alleges that the mortgage was given in good faith as security for debts then owed by Feliciano to one Fesler, who was a brother-in-law of Feliciano, and to Fred A. Shaeffer, who was Feliciano's attorney. It is further alleged that the note and mortgage was given to M. Nahmens, who was Shaeffer's secretary, at the request of Shaeffer and with the consent of Fesler. It is not alleged that either Fesler or Shaeffer had assigned his claim to the defendant Nahmens.

At the trial it was conceded that the mortgage was void in so far as the stock and fixtures were concerned, as no notice of intention to mortgage those items had been given. The case was tried on the issues as to the validity of the mortgage with respect to the trucks. A purported assignment was introduced in evidence dated December 27, 1937, whereby Fesler assigned a claim for $1,500 against Feliciano to Shaeffer, and Shaeffer assigned the same claim to M. Nahmens. There is no evidence that this assignment was ever delivered to Nahmens, or that Shaeffer's claim was ever assigned to her, and the answer alleges that at all times material here the purported debts secured by the mortgage were owed by Feliciano to Fesler and Shaeffer. The court found in all respects in favor of the plaintiff, including findings that this mortgage was given to Nahmens without consideration at a time when the mortgagor was insolvent, that it was given with intent to defraud, hinder and prevent the plaintiff from collecting the debt owed to it by Feliciano, and that the mortgagee took the instrument with knowledge that it was given for the purpose of defrauding the plaintiff. Judgment was entered accordingly and the defendants have appealed.

Appellants' main contention is that there is no evidence to support the court's findings to the effect that this mortgage was given with the intent to defraud and hinder the respondent, and prevent the collection of its debt. In this connection the record contains the following evidence. On December 27, 1937, Feliciano told respondent's local manager that he was unable to pay his debt to the respondent. This manager made him an offer to buy out his stock, fixtures and equipment. Feliciano asked for time in which to consider the proposition. On December 28, 1937, the parties again discussed a settlement and Feliciano asked for further time, saying nothing about any intention to mortgage or dispose of his property. On December 30, 1937, Feliciano told the respondent's manager that he was not going to accept the proposition and that "you can go as far as you like".

In the meantime and on December 28, 1937, Feliciano disposed of all of his other property and executed this mortgage. Feliciano testified that before the mortgage was drawn he told his attorney. Shaeffer, that he "was in a mess" and that the respondent was trying to take his business away from him. He gave conflicting testimony as to the amounts he owed to Fesler and Shaeffer. He admitted that after he gave the mortgage he put the trucks "in hiding", saying that he did this on "orders from my attorney". While Fesler testified that all of his claim was for money loaned to Feliciano many years before, while Shaeffer testified that most of his claim was for money advanced many years before, and while Feliciano had later gone through bankruptcy, these claims were not listed or filed in that proceeding. There is also evidence that Shaeffer, on November 8, 1937, sent a bill to Feliciano for $198.11 with a statement that it included charges and credits up to the first of that month.

The appellant Nahmens testified that the first knowledge she had of this mortgage or of a plan to execute it was when Shaeffer dictated it to her; that she had not talked to Feliciano about it; that she was not told why it was put in her name; that she knew a suit had then been filed against Feliciano; that she was not asked if she were willing to take an assignment of the Fesler claim; that she gave nothing for the note and mortgage; and that she makes no claim and never has made a claim of having any interest in the note and mortgage. When asked why she had signed the affidavit attached to the mortgage, to the effect that the same was not given for the purpose of defrauding creditors, she replied: "I just signed it because it should be signed." Feliciano admitted on the witness stand that in a previous action, in which this respondent recovered a judgment for $7,434.20 against him, he had testified that he gave this mortgage "for the purpose of defeating the claim of the Coca-Cola Bottling Company".

This evidence speaks for itself and, with the reasonable inferences therefrom, is entirely sufficient to sustain the findings of which the appellants complain.

The appellants further contend that the court erred in failing to specifically find with respect to three other matters, all of which are entirely immaterial in view of the other findings which we have considered and which are controlling.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

* * *

43 Cal.App.2d 616

JUSTESEN'S FOOD STORES, Inc., v. CITY OF TULARE et al.

Civ. 2600.

District Court of Appeal, Fourth District, California.

March 22, 1941.

1. Pleading 🔑214(8)

A general demurrer admitted allegations of fact in complaint to be true for purpose of appeal from judgment, entered after the sustaining of the demurrer, dismissing the action.

2. Municipal corporations 🔑611

A municipality in the exercise of its police power may pass and enforce nondiscriminatory closing ordinances where they substantially aid in preserving public health, morals, or general welfare.

3. Constitutional law 🔑253

Under the "due process of law" clause, a legislative body in the exercise of its police power has broad discretion to determine both what public interests are and the measures necessary for the protection of such interests. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

4. Constitutional law 🔑48

The determination of the need for a mode of exercising the police power is primarily for the legislative body, and courts will not hold enactments invalid unless they are palpably unreasonable, arbitrary, or capricious, having no tendency to promote the public welfare, safety, morals, or general welfare. Const.Cal. art. 1, §§ 1, 13; U.S.C.A. Const. Amend. 14, § 1.

5. Constitutional law 🔑48

Every presumption is in favor of the reasonableness of a law and its validity.

6. Constitutional law 🔑70(3)

A court is not concerned with the wisdom or policy of a law, and cannot substitute its judgment for that of the legislative body.

7. Constitutional law 🔑48

If reasonable minds might differ regarding reasonableness of a regulation, the law must be upheld.

8. Food 🔑1

The hours of selling uncooked and uncured meats may be restricted by a closing ordinance.

9. Food 🔑1

The prevention of sale of impure or tainted meat constitutes a proper subject for exercise of "police power", and to make inspection efficacious in the protection of public health it is reasonable to regulate hours of business, since in the exercise of such police power the legislative body has a broad discretion to determine not only what public need is, but mode or measure by which such need may be safeguarded.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

10. Constitutional law 🔑48

A determination of a legislative body, in the exercise of police power, regarding what public need is and mode or measures by which such need may be safeguarded will be overthrown only when it is arbitrary and capricious.

11. Constitutional law ⚷296(1)

A provision of municipal ordinance regulating hours during which uncooked and uncured meats may be sold is not unconstitutional as depriving store owner of its liberty and property without "due process of law". Const.Cal. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14, § 1.

12. Food ⚷1

Where ordinance establishing closing hours for stores and markets dealing in uncooked and uncured meats contained provision that where separate business is carried on in same room with one coming within ordinance, the separate business should be kept separate and apart by permanent partition not less than seven feet in height, the provision was a legitimate exercise of "police power". Const.Cal. art. 1, §§ 1, 13.

13. Constitutional law ⚷70(3)

Where the necessity or propriety of an enactment is a question upon which reasonable minds might differ, the propriety and necessity of such an enactment is a matter of legislative determination.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action for injunction by Justesen's Food Stores, Inc., against the City of Tulare and others. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

Russell & Heid and Ward G. Rush, all of Tulare, for appellant.

I. H. Ham, City Atty., of Tulare, for respondents.

GRIFFIN, Justice.

This action was brought in the superior court to obtain an injunction against the enforcement of three certain sections of a city ordinance. A general demurrer to the plaintiff's first amended complaint was sustained without leave to amend, and judgment was entered thereon, dismissing the action. This appeal followed.

[1] The following allegations of fact, admitted to be true for the purposes of this appeal by the general demurrer of the defendants, upon which judgment was entered, appear in the plaintiff's amended complaint: On August 15, 1939, the defendants City of Tulare and City Council of the City of Tulare adopted an ordinance entitled, "An ordinance of the City of Tulare providing for the inspection of uncured or uncooked meats and for the condemnation and destruction of the same when found unwholesome or deleterious as food, establishing opening and closing hours for places of business selling uncured or uncooked meats, regulating such places of business, making a violation hereof a misdemeanor and prescribing a penalty therefor." Section 1 declares that the public health of the people of the City of Tulare requires that stores and markets dealing in uncured and uncooked meats be regulated. Section 2 provides: "It shall be unlawful for any person, firm, association or corporation within the City of Tulare to sell or offer for sale any uncured or uncooked meats except between the hours of 7:30 o'clock a. m. and 6 o'clock p. m. on days other than Saturday, Sunday, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Armistice Day, Thanksgiving Day and Christmas, and except between the hours of 7:30 a. m. and 9 o'clock p. m. on Saturday, and except that shipments of such meats may be made out of the City in wholesale lots at any time."

Section 3 provides: "It shall be unlawful for any person, firm, association or corporation maintaining, or who may hereafter maintain, any store, place of business or establishment, in the City of Tulare, engaging in the business of selling or offering for sale uncured or uncooked meats, to keep such store, place of business or establishment open for the transaction of business to any extent whatever, or permit such store to be kept open for business, or to receive at such store, place of business or establishment any uncured or uncooked meats, or to remove from such store, place of business or establishment any uncured or uncooked meats for the purpose of sale or delivery, except between the hours" designated in section 2.

Section 4 provides: "In the event one or more other businesses is carried on in the same room with any business coming within the provisions of Section 3 of this Ordinance, and the person, firm, association or corporation operating such other business or businesses desires to operate the same on" the holidays or during the hours mentioned "the part of the room in which said other business or businesses is carried on shall be separated and set apart from the said business coming under the provisions of Section 3 of this Ordinance, by a permanent partition not less than seven (7) feet in height, and said partition shall enclose and separate said place where said other business or businesses is carried on from the remaining part of the room or space where the business coming under the provisions of said Section 3 is conducted."

Appellant alleges and claims that for more than eleven years it has conducted in the City of Tulare the business of buying and selling all commodities usually carried in an ordinary general grocery store, and supplied merchandise and commodities to the residents of the City of Tulare and suburban and agricultural districts adjacent to that city; that respondents threaten to enforce the above-mentioned ordinance against them and thereby prevent them from selling, receiving, delivering or offering for sale in the City of Tulare not alone fresh meats but also any foods of any kind intended for human consumption on any holiday mentioned in the ordinance or on Sundays, or between the hours of 6 o'clock p. m. and 7:30 a. m. on any week day unless it shall construct and maintain a permanent partition not less than seven feet in height separating the space where it is selling uncooked meats from the space where it is selling other commodities, thus in practical effect requiring its fresh meat business to be conducted in a separate building or room from its general grocery business. It is claimed that if this ordinance is enforced and a portion of its premises is required to be separated from the other portion of the premises it will be thereby prevented from selling such merchandise at the times when said portion of the premises will be required to be closed by the partition required by the ordinance.

Appellant relies upon the following for a reversal of the judgment: that sections 2, 3 and 4 of the ordinance are in derogation of the Constitution of the United States (Sec. 1, Art. XIV), and of the Constitution of the State of California (Secs. 1 and 13, Art. I) in that they deprive the appellant of its liberty and property without due process of law.

[2] Appellant concedes that municipalities in the exercise of their police power may pass and enforce nondiscriminatory closing ordinances where they substantially aid in preserving the public health, morals or general welfare, and admits that a general Sunday closing ordinance has been upheld when applied to every business and industry in the community, except public utilities, restaurants and other businesses which of necessity must be operated on a seven-day basis, under the theory that such an ordinance conserves public health by establishing a community day of rest, citing In re Sumida, 177 Cal. 388, 170 P. 823 and Ex parte Koser, 60 Cal. 177; but on the other hand contends that where a Sunday closing law, such as the instant one, singles out single industries, or is discriminatory because of the character of the exceptions, it is void, citing Deese v. City of Lodi, 21 Cal.App.2d 631, 69 P.2d 1005, and other similar cases.

It is further argued that in the instant case a municipality has no plenary power to regulate or restrict the hours of an isolated business unless such regulation serves to promote the public health, morals or general welfare; that the sale of fresh meats involves no issue of public morals and no fire hazard; that the only conceivable concern of the city is that the meats be wholesome and that they be what they pretend to be; that no regulation of hours or days of sale will per se tend to increase the quality and wholesomeness of meats sold, nor will it tend to eliminate fraud, citing Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 19 L.R.A. 727, 35 Am.St.Rep. 152; Lisichin v. Andrews, D.C., 26 F.Supp. 882; Skaggs v. City of Oakland, 6 Cal.2d 222, 57 P.2d 478; and Justesen's Food Stores Inc. v. City of Tulare, 12 Cal.2d 324, 84 P.2d 140.

It is also argued that if the several decisions of the District Courts of Appeal (In re Lowenthal, 92 Cal.App. 200, 267 P. 886; In re Gatsios, 95 Cal.App. 762, 273 P. 826; Dorsa v. Board of Supervisors, etc., 23 Cal.App.2d 217, 72 P.2d 912 and In re Banta, 25 Cal.App.2d 622, 78 P.2d 243) have held that the hours of sale of uncooked and uncured meats may be restricted upon the theory that the object of the ordinance was to prevent the sale of unfit or tainted meats at a time when meat inspectors were not on duty, because of the opinions in Justesen's Food Stores, Inc. v. City of Tulare, supra, and Skaggs v. City of Oakland, supra, being rendered after all of the above-mentioned decisions, that the decisions of the District Courts of Appeal were thereby overruled because therein it is expressly stated in the opinions that the regulation of hours of business cannot be governed by the necessity of conforming to the inspector's convenience.

An ordinance of the City of Tulare, somewhat similar but different in effect and operation from the one before us, was before the Supreme Court for consideration and was held to be invalid in part in the case of Justesen's Food Stores, Inc. v. City of Tulare, supra. Another ordinance has been since adopted by that city by which it has endeavored to eliminate the objectionable features pointed out by that decision. That ordinance is now before us for a construction as to its validity.

[3-7] The principles governing courts in determining the validity of legislative enactments under the due process of law clause are clearly defined. A legislative body, in the exercise of its police power, has a broad discretion to determine both what public interests are and the measures necessary for the protection of such interests. The determination of the need for a mode of exercising the power is primarily for the legislative body and the courts will not hold enactments invalid unless they are palpably unreasonable, arbitrary or capricious, having no tendency to promote the public welfare, safety, morals, or general welfare. Every presumption is in favor of the reasonableness of the law and its validity. A court is not concerned with the wisdom or policy of the law and cannot substitute its judgment for that of the legislative body. If reasonable minds might differ as to the reasonableness of the regulation, the law must be upheld. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 550, 579, 55 P.2d 495.

[8] It will now be in order to examine the nature of the regulations in the light of the subject matter upon which they are operative and the ends sought to be achieved, and to determine whether it can be said that the City Council of Tulare acted in an arbitrary and capricious manner. In so doing, we may first consider the nature of establishments conducting a general grocery business and in particular only those including a meat department, to which type of establishment the problems arising on this appeal should be limited. We are convinced that appellant's argument that the cases of Justesen's Food Stores, Inc. v. City of Tulare, supra, and Skaggs v. City of Oakland, supra, overrule prior appellate court decisions which hold that the hours of selling uncooked and uncured meats may be restricted, must be rejected as untenable. In fact, these two cases support, rather than overrule, the prior decisions.

In Justesen's Food Stores, Inc. v. City of Tulare, supra, 12 Cal.2d at page 329, 84 P.2d at page 143, it was said, "The conduct of meat markets has always been the subject of regulation under the police power of the state or a municipality. In re Lowenthal, 92 Cal.App. 200, 267 P. 886. A city has full power under the Constitution, art. 11, sec. 11, to adopt and enforce laws having for their object the protection and preservation of the health of the people."

The case of Skaggs v. City of Oakland, supra [6 Cal.2d 222, 57 P.2d 480], involved an ordinance restricting the hours of delivery of bakery products. The correctness of the decision of In re Lowenthal, supra, was not denied, and the court said: "The cases of In re Lowenthal, 92 Cal.App. 200, 267 P. 886, and In re Gatsios, 95 Cal. App. 762, 273 P. 826, cited by defendants, are not controlling. They concern only uncooked products, such as fresh uncooked meats, which are easily infected." See, also, Ganley, v. Claeys, 2 Cal.2d 266, 40 P.2d 817.

Sections 2 and 3 of the ordinance as now presented applies to all persons, firms, associations or corporations who sell or offer for sale any uncured or uncooked meats, and all persons, firms, associations or corporations maintaining any store, place of business or establishment in the City of Tulare engaged in the business of selling uncured or uncooked meats. It will be noted that the objectionable feature of the previous ordinance, i. e., that it did not apply to all dispensers of uncured and uncooked meats alike and that it applied to uncured and uncooked meats and other foods, has been removed and it is now made applicable to all such classes and now applies only to uncured and uncooked meats rather than uncured and uncooked meats and other foods.

[9, 10] By the reported decisions it has been clearly established that there is a need for rigid and frequent inspections by

skilled public inspectors of fresh meats carried in meat markets and butcher shops to prevent the sale of impure or tainted meats and that the province of such inspections is to safeguard the public health; that this constitutes an eminently proper subject for the exercise of the police power; to make such inspections efficacious in the protection of the public health it is necessary and reasonable to make regulations to insure that the meat markets and butcher shops shall not be open except at specified reasonable hours; and that in the exercise of the police power the legislative body has a broad discretion to determine not only what the public need is, but the mode or measure by which such need shall be safeguarded. Its determination will be overthrown only when it is arbitrary and capricious.

[11] The validity of sections 2 and 3 of the ordinance is not now open to question as being in violation of article XIV, section 1 of the Constitution of the United States or article I, sections 1 and 13 of the Constitution of the State of California.

[12] Section 4 of the ordinance relating to the cases where a separate business is carried on in the same room with one coming under the operation of the ordinance, provides that the separate business shall be kept separate and apart by a permanent partition not less than seven feet in height, and is a legitimate exercise of the police power. It does not violate any provision of the United States or State Constitutions. This was clearly established by our Supreme Court, respecting Sunday closing of certain stores, etc., in In re Sumida, supra, involving a similar provision of an ordinance which provided "that in case one or more of the excepted businesses is carried on in the same room with any business coming within the operation of this ordinance and required thereby to be kept closed on Sunday, that the part of the room in which said excepted business is carried on, shall be separated and set apart from the said business coming under the operation of this ordinance as aforesaid by a permanent partition or screen not less than five feet in height, and which said permanent partition or screen shall enclose and separate said place where said excepted business is carried on, from the remaining part of the room wherein the business coming under the operation of this act is operated as aforesaid." There the court said, speaking through Mr. Justice Shaw [177 Cal. 388, 170 P. 825]: "The answer to the proposition is that, as the board of trustees has power to enact the ordinance prohibiting the operation of the general store on Sundays, it must likewise have power to adopt such regulations as may be necessary to prevent the secret or surreptitious violation of that ordinance in a manner which could not be detected without an unreasonable expense on the part of the public, and that the fact that such regulation may impose a considerable burden upon the property owner does not make the ordinance invalid. This proposition is well settled. * * * So here it is obvious that, if the petitioner is allowed to keep his general store open on Sundays, in order that he may sell therein the soda water, confections, and bread, which under the first part of the section he would be allowed to sell on Sunday, it would be easy for him to violate the law at any time by also selling other goods to persons thus patronizing him, and it would be practically impossible, for the authorities to detect or prevent such clandestine sales, except by keeping an officer in the store on Sunday. It is lawful for the legislative power to make such provisions in order to protect itself against such violations of its lawful police regulations and facilitate the enforcement thereof. The result is that the ordinance must be declared valid * * *."

[13] In view of the decisions, we are unable to hold that the regulation in regard to the partition is unreasonable. It therefore must follow that the ordinance cannot be held invalid under the rule regarding the due process of law clause enunciated in Miller v. Board of Public Works, supra, to the effect that, when the necessity or propriety of an enactment is a question upon which reasonable minds might differ, the propriety and necessity of such an enactment is a matter of legislative determination. This holding has been repeatedly affirmed by later decisions of this court. Resolving every possible presumption in favor of the validity of the ordinance, appellant has not sustained its burden of alleging and showing that the city council acted in an arbitrary manner.

For the reasons expressed, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

PEOPLE v. LIM et al.*

Civ. 11441.

District Court of Appeal, First District, Division 2, California.

March 18, 1941.

Rehearing Denied April 17, 1941.

Hearing Granted May 15, 1941.

1. Nuisance ⚷61

A public gambling place is enjoinable by the state as a "public nuisance". Code Civ.Proc. § 731; Civ.Code, §§ 3479, 3480; Pol.Code, § 4468.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

2. Nuisance ⚷61

At common law, a gambling house was treated as a "nuisance per se".

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance Per Se".

3. Nuisance ⚷65

The enumeration in the code sections of certain offenses as nuisances does not abrogate the common-law rule that other offenses equally obnoxious such as public gambling place are nuisances per se. Code Civ.Proc. § 731; Civ.Code, §§ 3479, 3480; Pol.Code, § 4468.

4. Common law ⚷12

In California, the common law, except so far as it is inapplicable to conditions of California, or has been modified by statute, remains in force. Pol.Code, § 4468.

5. Statutes ⚷222

Except in those instances where language of statute clearly discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject-matter, a statute purporting to embody such doctrine or rule will be construed in the light of common-law decisions on the same subject. Pol.Code, § 4468.

6. Nuisance ⚷65

The statutes enumerating certain specific acts as nuisances do not support conclusion that legislature intended to exclude all other acts known to be such at the common law, under the maxim "expressio unius est exclusio alterius". Code Civ.Proc. § 731; Civ.Code, §§ 3479, 3480; Pol.Code, § 4468.

See Words and Phrases, Permanent Edition, for all other definitions of "Expressio Unius Est Exclusio Alterius".

7. Statutes ⚷239

Under the doctrine that repeals by implication are not favored, it must clearly appear from legislation that the abrogation of settled rules of common law was intended before it will be held that the statute brought that result.

8. Nuisance ⚷82

District attorney had authority to maintain action in name of the people to abate as a public nuisance a public gambling house. Code Civ.Proc. § 731; Pol.Code, § 4156; Civ.Code, § 3479.

9. Pleading ⚷35

Where complaint for abatement of public gambling house as a public nuisance alleged that keeping of gambling house was injurious to health, was indecent and offensive to the senses and interfered with free use of property, and made other similar allegations, if any of the allegations relating to the harmful results of the activities complained of were conclusions rather than statements of fact, they could be disregarded as surplusage. Code Civ.Proc. § 731.

◆

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Jr., Judge.

Action by the People against Eddie Lim and others to restrain operation and maintenance of and to abate as a public nuisance a public gambling house. From an adverse judgment, the plaintiff appeals.

Judgment reversed, with directions.

Anthony Brazil, Dist. Atty., of Salinas, Earl Warren, Atty. Gen., and Warren Olney and Herbert E. Wenig, Deputy Atty. Gen., for appellant.

Harry L. Noland, of Salinas, and James M. Hanley, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued to restrain the operation and maintenance of, and to abate as a public nuisance a public gambling house in the city of Monterey. The action was instituted by the district attorney of Monterey County upon a complaint alleging in detail the manner of operating the gambling place, the character and variety of the several gambling devices indulged in, and the difficulties encountered by the peace officers of the city and of the county in

*Subsequent opinion 118 P.2d 472.

controlling the activities of the defendants. It is further alleged "That the maintenance, existence, operation, and conduct of said gambling games by the owners and operators thereof has in the past constituted and does now and will in the future constitute the keeping of a gambling house, a public nuisance, to the extent that the keeping of said gambling house is injurious to the health, is indecent, and offensive to the senses and interferes with the free use of property, the comfortable enjoyment of life and property of the people of the State of California, and particularly that portion thereof referred to in the next succeeding paragraph, for the reason that it tends to and does in fact debauch and corrupt the public morals, encourage idle and dissolute habits, draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property." The defendant Eddie Lim alone appeared and filed a general and special demurrer to the complaint. This was sustained and the people appeal.

[1] The primary question argued by appellant is whether a public gambling place is enjoinable by the state as a public nuisance. It is the position of the respondent that since the statute does not include a public gambling place in its definition of public nuisances they are not enjoinable under section 731 of the Code of Civil Procedure. Appellant takes the position that such places were nuisances per se in the common law and that the statute has not eliminated them as such. We are in accord with the views expressed by the appellant and for that reason the judgment must be reversed.

[2] There can be no doubt that a gambling house was treated as a nuisance per se at the common law. In 46 Corpus Juris, page 700, it is said: "In a broad sense the term 'disorderly house' includes bawdyhouses, common gambling houses, and places of like character. The specific kinds of disorderly houses which are regarded at law as nuisances per se are bawdyhouses and gambling houses; and such houses are per se nuisances at common law whether or not they are conducted in such manner as to amount to a disturbance of the public peace." See Wood on Nuisances, 3rd Ed., 1893, vol. 1, pp. 45, 46, 63. Sections 3479 and 3480 of the Civil Code read: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance." and "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." At the same session when these sections were enacted the legislature enacted section 4468 of the Political Code which reads: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state."

[3-5] Does the enumeration in the code sections of certain offenses as nuisances abrogate the common law rule that other offenses equally obnoxious are nuisance per se? We can find no sound reason for holding that it does. To our minds the true rule is stated in Re Estate of Elizalde, 182 Cal. 427, 432, 433, 188 P. 560, 562, where it is said: "In this state the common law, except so far as it is inapplicable to our conditions, or has been modified by statute, still remains in force. This principle is referred to in the Estate of Apple, 66 Cal. [432] 434, 6 P. 7, where the court said: '"The Code establishes the law of this state respecting the subjects to which it relates;" but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the Code. When the Code speaks, its provisions are controlling, and they are to be liberally construed with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed having been * * * abolished here; but where the Code is silent, the common law governs.'

"The common law of England is declared to be the rule of decision in all the courts of this state so far as not repugnant to or inconsistent with our Constitution and statutes. Pol.Code, § 4468.

The Civil Code was not designed to embody the whole law of private and civil relations, rights and duties; it is incomplete and partial; and, except in those instances where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning a particular subject-matter, a section of the Code purporting to embody such doctrine or rule will be construed in the light of common-law decisions on the same subject. Siminoff v. Goodman & Co. Bank, 18 Cal.App. 5, 11, 121 P. 939." To the same effect is Stiles v. Laird, 5 Cal. 120, 122, 63 Am.Dec. 110, where the court said: "The statute of this State defining what are nuisances and prescribing a remedy by action, does not take away any common law remedy in the abatement of nuisances which the statute does not embrace." See, also, Farmer v. Behmer, 9 Cal.App. 773, 781, 100 P. 901; Weis v. Superior Court, 30 Cal.App. 730, 733, 159 P. 464; People v. Glenn-Colusa Irr. Dist., 127 Cal.App. 30, 38, 15 P.2d 549; and People v. Truckee Lumber Co., 116 Cal. 397, 400, 48 P. 374, 39 L.R.A. 581, 58 Am.St.Rep. 183.

[6, 7] There is nothing in the statutes referred to which would support a conclusion that the legislature, in enumerating certain specific acts as nuisances, intended to exclude all those acts known to be such at the common law. When the maxim expressio unius est exclusio alterius is invoked the decision must rest upon a determination of the legislative intent, and, under the well-settled doctrine that repeals by implication are not favored, it must clearly appear from the legislation that the abrogation of settled rules of the common law was intended before it will be held that the statute brought that result.

[8] The respondent argues that the district attorney was without authority to maintain the action in the name of the people because section 731 of the Code of Civil Procedure authorizes him to sue "to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code". The section referred to merely states that "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons." It should be noted that section 731 of the Code of Civil Procedure makes no reference to section 3479 of the Civil Code, and also that section 4156 of the Political Code provides that "The district attorney may, and when directed by the board of supervisors must, bring a civil action in the name of the people of the state of California, to abate a public nuisance in his county." This authority was sustained in Weis v. Superior Court, 30 Cal.App. 730, 733, 159 P. 464.

[9] There is no merit in the special demurrer. If any of the allegations relating to the harmful results of the activities complained of should be deemed conclusions rather than statements of fact, they were surplusage and may be disregarded.

The judgment is reversed with directions to overrule the demurrer.

We concur: STURTEVANT, J.; SPENCE, J.

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43 Cal.App.2d 587

McAVOY v. HELMS BAKERIES.

Civ. 12692.

District Court of Appeal, Second District,
Division 2, California.

March 21, 1941.

Hearing Denied May 17, 1941.

Appeal and error ⇨1015(1)

Where affidavits supporting plaintiff's contention that trial court refused request that instructions be re-read to jury failed to show that affiants had personal knowledge of any action by judge, and judge, who had stated that he would re-read instructions if necessary, testified that, although he did not remember alleged request, he at no time in any case refused to re-read instructions, the showing of a refusal was insufficient to require reviewing court to determine whether such a refusal would require a reversal. Code Civ.Proc. § 614.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Katherine McAvoy against Helms Bakeries, to recover for injuries sustained when struck by the defendant's truck. Judgment for defendant, and the plaintiff appealed from the judgment and from an order denying a new trial.

Judgment affirmed and purported appeal from order denying new trial dismissed.

Entenza & Gramer and William Rains, all of Los Angeles, for appellant.

Mills, Hunter, Dunn & Liljestrom, by C. R. Liljestrom, all of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which she suffered when she was struck by a truck owned by defendant. By a nine to three vote the jury returned a verdict in favor of defendant and plaintiff appeals from the resulting judgment.

The accident occurred at about 6 o'clock p. m. on October 31, 1938, at the intersection of Elm Drive and Pico boulevard in the city of Los Angeles. Plaintiff was walking from north to south across Pico boulevard on an unmarked crosswalk. The evidence as to the point at which plaintiff was struck is conflicting. Plaintiff's evidence tended to establish that she was struck at a point one or two feet north of the center line of Pico boulevard by defendant's truck as it was being driven in an easterly direction on Pico boulevard. Evidence on behalf of defendant tended to establish that plaintiff was struck as she stepped two or three feet south of the center line of Pico boulevard. Automobile traffic was heavy at the time.

On this appeal it is plaintiff's contention that "it was error for the trial court to refuse to comply with the request of the jury delivered through the bailiff to re-read the instructions which had previously been given by the court concerning the right of the plaintiff to walk across Pico boulevard at the point where she was walking when she was struck by defendant's truck and to refuse to give further instructions". She cites section 614 of the Code of Civil Procedure and asserts that it was obligatory upon the court to re-read the instructions and to further instruct the jury. This section reads as follows: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel." Among the answers presented to plaintiff's contention defendant asserts that the court did not refuse any request to the jury to have instructions re-read or to give them further instructions. The instructions actually given were complete and free from error.

In support of her contention plaintiff presented to the trial court four affidavits, one by her attorney, Mrs. S. E. Gramer, and three by members of the jury. In Mrs. Gramer's affidavit she states that she was in the court room "at all times from the time the jury was instructed and left to deliberate until they returned a verdict". The balance of her affidavit consists of conclusions and hearsay statements, for she says that "she did not know at the time she was seated in the court room when the bailiff returned with the request for instructions that the jury had made such request". She set forth in the affidavit that approximately one and one-half hours after the jury had retired the bailiff was called to the jury room and returned to the court room with a request from all of the jurors that the court re-read the instructions given concerning the right of plaintiff to walk across Pico boulevard at the point where she was walking when she was struck by the truck and with a request for further instructions "if necessary to clarify the said point". She further sets forth that she "is informed and believes and therefore alleges that the said request when communicated to the judge, who was present, was refused". The affidavit contains further statements giving her view that the instructions "were extremely conflicting and were not understood by certain jurors when read". In the affidavits of the jurors it is set forth that during their deliberations the jury voted unanimously in favor of a motion to request the judge to give further instructions to clarify the rights of plaintiff to be in the crosswalk at the time she was struck and "that this request was transmitted to the court through the bailiff in charge of the jury and that the court sent word back to the jury through the bailiff that the request was denied". These affidavits were executed by the three jurors who did not join in the verdict.

Assuming, without deciding, that the affidavits of the jurors could be used for the purpose for which they were presented, we must nevertheless uphold the judgment on the record before us. When the court finished giving its formal instructions to the jury one of the jurors asked if it would "be possible for us to take that section of the Motor Vehicle Code". To this the court replied: "No; that is one thing you can't do. Not in a civil case. I can't give you the instructions that I have just read to you. If at any time, however, you feel that you have to have them read again—I hope you don't—if you feel that you have to, why, then instruct the bailiff and decide on what portion of instructions you want read again and I will read them. I tried to read them clear enough." At the time the motion for a new trial came on for hearing the judge was sworn as a witness and he testified as follows: "Now, as to this particular matter, I at no time in any case involving a jury refused to give additional instructions, nor to re-read the instructions already given but, however, having no independent recollection of what did happen in this particular case, I cannot say as to what conversation with the bailiff went on. That is all. That is the best I can do."

It is provided in section 614 of the Code of Civil Procedure that if the jury desires to be informed on any point of law, "they may require the officer to conduct them into court". No showing has been made by the affidavits of the jurors or otherwise that they requested that they be conducted into court. Although the court suggested at the hearing of the motion for new trial that an affidavit might be secured from the bailiff, the record does not disclose any affidavit by this official.

The sworn statement of the trial judge presents a sufficient answer to plaintiff's contention. In his testimony, which was given more than six months after the trial, the judge states that although he had no independent recollection of his conversation with the bailiff he at no time in any case refused to re-read instructions already given to a jury or to give them additional instructions. This statement of the judge, considered together with his voluntary suggestion to the jury at the close of his formal instructions to them that he would re-read to them the instructions upon their request to the bailiff, affords sufficient proof that there was in fact no refusal on the part of the judge to re-read the instructions or to give additional instructions. The statement of the judge is not contradicted by any of the affidavits presented by plaintiff, for it is affirmatively shown in the affidavits that none of the affiants had personal knowledge of any action taken by the judge or of any action he failed to take.

Our conclusions above set forth make it unnecessary to determine whether a refusal of the court to re-read instructions or to give further instructions on points which had been properly covered, if made in the manner set forth in section 614 of the Code of Civil Procedure, would call for a reversal of the judgment.

The purported appeal from the order denying new trial is dismissed.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

43 Cal.App.2d 511

VINCENT PETROLEUM CORPORATION, Limited, v. CULVER CITY et al.

Civ. 11310.

District Court of Appeal, First District, Division 1, California.

March 18, 1941.

1. Injunction 🔑**12**

An injunction lies only to prevent threatened injury, and has no application to wrongs which have been completed, and hence action to enjoin city from revoking permit to drill oil well within city limits could not be maintained several months after permit had been revoked.

2. Injunction 🔑**77(1)**

In so far as revocation by city council of permit to drill oil well was predicated on determination that there had been a breach of ordinance granting the permit, such action of the council was quasi judicial, and could be reviewed only by certiorari or mandamus, and not by action in superior court for injunction.

3. Licenses 🔑**7(1)**

A city ordinance requiring any one who desired to drill an oil well inside city limits to procure a license and post bond was a proper exercise of city's "police power".

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

4. Constitutional law 🔑**101**

A license or permit granted under the police power creates no "property or contract right" in the constitutional sense, but is always subject to revocation in the legitimate exercise of such police power.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract Right" and "Property Right".

5. Mandamus ⚷87

Only when action of city officials in revoking a license issued under police power is arbitrary, tyrannical, and unreasonable do those unfairly affected thereby have a remedy by mandamus.

6. Licenses ⚷38

The power to revoke licenses of businesses subject to police power of city is necessarily implied, and hence it is immaterial whether licensing ordinance contains express provision permitting revocation.

7. Pleading ⚷350(3)

In determining defendant's motion for judgment on the pleadings on the ground that complaint failed to state a cause of action, facts alleged in complaint must be accepted as true.

8. Injunction ⚷77(1)

Where oil company's predecessor as lessee of realty within city had procured permit to drill an oil well, and seven years later, while well was still nonproducing despite expenditure of several thousand dollars, and although oil company had complied with terms of permit, city council, after a hearing, revoked the permit, oil company would not be entitled to injunctive relief in the absence of allegation and proof of facts showing that council in revoking permit acted arbitrarily, illegally, unreasonably, or fraudulently.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Suit by the Vincent Petroleum Corporation, Limited, against the City of Culver City, and others, for an injunction to restrain defendants from revoking plaintiff's oil well drilling permit or otherwise interfering with operation of plaintiff's oil well. From a judgment on the pleadings dismissing its complaint, plaintiff appeals.

Judgment affirmed.

Cannon & Callister and David H. Cannon, all of Los Angeles, for appellant.

M. Tellefson, City Atty., of Culver City, for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment dismissing its complaint for an injunction entered after the granting of defendants' motion for a judgment on the pleadings. The sole question presented on this appeal is whether the complaint states a cause of action.

The complaint alleges that in 1925 the defendant city adopted ordinances 146 and 153, copies of which are attached to the complaint. By these ordinances it was made unlawful to drill for oil within the corporate limits of the city, except within the limits of a described district. The ordinances required that every permittee, before commencing drilling operations, must furnish to the city a $1,000 bond "conditioned for the faithful drilling and operation of such well and the removal of the derrick and closing up of such well within ninety (90) days from the cessation of drilling operations or other work or operation in connection with such well". They further provided that it should be unlawful to drill for oil within the excepted district without first securing a license or permit from the city clerk which should cost $250. Any violation of the ordinances was made a misdemeanor.

The complaint alleges that plaintiff is the assignee of a certain oil lease made between Maria Uharriet and others as lessors, and Taylor Oil Company, Ltd., as lessee; that the land covered by the lease is located within the district in which oil drilling is permitted by the above-mentioned ordinances; that in November, 1930, plaintiff's predecessor in interest began drilling "Uharriet Well No. 1" on the leased premises "and diligently continued said operations either by themselves or through the plaintiff * * * to a depth of more than 6061 feet"; that until on or about May 25, 1937, plaintiff has been "doing work on the said well, in an attempt to complete it as a commercially producing oil and gas well." It is further alleged that before commencing drilling operations a permit was secured from the city under the above ordinances; that since beginning operations plaintiff and its predecessor "have complied in every way with the provisions of both of said ordinances"; that a license has been secured from the city clerk and a bond furnished as required by the ordinances; that on or about May 18, 1937, defendants served on plaintiff an order to show cause why the drilling permit should not be revoked; that on or about May 24, 1937, the defendant city adopted resolution No. 2975 revoking the permit. Copies of the order to show cause and the resolution are attached to the complaint. The resolution recites the granting of the permit on November 3, 1930; that the city has granted various extensions of the permit, the last one up to May 30, 1937, which was made subject to the condition that the well be placed on commercial production before said date; that the plaintiff has requested a further extension of the permit; that "it appears from the records and the facts within the personal knowledge of each and all of the members of the city council that said oil drilling operations have been suspended for long periods of time and have not been prosecuted with reasonable diligence since the original permit was granted in 1930, and that the promoters of said operations have many times definitely agreed that said operations would be completed within a time certain and have thereupon failed to carry on active work and have continuously kept said operations in suspense with little evidence of the fulfillment of any of the agreements made with the City Council during the past three years"; that "it appears to the City Council that a sufficient time has been given to the promoters of said enterprise to demonstrate definitely whether or not oil can be produced in paying quantities, and that further extension of said permit would not assure successful operations within a given time"; that the location of the oil drilling equipment and the uncertainty of the "final disposition of said activities" are detrimental to the property interests of residents of the city in the area involved, and will result, if continued, "in retarding the development of said district to the detriment of the public interest". Predicated on these findings, the resolution provides that (1) the public interest requires that no further extensions of the permit be granted; (2) that the application of plaintiff for such extension is denied; (3) that all permits or extensions granted to plaintiff or its predecessor to drill for oil on the land in question are terminated and revoked "in accordance with the conditions of the last extension of said permit * * * granted to the applicants and accepted by them"; (4) that the city attorney is instructed to notify the permittee and its bonding company to remove all oil drilling equipment from the premises.

The complaint then alleges that, after the adoption of this resolution revoking the permit, plaintiff requested another extension which was refused; that, by reason of the foregoing, plaintiff has been prevented from developing its property; that plaintiff has been threatened by defendants with criminal prosecution if it continues its drilling operations; that plaintiff is informed and believes that the real property covered by the oil lease is rich in oil and gas; that it is impossible to estimate the damage plaintiff will suffer if it is prevented from completing the well; that the action of defendants is depriving plaintiff of its property without due process and "is in violation of the rights secured to the plaintiff by law"; that plaintiff and its predecessor have already spent more than $68,000 in the drilling of the well; that the action and threats of the defendants will compel plaintiff to pay out a large sum in fines and penalties and will cause the frequent arrest of the officers and agents of plaintiff; that, unless defendants are restrained, plaintiff fears defendants will carry out their threats and the business and property of plaintiff will be irreparably injured, and plaintiff will be subjected to a multiplicity of suits.

The prayer of the complaint is as follows: "Wherefore, plaintiff prays that said defendants, and each of them, be enjoined and restrained from revoking, cancelling, or terminating the permit heretofore issued by said City for the drilling of the said 'Uharriet Well No. 1,' and from removing or causing to be removed the oil well derrick, or any of the equipment on the premises now held by the plaintiff as lessee under said oil and gas lease, and from interfering in any way with the action of the plaintiff in going forward with the further drilling or operation of 'Uharriet Well No. 1,' or with the further development of the real property covered by said oil and gas lease; and for such other and further relief as may be just and proper in the premises, and for costs of suit."

Neither the complaint nor the briefs clearly set forth the theory upon which plaintiff contends that it is entitled to the relief prayed for. It is apparently the theory of plaintiff that, having secured a permit, and having spent $68,000 in the development of the well without producing oil, it has some sort of a vested right of contract or property that the city was powerless to take away. It is to be noted that the complaint contains no direct, or, in fact, any indirect, allegation, that the board, in revoking the permit, acted unreasonably, illegally, arbitrarily or fraudulently or in abuse of its powers. Under such circumstances, it is our opinion that the complaint does not state a cause of action.

[1] In the first place, the main purpose of the proceedings seems to be to enjoin the city from revoking the permit. The allegations of the complaint show that the legislative body of the city has acted, and that the permit was revoked, several months before the complaint was filed. It is well-settled that an injunction lies only to prevent threatened injury and has no application to wrongs which have been completed. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165.

[2] In the second place, in so far as the revocation of the permit was predicated on the determination that there had been a breach of the ordinance granting the permit, the action of the council was at least quasi judicial. The sole method of review would be by certiorari or mandamus. Plaintiff cannot be permitted to try this issue of fact before the city council, and then, after losing its case there, proceed into the superior court and secure a trial de novo on this same issue. It is to be noted that the complaint contains no allegation that the findings of fact set forth in the revocatory resolution were not supported by the evidence.

[3, 4] Of far more importance than either of these points is the fact that there are no allegations in the complaint that the revocatory ordinance was invalid or void, nor are any facts alleged showing that the city acted unreasonably, illegally, arbitrarily, or fraudulently. The original licensing ordinance was well within the police power of the city. Under the permit secured by the plaintiff, it secured no right of property or of contract, in a constitutional sense. Whatever right it secured was subject to revocation. These principles are well-settled.

In Hevren v. Reed, 126 Cal. 219, 222, 58 P. 536, 537, the court, in referring to the power to revoke a permit granted under the police power, approved the following rule, quoting from a Connecticut case, La Croix v. Fairfield County Com'rs, 50 Conn. 321, 47 Am.Rep. 648: "'But, aside from this consideration, if anything can be settled by legal authorities, the doctrine is too well established to be longer called in question that a license of this character, whether revocable in terms or not, is neither a contract nor property, in any constitutional sense, but is subject at all times to the police powers of the state government.'"

An instructive case on this subject is the decision of the Circuit Court of Appeals, Ninth Circuit, in Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528, certiorari denied 284 U.S. 634, 52 S.Ct. 18, 76 L.Ed. 540, passing upon the validity of certain Los Angeles ordinances. In that case, by amendment to a zoning ordinance, certain real property was brought within the residential zone. In the early part of 1927 a portion of the area was exempted from the restriction and oil drilling permitted thereon. In reliance on this amendment to the zoning ordinance, the oil company secured an oil lease on certain property within the area where drilling was permitted and immediately started work looking toward the development of the land for oil purposes. The oil company expended a total of $211,000 for this purpose. Later in 1927 the zoning ordinance was again amended to include the land in question within the residential zone. The power of the city to thus amend its ordinances was upheld. After holding that the legislative body of a city entrusted with the police power has a wide discretion which cannot be interfered with by the courts, the court stated (47 F.2d page 534): "It has uniformly been held that there is no vested right in a permit or an ordinance of the nature of that involved here, by which the boundaries of the residential zone were changed to exclude appellants' property therefrom. That being true, appellants are without remedy unless on the whole it can be said that the final action of the city council, by which it again included their property in the residence zone, was so wholly unreasonable and unjustifiable under the circumstances as to be void. In this connection it is proper to consider the changes in the situation of the parties brought about by the ordinance excluding the lands of appellants from the residence district, but a mere change of policy or of legislation, however unfortunate the result may be to appellants, does not justify the courts in declaring void an ordinance exercising legitimate police power. The loss suffered by the appellants by reason of this change in legislative policy is no more a taking of their property than is the loss resulting to them by reason of being deprived of the right to develop the oil on their property or the right to use their land for other than residence purposes." This case was cited with approval in Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 94, 33 P.2d 672.

The rule that a license or permit granted under the police power creates no property or contract right, and that such license or permit is always subject to revocation is well-settled. In McKenzie v. McClellan, 62 Misc. 342, 116 N.Y.S. 645, 646, the rule is stated as follows: "A license is only a permit to do a particular thing, and it is not property in any legal sense. It is a mere privilege granted by the municipal officer empowered to issue it, and is always revocable; the correlative power to revoke a license being a necessary consequence of the power to grant it."

[5] In People v. Department of Health 189 N.Y. 187, 82 N.E. 187, 188, 13 L.R.A., N.S., 894, the court held that a license issued under the police power was "not a contract or property, but merely a temporary permit issued in the exercise of the police powers to do that which otherwise would be prohibited". The court also held that it is only when the action of the city officials is "arbitrary, tyrannical, and unreasonable" that those unfairly affected have a remedy by mandamus. See, also, Wallace v. Mayor, etc., of City of Reno 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am.St.Rep. 747, where many cases are collected and commented on.

[6] Several of the cases above cited also hold, and there are many other cases holding to the same effect, that, so far as the power of revocation is concerned, it is immaterial that the licensing ordinance contains no express provision permitting revocation; that the power to revoke licenses of businesses subject to the police power is necessarily implied. The cases are collected and commented on in 3 McQuillin, Municipal Corporations, 2d Ed., section 1108.

[7, 8] From these authorities it appears that the complaint here involved is fatally defective. All that is alleged is that in 1930 the predecessor of plaintiff secured a permit to drill for oil; that seven years later, after expending $68,000, the well was still non-producing after being sunk to a depth of 6,061 feet; that plaintiff has complied with the terms of the permit; that in 1937, after a hearing, the city council revoked the permit. If all those facts are accepted as true, as we must accept them on this appeal, they would not warrant the issuance of an injunction. An injunction can be granted only where the board revokes the permit arbitrarily, illegally, unreasonably or fraudulently. Without allegations of fact which, if proved, would show that the board acted arbitrarily, illegally, unreasonably or fraudulently, the complaint is fatally defective.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

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43 Cal.App.2d 492

CATE v. STAPLETON et al.

Civ. 2573.

District Court of Appeal, Fourth District, California.

March 17, 1941.

Hearing Denied May 15, 1941.

1. Bankruptcy 🔑297

Under provisions of Bankruptcy Act, superior court had jurisdiction in action by a trustee in bankruptcy to avoid a preference knowingly received by creditors of bankrupt, and venue of a particular action of such nature depended upon the laws and rules of the state. Bankr.Act §§ 23, 60, and sub. b, 11 U.S.C.A. §§ 46, 96, and sub. b.

2. Venue 🔑7

Under rule that parties are deemed to have incorporated into their agreement statute which affects the matter concerning which they have contracted, not all obligations created by statute, particularly where a remedy is expressly provided by statute, are contractual within meaning of statute authorizing suit on a contract in county in which defendant contracted to perform. Code Civ.Proc. § 395.

3. Bankruptcy 🔑159

In order to avoid a preference received by creditor of a bankrupt, it is not necessary to show that there was any agreement or arrangement between the parties to the preference. Bankr.Act § 60, and sub. b, 11 U.S.C.A. § 96, and sub. b.

4. Venue ⚷7

The obligation imposed by Bankruptcy Act upon a preferred creditor of bankrupt to return proceeds of preference is not a "contractual obligation" within meaning of venue statute authorizing action on contract to be tried in county in which defendant contracted to perform, and hence venue of action by trustee in bankruptcy to recover proceeds of preference allegedly received by creditors of bankrupt corporation could not be maintained in county of bankrupt's principal place of business as against motion for change of venue by one of creditors, none of whom resided in county of suit. Code Civ.Proc. § 395; Bankr.Act §§ 23, 60, and sub. b, 11 U.S.C.A. §§ 46, 96, and sub. b.

See Words and Phrases, Permanent Edition, for all other definitions of "Contractual Obligation".

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Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Clyde E. Cate, trustee in bankruptcy, against James A. Stapleton and others to recover certain money and property allegedly received by defendants as a preference within the meaning of the Bankruptcy Act. From an order denying motion for change of venue, the named defendant appeals.

Order reversed.

Frank H. Marvin, of Fresno, and Cooley, Crowley & Supple, of San Francisco, for appellant.

Henry O. Wackerbarth, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion for a change of venue from the county of Fresno to the city and county of San Francisco, which is the residence of the appellant.

The action is one brought by a trustee in bankruptcy for the purpose of recovering certain money and property alleged to have been turned over to the defendants in payment of a debt, on the ground that the same constituted a preference within the meaning of the Bankruptcy Act. The bankrupt corporation had its principal place of business in Fresno county and the trustee in bankruptcy was appointed by a referee of the United States District Court at Fresno. It is conceded that neither defendant resides in Fresno county and the question presented is whether or not an action to set aside a preference, as authorized by the Bankruptcy Act, is predicated upon a contractual obligation.

Section 46 of the Bankruptcy Act (U.S. C.A., Title 11) provides that suits by a trustee shall only be brought or prosecuted in courts where the bankrupt could have done so had bankruptcy proceedings not been instituted "except as provided in sections 96 * * * of this title". Section 96 of this act provides what shall constitute a preference and, in subdivision b thereof, provides that any such preference may be avoided by the trustee if the creditor receiving it has reasonable cause to believe that the debtor was insolvent at the time and that, for such purpose, "any State court which would have had jurisdiction if bankruptcy had not intervened * * * shall have concurrent jurisdiction".

[1] Such actions have been frequently filed in the superior courts of this state and it cannot now be questioned that these courts have jurisdiction in such actions. This being true, the venue or particular court where such an action is to be tried depends upon the laws and rules of this state. Under section 395 of the Code of Civil Procedure, the county in which one of the defendants resides is the proper county for the trial of this action unless it is one where "a defendant has contracted to perform an obligation in a particular county", in which case it may be tried in that county, subject to exceptions which are not material here.

The respondent argues that statutory obligations or liabilities are contractual, relying on such cases as Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am.St.Rep. 153; Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156; Thomas v. Wentworth Hotel Co., 158 Cal. 275, 110 P. 942, 139 Am.St.Rep. 120; Kennedy v. California Sav. Bank, 97 Cal. 93, 31 P. 846, 33 Am.St.Rep. 163; Marshall v. Wentz, 28 Cal.App. 540, 153 P. 244; Bliss v. Sneath, 103 Cal. 43, 36 P. 1029; County of San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174; Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; and Hollywood, etc., v. Keyes, 12 Cal.App. 172, 107 P. 129, in which cases it has been held, in general effect, that parties will be deemed to have incorporated into their agreements the statutes which affect the matters concerning which they have contracted. It is then argued that during the period of its insolvency this bankrupt corporation and its officers held its assets in trust for the benefit of its creditors and its stockholders, that if the defendants received any of these assets during that time there was an implied promise on their part to repay and return such trust property, and that this action is based upon that obligation which the defendants impliedly agreed to perform in Fresno county.

[2] Not all statutory obligations or liabilities are contractual, although in many cases, notably those involving the rights and liabilities of stockholders and officers of corporations, a party is deemed to contract in view of existing statutes, even to the extent that these become a part of his contract. Moreover, a contract has often been implied in order to provide a remedy where one would otherwise not exist. In the instant case a remedy is expressly provided by statute and it is not necessary to rely upon any theory of implied contract. Obviously, there is a difference between accepting the provisions of a statute as a part of a contract which is being entered into and the doing of something which a statute expressly forbids. It is well settled that actions based on obligations created by statute may or may not be contractual in nature.

In 6 California Jurisprudence, page 24, it is said: "It may be conceded that there are obligations arising by operation of law which do not also come within the class of obligations arising from contract; but it must also be admitted that there are obligations which, in a certain sense, arise from the operation of law, and at the same time are in substance and effect contracts—that there are liabilities which although arising from statute may nevertheless be contracts. Contracts may be made or evidenced by a statute, and by conduct ensuing thereupon, as well as by other means or evidence. The statute itself, coupled with the subsequent performance of the conditions, furnishes all the elements which are necessary to the formation and existence of an implied contract. There is a clear distinction between such a case and one in which an implied contract is raised by the law out of pure necessity and merely to provide a remedy."

In Walker v. McCusker, 65 Cal. 360, 4 P. 206, 207, an action based upon a statutory liability, the court said: "The liability of the tenant in possession to the purchaser for rents, or use and occupation, from the day of sale to the expiration of the time for redemption, is a statutory liability merely, and exists without the assent of the person in possession. It is not a liability founded on a contract, express or implied, within the meaning of section 537, Code of Civil Proc., authorizing the issuance of an attachment."

In Talcott Land Co. v. Hershiser. 184 Cal. 748, 195 P. 653, 659, in passing upon a statutory obligation imposed upon the directors of the corporation, the court said: "Appellant's contention is that this is not an action upon a contract express or implied for the direct payment of money within the meaning of section 537 of the Code of Civil Procedure, authorizing attachments in such cases only. The argument that the liability is contractual is predicated upon the proposition that the director upon assuming office enters into a contract to perform the duties of his office in a lawful manner, and that his failure so to do is a breach of this implied contract, and for such breach an attachment will lie upon the implied obligation to restore to the corporation the full amount of the capital so diverted. We think it clear that the obligation is wholly statutory, if not penal, as we have heretofore pointed out, and is in no sense contractual within the meaning of the attachment law."

In Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 149, 12 Am.St.Rep. 17, the court said: "The existence of a contract, express or implied, is an essential basis without which no writ of attachment can properly issue; and, as in this case the action was founded, not upon contract, but upon the fraud and wrongful acts of the defendant, we are of opinion the writ of attachment issued therein was absolutely void * * *.'

[3, 4] The provisions of the Bankruptcy Act here in question are in fact not based upon any contractual obligation, but upon the theory that a wrongful act has been committed which interferes with the rights of other creditors. It has been held that it is not necessary to show that

there was any agreement or arrangement between the parties to the preference. Gabriel v. Tonner, 138 Cal. 63, 70 P. 1021. In practical effect the action sounds more in tort than in contract, being based upon the wrongful act of the parties, resulting in harm to others, when they had knowledge of the conditions at the time they acted. The duty to return the property arises from the express provisions of the statute irrespective of any contract, express or implied. In so far as any contractual relationship is concerned, rather than being based upon the performance of an obligation, the action is more in the nature of one to set aside a contract as expressly forbidden by the statute under the existing circumstances. For these reasons we hold that the obligation of these defendants, if any, to return the proceeds of the preference obtained by them, was not one which they had contracted to perform in Fresno county, within the meaning of section 395 of the Code of Civil Procedure.

The order is reversed.

We concur: MARKS, J.; GRIFFIN,

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43 Cal.App.2d 629

REITHARDT et al. v. BOARD OF EDUCATION OF YUBA COUNTY et al.

Civ. 6485.

District Court of Appeal, Third District, California.

March 24, 1941.

Hearing Denied May 22, 1941.

1. Schools and school districts ⇨121

In high school student's action against county board of education and union high school district for personal injuries, student was bound to show that injuries were received as a direct and proximate result of negligence on part of district, board, or their officers or agents. School Code, § 2.801.

2. Schools and school districts ⇨89

A rule of state board of education that where special playground supervision is not provided, teachers shall direct play of pupils during intermission did not apply to a ten-minute interval between high school classes, and hence violation, if any, of rule by a county board of education and union high school district did not render board and district liable for injuries received by high school student when a fellow student willfully caused student to fall from seat on window ledge in school building during interval between classes.

3. Schools and school districts ⇨89

Under rule of state board of education that where special playground supervision is not provided, teachers shall direct play of pupils of their classes in school or on school grounds during "intermission", quoted word refers to a general cessation of all teaching activity in school, and board's intent under rule was to deal with supervision at intervals which might be used for school play.

See Words and Phrases, Permanent Edition, for all other definitions of "Intermission".

4. Statutes ⇨184

Every statute and code section should be construed with reference to its purpose and objects intended to be accomplished by it.

5. Schools and school districts ⇨89

Under rule of state board of education that where special playground supervision is not provided, teachers shall direct play of pupils of their classes in school or on school grounds during intermission, board did not intend to place upon governing body of a school the burden of employing additional teachers to follow students from class to class during ten-minute intervals between classes.

6. Schools and school districts ⇨89

If a rule of state board of education respecting supervision of play on school grounds had a doubtful meaning, in construing rule, court could consider any inconvenience which might result from a given construction.

7. Schools and school districts ⇨89

The court was bound to place a reasonable interpretation upon rule of state board of education respecting supervision of play on school grounds during intermission. Civ. Code, § 3512.

8. Schools and school districts ⇨89

Where it was conceded that a rule of state board of education respecting supervision of play on school grounds during intermission had the force of law, in construing rule, court was governed by rules of statutory construction.

9. Schools and school districts ⚷121

Evidence *held* not to authorize recovery by high school student from county board of education and union high school district for injuries received when a fellow student willfully caused student to fall from seat on window ledge in school building during ten-minute interval between classes upon theory that allowing students to sit upon ledge was negligence. School Code, § 2.801.

10. Negligence ⚷4

In action for injuries as result of alleged negligence, plaintiff is not bound to prove that defendant should have foreseen the very injury which resulted, and defendant's negligence is established if a reasonably prudent person would have foreseen that injuries of the same general type would be likely to happen.

11. Schools and school districts ⚷89

The liability of a school district for injuries to its students rests upon statute which permits recovery only when injuries arise from negligence of district or its officers or employees. School Code, § 2.801.

12. Schools and school districts ⚷89

The statute authorizing recovery against a school district for injuries to students which arise from negligence of district or its officers or employees does not create a liability upon district for injuries arising from unlawful or willful misconduct of its students, nor for injuries arising from negligence of a fellow student. School Code, § 2.801.

13. Schools and school districts ⚷120

To hold a school district liable for injuries which a student received from willful misconduct of a fellow student, it is necessary to allege and prove that district was guilty of some act of commission or omission amounting to negligence. School Code, § 2.-801.

14. Schools and school districts ⚷89

A school district, although required to exercise reasonable supervision over its students while school is in session, is not an "insurer" of safety of students at play or elsewhere. School Code, § 2.801.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

15. Schools and school districts ⚷89

A union high school district and county board of education were not liable for injuries received by high school student when a fellow student willfully caused student to fall from seat on window ledge in school building during ten-minute interval between classes, since fellow student's acts could not reasonably have been foreseen by a person of ordinary prudence. School Code, § 2.801.

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Henry Reithardt and Dorothy Reithardt against the Board of Education of Yuba county and another, for personal injuries sustained by Dorothy Reithardt and to recover for hospital and medical expenses allegedly incurred by Henry Reithardt, as result of such injuries. From a judgment for plaintiffs on a verdict in favor of Dorothy Reithardt for $1,000, and in favor of Henry Reithardt for $1,250 and from an order denying defendants' motion for judgment notwithstanding the verdict, defendants appeal.

Judgment and order reversed.

Archibald D. McDougall, of Sacramento, and Joseph L. Heenan, of Marysville, for appellants.

Carlin & Fuidge, of Marysville, for respondents.

PER CURIAM.

This is an action to recover damages for personal injuries suffered by plaintiff Dorothy Reithardt, who, while a student in Marysville Union High School, was injured as the result of a fall. Plaintiff Henry Reithardt is her father.

The complaint is in two counts. The first count is for general damages suffered by plaintiff Dorothy Reithardt; the second count, for special damages consisting of nurses, hospital and medical expenses incurred by plaintiff Henry Reithardt, the father of Dorothy Reithardt. The jury returned a verdict in favor of plaintiff Dorothy Reithardt in the sum of $1,000, and in favor of plaintiff Henry Reithardt in the sum of $1,250, and against defendants Board of Education of Yuba County and Marysville Union High School District. Defendants thereafter moved for judgment notwithstanding the verdict, which motion was denied. Thereafter, judgment in favor of plaintiffs and against defendants was entered by the court on the verdict. The motion for new trial later made by defendants was also denied. This is an appeal from such judgment and from the order of the court denying defendants' motion for judgment notwithstanding the verdict.

At the time of the accident Dorothy was fifteen years of age. (We shall hereafter refer to her as "plaintiff".) The undisputed facts show that she was a member of the freshman class of said school. On the morning of the accident, plaintiff had been dismissed from her second period, a glee club class, about 10 o'clock. She then proceeded to the dressing-room, changed her clothes, and went into the apparatus room to be present when the roll was called. There she talked with several classmates, and then went to the center window opening. She jumped up the short distance and seated herself on the ledge of the opening. She seated herself on the ledge in a firm manner, with her hands resting in her lap and her legs dangling over the side facing the apparatus room. Her legs were vertical to the floor and she was sitting there quietly talking to Mary Kelley, a fellow-student. Suddenly and without any words of warning, Margaret Thompson, another student, seized both of plaintiff's ankles, pulled her legs up horizontal to the floor, and jerked or pulled plaintiff forward off of her seat. In falling plaintiff's arm hit the floor, causing the injuries complained of.

Plaintiff testified that she was comfortably and firmly seated on the ledge, and that it was the act of her fellow-student, Margaret Thompson, in grabbing hold and pulling her feet out that caused her to fall off the ledge. During the ten-minute period intervening between the second and third classes, the gym teacher was in her office preparing for the next class. The accident happened just at the end of that ten-minute intermission. The roll call bell had just rung, and the gym teacher had started from her office to the apparatus room when she met the girls bringing the plaintiff to her office.

Plaintiffs proceeded upon what are in reality two causes of action—the first, based upon negligence arising out of a breach of the rules of state board of education, and the second, based upon negligence in allowing students (including plaintiff) to sit upon the window ledge in question. The liability of defendants, if any, is based on section 2.801 of the School Code of the state of California, which provides as follows: "Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees."

[1] In other words, it is incumbent upon plaintiff to show that the injuries were received as a direct and proximate result of negligence on the part of the district, board, or their officers or agents.

Taking up the first ground for recovery, subdivision "D" of section 3 of the Rules and Regulations of said Board reads as follows: "Where special playground supervision is not provided, teachers shall supervise the conduct and direct the play of the pupils of their classes in the school or on the school grounds during intermission and before and after school."

[2-8] Appellants contend that the foregoing rule is not applicable to the facts of this case. We are in accord with that view. As we construe the word "intermission", used in the rule quoted, it refers, not to time which is consumed in going from one classroom to another, as the facts show here, but to a general cessation of all teaching activity in the school. The term might be applied to the period allowed for lunch, which is designated as the "noon intermission" in subdivision "C" of section 1 of said rules, and to the twenty-minute recesses mentioned in said section. This construction follows, for the reason that section 3, subdivision "D" deals with the matter of playgrounds and play. The opening sentence is the key to the remainder of the section, showing that the intent was to deal with the supervision at intervals which might be used for school play. "Every statute and Code section should be construed with reference to its purpose and the objects intended to be accomplished by it." 23 Cal.Jur. p. 764, sec. 138. Here, the purpose was to supervise play. It cannot be seriously or reasonably contended that the interval between classes (ten minutes here) could be devoted to play, as that word is used in school activities. To hold otherwise would not only be contrary to the obvious intent of the rule, but would place upon the governing body of a school the onerous burden of employing additional teachers to follow the students about from class to class. We do not believe that the state board of education ever intended or contemplated such a result. If it can be

said that the rule has a doubtful meaning, then "the court may take into consideration any great inconvenience which may result from a given construction". 23 Cal.Jur. p. 768, sec. 142. "Interpretation must be reasonable." Civ.Code, sec. 3542. Reasonably construed, the section of the rules last mentioned was intended to deal solely with play periods, and the conducting and directing of play during such intervals. It is impliedly conceded by both parties that said section has the force of law, and we are therefore governed by the rules of statutory construction. We conclude that there was no breach of the rule shown at the trial, and therefore a cause of action based on this count was not made out. In the case of Ogando v. Carquinez Grammar School District, 24 Cal.App.2d 567, 75 P.2d 641, the accident came squarely within the terms of the rule. It occurred during a recess or intermission, while the pupils were at play. The case of Buzzard v. East Lake School District, 34 Cal.App.2d 316, 93 P.2d 233, did not involve the rule. (Section 3, subd. "D".) We there held that it was negligence to permit pupils to ride bicycles about the playground among the children while they were engaged in playing games. In the case of Forgnone v. Salvador Union Elementary School District, Cal.App., 106 P.2d 932, we held that the complaint stated a cause of action, where the allegations were that there was no supervision of pupils during the noon intermission, and the accident occurred during that period. We believe that the foregoing cases have given a reasonable and liberal interpretation of the rule in question, and we are not prepared to hold that it should be extended to cover a situation which clearly was not within the contemplation of the state board of education when it was adopted.

[9] As to the other ground urged by respondent, we do not believe that the evidence justified a recovery based upon the theory that allowing students to sit upon a window ledge of the character described is negligence. Respondents point to no evidence whatever indicating the dangerous character of the opening. The only possible evidence which can be drawn from the entire record to support its allegedly dangerous character is the fact that the respondent was injured by falling from the opening. But the evidence does not show that she fell because of any defect in the opening, or because of the way she was seated, or because she could not be securely seated, or because of any act or omission on the part of appellants. The evidence on this matter is definite, uncontradicted, and points to one conclusion, that the respondent fell from the opening only because her fellow student wilfully and deliberately pulled her from the opening. The window opening was about three feet wide and four feet high; the bottom or ledge, upon which respondent was seated, was three and one-half feet above the floor, and was about six or eight inches wide. The evidence was to the effect that students had been using the ledges as seats for twelve or thirteen years, and no student had fallen or been pulled or pushed from the ledges since the school had been built. In the opinion of the teacher and respondent (the only testimony on the matter), the ledges were not dangerous or hazardous places to sit.

[10] Respondents contend that the question was one for the jury; that the window ledge presented a condition of danger, and defendants should have anticipated that an accident would arise by the use of said ledge as a seat by the pupils who were occupying the room. As we have stated, we do not believe that an ordinary school window of the type here involved is a condition which is a sign of danger, nor do we believe that defendants could reasonably anticipate that one high school pupil would seize another who was sitting upon the ledge and drag her suddenly to the floor. If such a contingency could not reasonably have been foreseen, no negligence is established. By the last statement (and wherever a similar statement is made) we do not mean to say that it was incumbent upon plaintiffs to prove that these defendants should have foreseen this very injury. Their negligence is established if a reasonably prudent person would have foreseen that injuries of the same general type would be likely to happen.

[11-14] In Weldy v. Oakland High School District, 19 Cal.App.2d 429, 65 P.2d 851, 852, it is stated:

"The liability of a school district for injuries to its students rests upon section 2.-801 of the School Code (Stats.1931, p. 2487), which permits recovery only when the injuries arise from 'the negligence of the district, or its officers or employees.' The statute does not create a liability upon the district for injuries arising from the unlawful or willful misconduct of its students (Whiteford v. Yuba City Union H. S. Dist., 117 Cal.App. 462, 464, 4 P.2d 266), nor for injuries arising from the negligence of a fellow student (Hack v. Sacramento City Junior College Dist. 131 Cal.App. 444, 448, 21 P.(2d) 477; McCloy v. Huntington Park Union H. S. Dist., 139 Cal.App. 237, 33 P.(2d) 882; Goodman v. Pasadena City H. S. Dist., 4 Cal.App.(2d) 65, 40 P.(2d) 854, 855; Underhill v. Alameda Elem. S. Dist. 133 Cal.App. 733, 24 P.(2d) 849; Kerby v. Elk Grove Union H. S. Dist., 1 Cal. App.(2d) 246, 36 P.(2d) 431, 94 A.L.R. 1502).

"To hold the school district liable for injuries received in this manner, it is necessary to allege and prove that the district was guilty of some act of commission or omission amounting to negligence. Thus, if experience had demonstrated that a game of football was likely to be attended by rowdyism and injury to spectators the school district might be held bound to anticipate 'such consequences as a reasonably prudent man would anticipate as likely to result therefrom.' Katz v. Helbing, 205 Cal. 629, 634, 271 P. 1062, 1064, 62 A.L.R. 825. * * * It may be taken for granted that a school district is required to exercise reasonable supervision over its students while the school is in session, but, even under such circumstances 'the law does not make school districts insurers of the safety of the pupils at play or elsewhere.' Goodman v. Pasadena City H. S. Dist., supra."

[15] In the instant case the act of the fellow student in dragging plaintiff from her seat is in no different category than the act of the student in the foregoing case —throwing objects during a school football game. Both of such acts were wilful misconduct upon the part of the student, and a school district cannot be held liable under such circumstances, since such acts could not reasonably have been foreseen by a person of ordinary prudence.

In the case of Goodman v. Pasadena City H. S. Dist., 4 Cal.App.2d 65, 40 P.2d 854, 855, a judgment in favor of a pupil and against a school district was reversed, where the accident occurred through the act of a fellow student in school shop. The latter was pounding aluminum when a fragment flew out and entered plaintiff's eye. It was charged that the school was negligent in not furnishing goggles to the students when they were thus engaged. The record discloses no proof that any school authority knew that aluminum shatters when pounded, although the pupils had been advised with reference to the striking together of steel implements. The students had all been advised to wear goggles when working around the emery wheel, but at no other work in the shop was it deemed advantageous to wear goggles for the protection of one's eyes. It is not shown that any instructor knew that goggles were necessary for the safety of a spectator within the shop. Quoting from that case: "The negligence suggested by plaintiffs was the failure to require the pupils to wear goggles in the presence of the possible injury from flying particles of hammered metal. However, the record discloses no substantial evidence that there existed such danger which was known, or ought to have been known, to the authorities. 'The law does not make school districts insurers of the safety of the pupils at play or elsewhere, and no liability is enjoined upon a district under the above-mentioned section, in the absence of negligence on the part of the district, its officers or employees.' Underhill v. Alameda Elementary School District, 133 Cal.App. 733, 24 P.(2d) 849, 851; Ellis v. Burns Valley School District, 128 Cal.App. 550, 18 P.(2d) 79."

Several cases are relied upon by respondent. In Stovall v. Toppenish District, 110 Wash. 97, 188 P. 12, 9 A.L.R. 908, a tank was left in the school yard. The pupils, in play, rolled the tank about, and one of them was injured. A judgment against the school was upheld. We believe, as the court held, that such contingency could reasonably have been foreseen. Nothing is more inviting to children at play than an object which can be rolled about. Bruenn v. North Yakima District, 101 Wash. 374, 172 P. 569, presents a case where there was inadequate supervision while pupils were playing with a "teeter-board". No dangerous condition of buildings was involved. Recovery was had on account of negligence arising out of lack of supervision during a play period. Such question is not presented here. In Williams v. Board of Trustees, 210 App.Div. 161, 205 N.Y.S. 742, a child on a crowded seat of a vehicle was pushed over a small rail and against a wheel. It was held that the turning wheel was a dangerous place, and it might be anticipated that the seat would sometime be crowded with pupils. Certainly, all must admit that the wheel was a dangerous instrumentality which should have been adequately guarded. None of these cases go so far as to permit us to hold that this window ledge was a sign of danger, or that the situation here could reasonably have been anticipated.

We therefore conclude that the evidence on either cause of action is insufficient to sustain the verdict.

The judgment and the order are reversed.

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43 Cal.App.2d 624

BIRCH RANCH & OIL CO. v. CAMPBELL.

Civ. 12270.

District Court of Appeal, Second District, Division 1, California.

March 24, 1941.

Hearing Denied May 22, 1941.

1. Appeal and error 🔑917(1)

On appeal from a judgment dismissing action after a general demurrer to second amended complaint was sustained, the truth of the allegations was required to be presumed by appellate court.

2. Execution 🔑472

Where escrow was pending for the sale of realty, owner of realty on learning of levy on the realty could have immediately commenced an action under the Code of Civil Procedure for the purpose of determining the adverse claim created by the levy, but where owner failed to act for more than 50 days, with the result that alleged impairment of its credit as a corporation was caused by its own act, no recovery could be had therefor. Code Civ.Proc. § 738.

3. Payment 🔑82(3)

Where levy and sale of realty was made under an execution issued in an action to which plaintiff was not a party, it failed to cast a cloud on plaintiff's title to the realty, and hence payment by plaintiff to defendant of money to redeem the realty was a "voluntary payment", and could not subsequently be recovered in an action therefor.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Payment".

4. Execution 🔑472

In action for damages for wrongful levy on and sale of realty, alleged injury to plaintiff's credit was speculative and too remote as a basis for either general or special damages, though it would be a proper element for consideration in assessing exemplary damages.

5. Damages 🔑87(2)

Exemplary damages are mere incidents to and not the basis of a cause of action, and hence are not recoverable in absence of a showing of actual damages. Civ.Code, § 3294.

6. Appeal and error 🔑843(4)

Where District Court of Appeal determined that appellant was not entitled to recovery on its first count, and appellant conceded in its brief that the sum sought to be recovered in the second count was the same as that set forth in the first count, trial court's propriety in sustaining a general demurrer to the second count presented a "moot question".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

7. Execution 🔑465

Where it was determined in action for damages for alleged wrongful levy on and sale of realty that plaintiff had no cause of action for money paid voluntarily to defendant to obtain release of the realty, services of an attorney retained to make the voluntary payment to defendant, furnished no basis for the action.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the Birch Ranch & Oil Company against Roy Campbell to recover damages for a wrongful levy on and sale of realty. From a judgment dismissing the action after a general demurrer to the second amended complaint was sustained without leave to amend further, the plaintiff appeals.

Judgment affirmed.

Vallee, Beilenson & Kenny and George Edward Acret, all of Los Angeles, for appellant.

Syril S. Tipton, of Los Angeles, for respondent.

DORAN, Justice.

The plaintiff, in an action for damages for a wrongful levy upon and sale of real property, appeals from a judgment dismissing the action after a general demurrer to the second amended complaint was sustained without leave to amend further.

[1] The complaint in question contains the following allegations, the truth of which must be presumed on this appeal from a judgment after demurrer: That plaintiff is a California corporation possessing large assets and extensive business activities, chief of which are ranching on a large scale and drilling for and production of oil; that during all times material to the action plaintiff was the owner of certain described real property; that on or about April 1, 1938, and ever since, plaintiff has been greatly in need of additional finances for use in its operations, and at said time it became necessary for plaintiff to sell the said real property and also to obtain a substantial loan; that on or about April 14, 1938, the defendant, who had obtained a judgment against A. Otis Birch and wife, caused the sheriff of Los Angeles county to make a levy of execution upon all right, title and interest of said A. Otis Birch and wife in the said real property, knowing that said Birch and wife had no interest in the property and knowing plaintiff's needs above mentioned and the necessity for plaintiff to sell the property. The complaint further alleges that plaintiff on May 2, 1938, without knowledge of the said levy of execution, entered into an agreement to sell the said real property, the terms of which agreement provided that plaintiff would deliver satisfactory title to the purchaser within a reasonable time and would deliver a certificate of title thereon, and the transaction was accordingly placed in escrow. It is then alleged that plaintiff first learned of the said levy of execution on June 10, 1938, through receipt of a notice of sale by the sheriff of the real property under execution; that defendant caused the sheriff to hold the sale on July 5, 1938, notwithstanding the demand of plaintiff's attorney at the sale to cease and desist, and that at the said sale the property was sold to the defendant, who caused the sheriff to issue a certificate of sale based upon the said purported sheriff's sale, and who then recorded the said certificate in Los Angeles county; that thereafter the title company completed the title search on the said property and informed plaintiff that the escrow was ready to be closed and that satisfactory title to the said property was ready to be delivered pursuant to the terms of the escrow, except for the said levy, sale and certificate of sale; and the title company informed plaintiff that because of the said levy and sale it would not deliver a certificate of title, which refusal was pursuant to the usual custom in such instances. It is then alleged that the escrow not having been closed by the 30th day of July, 1938, the purchaser was then threatening to withdraw from the escrow and sue plaintiff for damages, whereupon the plaintiff served the defendant herein with a written notice and demand to release the property in question and deliver a quitclaim deed thereto on or before August 2, 1938; that defendant informed plaintiff he would release the property only on payment of the sum of $2,525, the amount for which he obtained the property on the sheriff's sale; that being in immediate danger of losing its purchaser and the sale of the property, and in order to save itself from an action for substantial damages threatened to be brought by the said purchaser and from the loss of the proceeds of the sale, "and in order to save itself from great loss under the circumstances of oppression and duress aforesaid arising out of the existence of said levy of execution and sheriff's sale", the plaintiff consented to pay the defendant the sum of $2,525, and on payment thereof defendant released the said real property. Plaintiff then alleges injury to his credit to the extent of $25,000, as a result of the wrongful levy and sale, and charges that the defendant's acts were done maliciously and oppressively and without probable cause and asks for punitive damages. Plaintiff prays for recovery of general and special damages consisting of the sum of $2,525 paid for the release of the property and $25,000 for injury to plaintiff's credit, together with punitive damages in the sum of $25,000. The complaint also contains a second cause of action for recovery of $2,525 for money had and received.

To this second amended complaint a general and special demurrer was interposed and the general demurrer was sustained. Demurrers had previously been sustained both to plaintiff's original and first amended complaints. Plaintiff was denied leave to amend further, though it submitted a proposed third amended complaint, which, however, added nothing to plaintiff's cause of action.

[2] It should be noted that the complaint states facts from which it might readily be inferred that any damage to plaintiff's credit and any exigency created was due as much to plaintiff's conduct as to that of defendant. With an escrow pend-

ing for the sale of the property, plaintiff allowed some fifty days to elapse before it took any positive or effective steps toward clearing up the condition caused by the wrongful levy and sale. When plaintiff first learned of the levy early in June it could have immediately commenced an action under section 738 of the Code of Civil Procedure for the purpose of determining the adverse claim. Plaintiff failed to take any legal steps at all to clear up the matter and not until the end of July or the first of August, when it was threatened with a suit by the purchaser because of failure to complete the escrow, did plaintiff make a definite effort to clear the property. By that time immediate release was necessary and plaintiff was forced to settle with defendant by a compromise. It does not appear that plaintiff would have been placed in such an uncomfortable position had it not been for its own failure to act promptly. Certainly failure to protect itself from any effects of the wrongful levy and sale would in itself tend to injure plaintiff's credit and standing as a corporation.

[3-5] In any event, the complaint fails to set forth a cause of action in the first count. The levy and sale complained of were made under an execution issued in an action to which plaintiff was not a party and therefore failed to cast a cloud upon plaintiff's title to its real property. Miller v. Price, 103 Cal.App. 650, 653, 284 P. 1035, citing Russ Sons & Co. v. Crichton, 117 Cal. 695, 49 P. 1043. Money paid to redeem real property sold under execution, where such sale did not cast a cloud upon the title, must be held to have been paid voluntarily and may not be subsequently recovered in an action therefor. Maskey v. Lackmann, 146 Cal. 777, 81 P. 115. Hence plaintiff may not recover the sum of $2,525 thus paid. The alleged injury to plaintiff's credit is speculative and too remote as a basis for either general or special damages, though it would be a proper element for consideration in assessing exemplary damages. See the annotation at 54 A.L.R. 451-454. However, plaintiff has shown no actual damages, and exemplary damages, being mere incidents and not the basis of a cause of action, are not recoverable in the absence of a showing of actual damages. Clark v. McClurg, 215 Cal. 279, 282, 9 P.2d 505, 81 A.L.R. 908. See annotation, 81 A.L.R. 913 et seq., and section 3294 of the Civil Code. It follows that plaintiff has shown no basis for the recovery of damages upon its first count.

[6] As to the second or common count, plaintiff concedes in its brief that the sum there sought to be recovered is the same as that set forth in the first count. This fact having been admitted, the propriety of sustaining a general demurrer to that count presents a moot question.

[7] The proposed third amended complaint merely adds attorney's fees as an element of damage in connection with procuring the release of the property from the wrongful levy and sale. Since it is seen above that plaintiff had no cause of action for the money paid voluntarily to obtain the release of the property, the services of an attorney retained to make the voluntary payment likewise furnish no basis for action, though the fees of an attorney in a proper legal action to determine or otherwise dispose of the adverse claim would undoubtedly be recoverable.

The general demurrer to plaintiff's second amended complaint was properly sustained without leave to amend, and the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

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43 Cal.App.2d 497

KEYES v. HURLBERT et al.

Civ. 2602.

District Court of Appeal, Fourth District, California.

March 17, 1941.

1. Partnership ⚷251, 254

The same person cannot enter into agreement between himself as surviving partner and himself as personal representative of deceased partner, but he may carry out provision in the articles of partnership for purchase of deceased partner's share at a valuation arrived at in prescribed manner.

2. Partnership ⚷254

Where manner of valuation of deceased partner's share is not prescribed in articles of partnership, surviving partner purchasing such share by agreement with himself as personal representative of deceased partner has burden of showing that sale price was fair.

3. Executors and administrators 🔑438(1, 5)

When representative is adversely interested as an individual but sues as a representative, he is disqualified to represent interests of heirs and creditors, and all creditors as well as all heirs must be made parties to the action.

4. Partnership 🔑251

Where surviving partner is also the personal representative of deceased partner, he acts in a dual capacity and has duty as survivor to collect decedent's share in the partnership and turn it over to decedent's separate estate.

5. Partnership 🔑258(6)

In action by surviving partner to compel other surviving partner, as executor of deceased partner's estate, to convey interest of deceased partner to the surviving partners pursuant to purchase option in the articles of partnership, heirs and legatees of deceased partner were "parties in interest" and were entitled to intervene. Code Civ.Proc. § 387.

See Words and Phrases, Permanent Edition, for all other definitions of "Party in Interest".

6. Partnership 🔑258(2)

In action by surviving partner to compel other surviving partner, as executor of deceased partner's estate, to convey deceased partner's interest to the surviving partners pursuant to purchase option in the partnership agreement, wherein heirs and devisees of deceased partner were made parties and no creditors of the estate were shown to exist, heirs and devisees could not complain that they were deprived of rights or prejudiced on ground that judgment was sought in favor of surviving partner individually but against himself as executor. Probate Code, § 571; Civ.Code, § 2436; Code Civ.Proc. § 387.

7. Appeal and error 🔑162(1)

Generally, a party cannot avail himself of that portion of an indivisible judgment, order or decree which is favorable to him and secure its fruits, while prosecuting appeal to reverse such portions as militate against him.

8. Appeal and error 🔑162(1)

The rule against party's availing himself of portion of judgment while appealing from other portions does not apply unless such party has accepted a substantial benefit, and does not apply where parts of the decree are independent, and receipt of benefit from one part is not inconsistent with appeal from another part.

9. Appeal and error 🔑162(1)

Where heirs and devisees of deceased partner appealed from decree of specific performance ordering surviving partner as executor of deceased partner to convey deceased partner's interest in partnership to the surviving partner pursuant to purchase option in partnership agreement, and after perfecting of appeal executor accepted price of partnership interest and executed bill of sale and deed, and heirs and devisees did not object to executor's account showing such acceptance, but participated in the resulting partial distribution which included purchase price of deceased partner's interest, heirs and devisees were barred by "estoppel" from denying validity of that portion of the judgment involving the purchase price of deceased partner's interest. Probate Code, §§ 927–931, 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

10. Partnership 🔑254

Where partnership agreement provided that surviving partners should have option to purchase deceased partner's interest at appraised value as of date of partner's death, surviving partners could not wait until after appraisal before purchasing, and then retain all profits accruing in the meanwhile. Code Civ.Proc. § 1585; Probate Code, § 571.

11. Partnership 🔑255(1)

Where surviving partner continues the partnership business unnecessarily, he may be charged with profits, or be liable for the surplus at time of partner's death, with interest, at the election of deceased partner's representatives. Code Civ.Proc. § 1585; Probate Code, § 571.

12. Partnership 🔑254

A deceased partner's estate could participate in profits earned by the partnership up to the time the surviving partners elected to exercise their option under the partnership agreement to purchase deceased partner's interest.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Vincent G. Keyes against Elmer O. Hurlbert, executor of the estate of Andrus Hurlbert, for specific performance of contract wherein Lillian Douglas and others intervened. From an adverse decree, the interveners appeal.

Motion to dismiss appeal denied, and judgment affirmed in part and reversed with directions in part.

See, also, 109 P.2d 364.

Irvine P. Aten and Richard Aten, both of Fresno, for appellants.

B. M. Benson, of Fresno, for plaintiff and respondent.

Dearing & Jertberg, of Fresno, for defendant and respondent.

GRIFFIN, Justice.

This is an appeal from a decree of specific performance whereby the defendant executor of the estate of a deceased partner was ordered to convey the interest of the deceased partner in the partnership to the surviving partners pursuant to an option to purchase contained in the partnership agreement. Judgment was rendered for plaintiff on the pleadings. This appeal is taken by the interveners in the action who are legatees and devisees under the will of the deceased partner. The defendant executor has not appealed.

The complaint alleges that in 1928 the respondent Vincent G. Keyes, Elmer O. Hurlbert and Andrus Hurlbert entered into a certain partnership agreement to engage in a certain transfer and trucking business known as "General Transfer Company"; that in 1939 they executed a written amendment to the partnership articles as follows:

"Upon the death of any one of said partners occurring during the continuance of this partnership it is understood that the two surviving partners shall have and they are hereby given the first right and option to purchase the entire interest and ownership in said partnership and its assets owned by the deceased partner at the time of his death, and the purchase price shall be the appraised value thereof as fixed by the official appraisement of the property of the estate of said deceased partner made under the authority of the probate court before which the said estate is administered."

The complaint further alleges that the partnership was engaged in such business on the 19th day of January, 1939, on which date Andrus Hurlbert died; that Andrus Hurlbert left a will wherein Elmer O. Hurlbert was appointed as executor; that it was admitted to probate on February 10, 1939; that on February 19, 1939, an inheritance tax appraiser was duly appointed as the sole appraiser of the estate; that thereafter he duly filed his inventory and appraisement and appraised the partnership interest at $30,828.94; that on October 11, 1939, plaintiff filed a certain "notice of exercise of option" whereby he gave written notice to Elmer O. Hurlbert as executor that plaintiff, on behalf of himself and Elmer O. Hurlbert as surviving partners, offered to buy for cash, for the sum of $30,828.94, all of the right, title and interest of Andrus Hurlbert in and to the said partnership; that prior to the commencement of this action this plaintiff offered to Hurlbert, as executor, $30,828.94, and demanded that he as executor make, execute and deliver a bill of sale and deed to the surviving partners conveying all the right, title and interest of Andrus Hurlbert in the partnership business; that the executor refused to accept the offer or to execute a bill of sale or deed. The prayer was for a decree of the court commanding Hurlbert as executor, upon receipt of the $30,828.94, to make, execute and deliver to plaintiff such a bill of sale and deed. Defendant executor filed an answer in which he admitted all of the allegations of the complaint and pleaded certain matters which occurred in the estate proceedings as follows: that after the inheritance tax appraiser had filed his appraisal certain heirs and legatees filed in said estate proceeding an exception to the appraisement by the appraiser wherein they alleged that the value placed upon the one-third interest was much lower than the actual value; that the one-third interest was of the value of $50,000; that the executor thereupon filed an answer to this exception and denied that the value was any greater than the sum at which it had been appraised; that the matter of the exception to the appraisal is now pending and at issue and ready to be tried, and until the issue is determined it cannot be told whether the appraisal of decedent's interest will be sustained by the superior court; that upon receipt of the written notice (exercise of option) the executor filed his petition for instructions; that thereafter the heirs above named filed an opposition to the petition for instructions and that the same is still undetermined.

Interveners by permission filed a complaint in intervention which by reference incorporates the "answer of defendants" and all matters of fact and denials set forth therein. It further alleges that they as legatees and devisees have a direct interest in the valuation of the interest of said estate in the partnership and in the success of the defendant executor in the action and unite with him in resisting the claims of the plaintiff. It then alleges that since the death of Andrus Hurlbert the surviving partners continued to conduct the business and earned in net profits $30,000; that the surviving partners have contended and now contend that the estate has no interest in the profits and have not offered to pay to the executor any of the net profits; that an accounting is necessary to determine the amount thereof; that the estate is entitled to one-third of the net profits; and that plaintiff take nothing by reason of his complaint. After granting a motion for judgment on the pleadings an interlocutory decree was entered whereby Hurlbert, as executor, was ordered upon receipt of $30,828.94 in cash or within ten days from that date to execute and deliver to the plaintiff for the use and benefit of Vincent G. Keyes and Elmer O. Hurlbert, a bill of sale and deed transferring all the right, title and interest of the estate of Andrus Hurlbert, deceased. Thereafter the respondent paid to Hurlbert as executor $30,828.94, and moved the court for an order making the interlocutory decree in the action final. The final decree was entered from which this appeal has been taken by interveners only.

Since perfecting the instant appeal respondent Keyes moved to dismiss the appeal on the grounds set forth in Keyes v. Hurlbert, 42 Cal.App.2d 532, 109 P.2d 364, where the motion was previously considered. In connection with the appeal from the decree we will also consider the pending motion. First, appellants contend that since the judgment in this case orders the executor to convey the estate's interest in the partnership to Keyes on behalf of respondents Keyes and Elmer O. Hurlbert, the two surviving partners, the judgment is in effect a judgment in favor of Elmer O. Hurlbert individually and against Elmer O. Hurlbert as executor, and that the proceeding therefore is a nullity and the judgment rendered is void, citing 11B Cal.Jur., page 322, section 907. Second, that there was not pleaded or proved adequacy of consideration or that the contract was fair and just, citing 23 Cal.Jur., page 428, section 10, and page 491, section 50; and Caspar Lumber Co. v. Stowell, 37 Cal.App.2d 58, 98 P.2d 744. Third, that the probate court had jurisdiction to hear appellant's exceptions to the appraisal, and that those exceptions being still undetermined the present action was prematurely brought, citing 11A Cal. Jur., page 92, section 39; and page 485, section 354. Fourth, that because of the pending petition in the probate court for instructions, this action for specific performance was prematurely brought, citing 23 Cal.Jur., page 418, section 6. Fifth, that if respondent was entitled to specific performance, he was also bound to account for profits made prior to his exercise of the option to purchase, citing Probate Code, section 571; Vasiljevich v. Radanovich, 138 Cal.App. 97, 99, 31 P.2d 802; Civ.Code, § 2436; Montgomery Gas-Light Co. v. City Council of Montgomery, 87 Ala. 245, 6 So. 113, 4 L.R.A. 616; and Hull v. Cartledge, 18 App.Div. 54, 45 N.Y.S. 450. Sixth, that the contract is ambiguous and specifically unenforceable, citing 23 Cal.Jur., page 429, section 11, and page 431, section 12.

[1-4] It has been generally held that the same person cannot enter into an agreement between himself as surviving partner and himself as the personal representative of deceased, but he may, however, carry out a provision in the articles of partnership for the purchase of the share of the deceased partner at a valuation arrived at in a prescribed manner, and where the manner of valuation is not prescribed the burden is upon him to show that the sale price was a fair one. 47 C.J., p. 1062, § 644; Byrne v. Byrne, 94 Cal. 576, 29 P. 1115, 30 P. 196; 11B Cal.Jur., p. 322, § 907. In 11B Cal.Jur., page 322, section 907, the following appears: "When the representative is adversely interested as an individual, but sues as a representative, since the representative in such case is disqualified to represent the interests of heirs and creditors by reason of adverse interest, it is necessary to make all creditors as well as all heirs parties to the action." When the surviving partner is also the personal representative of deceased, he acts in a dual capacity and it is his duty as survivor to collect decedent's share in the partnership and turn this over to

the separate estate of deceased. 47 C.J. 1062, § 643.

[5, 6] The instant action was brought by one of the surviving partners in his own behalf and in behalf of the other surviving partner against the executor of the deceased partner, who was also one of the surviving partners. Since such a surviving partner is authorized to fairly carry out the provisions in the articles of partnership for the purchase by the survivors of the share of the deceased partner at the valuation arrived at in a prescribed manner, it would only seem reasonable that such a surviving partner should be authorized to maintain an action to compel specific performance. However, assuming but not holding that the surviving partner was not authorized to do so, it appears from the complaint in intervention in the instant action that the interested legatees and devisees were made parties to the action and pleaded the same defense as was pleaded by the executor with the additional prayer for an accounting as to the profits earned by the partnership between the date of the death of the deceased partner and the date of the exercise of the option. Under the circumstances the heirs and legatees were parties in interest and were entitled to intervene. § 387, Code Civ.Proc.; Isaacs v. Jones, 121 Cal. 257, 261, 53 P. 793, 1101; Landis v. First National Bank, 20 Cal.App. 2d 198, 200, 66 P.2d 730; Ex parte Casey, 71 Cal. 269, 12 P. 118; Koerber v. Superior Court, 57 Cal.App. 31, 206 P. 496. The record does not disclose that there were any creditors of the estate. We must therefore conclude that the instant action comes within the exception noted and appellant devisees and legatees cannot claim to be deprived of any of their rights or that they have been prejudiced in the action.

The record now discloses that since this appeal by appellants was perfected the executor has received and accepted the sum of $30,828.94 and executed a bill of sale and deed in accordance with the judgment rendered in the instant action; that he accordingly filed his first account and report as executor in the estate matter; that the report and account was duly noticed for hearing; that notice thereof and copies of the report were given to the interveners herein as legatees and devisees; that no objections or exceptions to the account were made; that the court allowed and approved the account and confirmed all of the acts of the executor; and as "shown by the said account of the executor of the estate of A. Hurlbert, deceased, the interveners have participated in the partial distribution that has been made out of the funds of said estate, which funds included the sum of $30,828.94." Appellant Lillian Douglas's affidavit recites that "the acceptance by appellants of partial distribution was not intended by appellants as a compromise or settlement of this action. * * *"

[7, 8] It is a general rule that a party cannot avail himself of that portion of an indivisible judgment, order, or decree which is favorable to him and secure its fruits while prosecuting an appeal to reverse in the appellate court such portions as militate against him. However, the rule does not apply unless appellant has accepted a substantial benefit, nor does it apply where the parts of the decree are independent and the receipt of a benefit from one part is not inconsistent with an appeal from another. 3 C.J., p. 679, § 552, 4 C.J.S., Appeal and Error, § 215.

In Coffman v. Bushard, 164 Cal. 663, 130 P. 425, 426, it was held that plaintiff's "acceptance of his property under the indicated circumstances, the taking of that which indisputably is his, does not estop him from prosecuting his appeal and asserting his rights to other allowances which the court refused to grant," citing cases. See, also Wold v. League of the Cross, 107 Cal.App. 344, 290 P. 460; Walnut Irr. Dist. v. Burke, 158 Cal. 165, 110 P. 517; Hartke v. Abbott, 106 Cal.App. 388, 289 P. 206.

[9] In view of the admitted facts, appellants are estopped from denying the validity of that portion of the judgment involving the $30,828.94, and it now becomes unimportant in this action to determine whether appellants' exception to the appraisement was meritorious or whether the petition of the executor for instructions in the probate proceedings remained undetermined at the time this action was instituted. Turner v. Markham, 152 Cal. 246, 92 P. 485; Estate of Shaver, 131 Cal. 219, 63 P. 340; In re Baby, 87 Cal. 200, 25 P. 405, 22 Am.St.Rep. 239; Estate of Cohn, 36 Cal. App.2d 678, 98 P.2d 521; 3 C.J., p. 679, § 552; 4 C.J.S., Appeal and Error, § 215; § 1240, Probate Code; §§ 927–931, Probate Code.

[10] The question then presented is as to the right of the devisees and legatees

to require an accounting by the surviving partners and to require them to pay over to the estate such sum as may be found due thereunder. Appellants, by their amended complaint in intervention, affirmatively sought an accounting for one-third of the net profits earned since the death of decedent and the exercising of the option to purchase, claiming that such profits amounted to approximately $30,000. By answer respondent admitted the total net profits for that period to be approximately $12,470. If the judgment of the trial court may be so interpreted as holding that the estate was not entitled to share therein, from an examination of the authorities, we believe it was erroneous.

Section 571 of the Probate Code provides: "The surviving partner must settle the affairs of the partnership without delay, and account to the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent."

[11] It is the duty of a surviving partner to settle the business of a partnership without delay and make an accounting (Code Civ.Proc., § 1585; Probate Code, § 571), and where he continues the partnership business unnecessarily he may be charged with the profits or be liable for the surplus at the time of his partner's death with interest, at the election of the representatives of the deceased partner. Vasiljevich v. Radanovich, supra; Kimball v. Baxter, 67 Cal.App. 635, 228 P. 381; 47 C.J., §§ 671–675, p. 1075, et seq.

In Hull v. Cartledge, 18 App.Div. 54, 45 N.Y.S. 450, it was held that where the survivor has the right to acquire the property and business of the partnership by purchase, the representatives of the deceased partner are entitled to share in the profits until the survivor's election to purchase becomes effectual.

[12] Respondents argue that the contract of partnership itself gave the surviving partners the right to wait until after the appraisal before electing to purchase the interest of the deceased partner citing Kaufmann v. Kaufmann, 222 Pa. 58, 70 A. 956; and Rankin v. Newman, 114 Cal. 635, 46 P. 742, 34 L.R.A. 265. This argument seems contrary to the provisions of the articles of partnership. It is clear from the partnership agreement that the purchase price was to be the appraised value as of the date of death and not as of the date of the exercise of the option to purchase. (The appraisal was made on August 28, 1939, and the offer to purchase was made October 11, 1939.) The option to purchase is stated separately from the price provision which is in another clause. To construe this provision as allowing the surviving partners to wait until they saw fit to elect to purchase, and to allow them to retain all of the profits, would be unreasonable and would do violence to its express terms. Even if the surviving partners had the right to wait until after the appraisal before electing to purchase, that fact would not deny to the estate of the deceased partner the right to participate in the profits earned up to the time the election was made, for up to that time the estate's interest in the business continued.

In Hull v. Cartledge, supra [18 App.Div. 54, 45 N.Y.S. 455], the surviving partner had been given the option to purchase the deceased's interest for a fixed price within three months after the death. The court therein said, in part: "Up to the time that the election of the surviving partner to purchase became effectual, they were entitled to share in the profits of the business. This is not only substantially provided for by the contract, but it is in accordance with the law upon the subject", citing cases.

If respondent's position is correct, by making the election to purchase, the surviving partners acquired the estate's one-third share of the profits earned subsequent to the partner's death, this would thereby, in effect, cut down the price they had to pay for the partnership interest accordingly. We do not construe the contract as so intending. Interveners were entitled to an accounting. Other points presented are without merit.

The motion to dismiss the appeal is denied. That portion of the judgment ordering delivery and transfer of title of the deceased's interest in and to the partnership is affirmed. That portion of the judgment, in so far as it denies a right to appellants to an accounting according to the prayer of the amended complaint in intervention, is reversed and the court is directed to proceed with the issues therein presented.

We concur: BARNARD, P. J., MARKS, J.

43 Cal.App.2d 556

KELLIS v. LIVINGSTON et al.

Civ. 12230.

District Court of Appeal, Second District, Division 1, California.

March 19, 1941.

1. **Appeal and error** ⚿931(1)

Where testimony is conflicting, appellate court in support of decision will assume testimony of prevailing party to be true and construe it as favorably as possible in prevailing party's favor.

2. **Appeal and error** ⚿1011(1)

On plaintiff's appeal from judgment for defendants in nonjury trial in action for alleged breach of contract, where evidence was conflicting, District Court of Appeal could not interfere with judgment unless letters written by defendants contained statements and admissions supporting plaintiff's theory and offsetting conflict created by defendants' evidence.

3. **Appeal and error** ⚿996

Inferences to be drawn from conflicting evidence in nonjury trial were for trial court's determination, and trial court's conclusions respecting inferences were conclusive upon appeal.

4. **Principal and agent** ⚿41

Evidence sustained judgment for defendants in action for breach of contract giving plaintiff exclusive right to sell in certain territory garments manufactured by defendants.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Elsie Kellis against H. A. Livingston and others for damages for alleged breach of a contract giving plaintiff the exclusive right to sell in certain territory garments manufactured by defendants. From a judgment for defendants, plaintiff appeals.

Affirmed.

Daly B. Robnett and James W. Reitz, both of Los Angeles, for appellant.

Hooper & Miller and Lloyd O. Miller, all of Los Angeles, for respondents.

YORK, Justice.

Appellant in her complaint for damages for breach of contract alleged that on August 10, 1933, in consideration for valuable services rendered by her to respondents for approximately two years theretofore in experimenting with and developing the manufacture of corrective brassieres, and particularly the garment known as Lov-é Brassiere, an agreement was entered into whereby the respondents agreed to grant to her the exclusive right to purchase from them "Lov-é Brassieres manufactured by them at wholesale prices to be distributed by the plaintiff in the City of Cleveland, Ohio, and surrounding territory, namely the states of Ohio, Indiana, Illinois, Michigan, Western Pennsylvania and Western New York".

It was further alleged that respondents agreed to sell the brassieres to appellant in wholesale lots at wholesale prices and appellant agreed to purchase the same for sale and distribution by her at wholesale or retail throughout the territory covered by the agreement, and that "the exclusive right of plaintiff as distributor to purchase and distribute the said product throughout the territory should continue so long as the plaintiff might desire and the defendants should engage in the manufacture and sale of Lov-é Brassieres". Also, that appellant entered upon the performance of the contract in the city of Cleveland, Ohio, and during the period from August, 1933, to July, 1936, duly performed all the terms and conditions of the agreement by devoting her entire time to advertising, exploiting, demonstrating and building up a demand for the garment throughout the territory covered by the agreement, and in so doing expended approximately the sum of $10,000; that she purchased from respondents a large quantity of the product which she sold and distributed throughout said territory and realized a profit of approximately $10,000; that on July 22, 1936, respondents wilfully and without cause gave appellant notice of termination of her exclusive right to purchase and distribute the brassieres throughout the territory mentioned, and in violation of their agreement with her, said respondents made sale of the said product and thereafter continued so to do to sundry merchants and other persons in the city of Cleveland and elsewhere throughout the said territory.

It was then alleged that by reason of the breach of said agreement by respondents, appellant suffered general damages in the sum of $100,000; that relying upon her agreement for the exclusive sale of the said brassieres, she also suffered damages in the amount of $3,000 which sum she expended in leasing and furnishing a storeroom in the said city of Cleveland; and that through the termination of her contract by the respondents she was forced to close her storeroom thereby suffering damages in the sum of $1,875 on account of rental for the months of August to December, 1936, for which she became liable under her lease; or a total damage of $104,875.

At the conclusion of the trial before the court sitting without a jury, judgment was entered in favor of the respondents. This appeal is prosecuted from such judgment.

Appellant urges (1) that sixteen of the twenty-three specific findings of fact made by the trial court are not supported by the evidence; (2) that the letters admittedly written by respondents conclusively prove a contract of exclusive agency in favor of appellant, and that the question of their legal effect is one of law and not of fact; (3) that respondents are estopped to deny appellant's exclusive agency by reason of their having induced her to expend large sums of money building up the business relying upon their repeated assurances conveyed by letter that appellant was the exclusive owner of the right to distribute their product in the city of Cleveland and surrounding territory.

In presenting her first point appellant states, "we are not unmindful of the general rule that where the evidence is conflicting this court will not disturb a finding if there is any proper evidence to sustain the same. We contend, however, that where, as in this case, the defendants have by many letters which they admit they wrote, stated definitely that plaintiff had the exclusive right to distribute, handle and sell defendants' product, that the meaning and effect of these writings is a question of law, and that oral testimony of the defendants contrary thereto cannot be considered and does not constitute a legal conflict in the evidence, but that such writings are conclusive. We do contend that the oral evidence which is not conflicting with such writings is proper to be considered in order that the court may have the background."

Throughout the trial it was contended by appellant that she had an exclusive agency for the territory in question by virtue of an oral contract entered into between herself and the respondents just prior to the time she left for Cleveland, which gave her the exclusive selling rights in that city and other territory, "so long as plaintiff might desire and the defendants should engage in the manufacture and sale of Lov-é Brassieres".

With respect to this question it was found by the court as follows:

"V. That it is not true that the plaintiff and the defendants or either of them, ever agreed, or that any agreement was ever entered into, either orally or in writing, that the plaintiff should have the exclusive right as distributor or otherwise to purchase and distribute the said product in the City of Cleveland and northern Ohio, or at any other place, as long as the plaintiff might desire and as long as defendants should engage in the manufacture and sale of said Lov-é Brassieres, or as long as the plaintiff might desire, or as long as defendants should engage in the manufacture and sale or manufacture or sale of the said Lov-é Brassiere.

"VI. That the true facts are that some time during the month of July, 1933, the defendants did agree orally with the plaintiff that she could sell the Lov-é Brassiere in Cleveland, Ohio, and that they would furnish her with the Lov-é Brassieres at wholesale prices, and that she was to be entitled to sell the product in Cleveland, Ohio, under the same terms as she had been selling them in the City of Long Beach, California, in which said place she did not have the exclusive right.

"VII. That after this oral agreement was entered into as set forth in the preceeding paragraph and some time in the latter part of July, 1933, the plaintiff went to the City of Cleveland, Ohio, which was her former home, and began selling the Lov-é Brassieres in the said City of Cleveland, and that she continued to sell the said Lov-é Brassieres in the City of Cleveland until some time in the month of August, 1936.

"VIII. That on November 18, 1933, the defendants sent plaintiff a written statement in which they did agree to sell their product to no other retailer in the City of Cleveland, Ohio, for a period of one year, and which said agreement continued in force for one year, and which terminated on November 18, 1934."

It was further found by the court that during the time appellant sold said product in Cleveland (July, 1933, to August, 1936) "she paid for her advertising, rental of stores and expenses incidental to the carrying on and conducting of her business of the sale of the said Lov-é Brassieres, but that it is not true that she expended approximately the sum of $10,000 in advertising, traveling expenses and other sundry expenses whereby she created a demand for said product throughout the said territory of Cleveland and northern Ohio.

* * *

"XVII. That it is not true that the plaintiff on or about the 15th day of March, 1936, or any other time or at all, expended in fitting up any store room with furniture and fixtures, or any other equipment, approximately the sum of $3,000, or any other sum in excess of $500, and that the defendants never obligated themselves and are not obligated to pay any of said sum or sums whatsoever which the plaintiff may have expended for fitting up said store room with furniture, fixtures and equipment."

[1, 2] As is usual in cases of this character, the evidence introduced by the parties hereto presents two entirely different versions of what took place between them. It is well settled that "where the testimony is substantially conflicting, the appellate court in support of the decision or verdict will assume the testimony of the prevailing party to be true and construe it as favorably as possible in his favor". 2 Cal. Jur. 926. Therefore, it is beyond the power of this court to interfere, unless, as appellant contends, the letters written by respondents contain statements and admissions which support appellant's theory, and thus offset the conflict created by respondents' evidence.

[3] We have carefully read the correspondence which passed between the parties hereto and which was duly considered by the trial court, and find that it contains no statements or admissions inconsistent with the findings of fact. While it is true that some inferences in support of appellant's contentions might fairly be drawn from part of such evidence, that is equally true with respect to respondents' claims. At least, these letters do not prove any meeting of the minds or mutual binding agreements, as alleged in the complaint herein.

[4] Since these questions were for the trial court to determine, its conclusions either way are conclusive upon appeal. The record discloses ample evidence in support of the trial court's findings.

The judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

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43 Cal.App.2d 655

BATTLE v. NIECE et al.

Civ. 2638.

District Court of Appeal, Fourth District, California.

March 25, 1941.

Hearing Denied May 22, 1941.

1. **Mortgages** 🔑334

An agreement subordinating deed of trust to a subsequent deed of trust covering same property in no way changed or modified the terms of subordinated deed of trust so as to invalidate the trustee's sale thereunder, as against contention that it became necessary to foreclose such deed of trust as a mortgage.

2. **Mortgages** 🔑331

Where there is no modification of the terms of a deed of trust with power of sale, it need not be foreclosed as a mortgage.

3. **Mortgages** 🔑335

Where two separate deeds of trust were outstanding, one in favor of vendors and another in favor of bank, the assignment of rents to the bank by purchaser did not "estop" vendors from exercising power of sale upon default under their deed of trust, particularly where vendors had no knowledge of the assignment of rents.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. **Estoppel** 🔑54

A party to be estopped must be apprised of the facts on which the claimed estoppel is based.

5. **Jury** 🔑14(9)

In action to set aside sale under deed of trust wherein grantees in trust deed and purchasers at trustee's sale filed a cross-complaint to quiet title to property involved, court properly denied request for jury trial of cross-complaint.

6. Jury ⚿13(1)

A trial by jury in an action in equity is not a matter of right, where no issue at law is made by the pleadings.

7. Quieting title ⚿30(3)

Where cross-complaint of defendant bank sought a decree quieting title of bank to note and deed of trust in its favor made by plaintiff, demurrer by plaintiff to cross-complaint for nonjoinder of other defendants who were not interested in controversy between plaintiff and the bank, but were merely beneficiaries under a junior deed of trust upon same property, was properly overruled.

8. Mortgages ⚿25(3)

The satisfaction of an outstanding note and mortgage constituted sufficient "consideration" for note and deed of trust to bank, and partial payments thereafter made on note secured by deed of trust could not constitute maker a "co-owner" of the note.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration" and "Co-Owner".

9. Appeal and error ⚿1058(1)

Any error in the exclusion of evidence was rendered harmless by subsequent admission of like evidence upon the same question.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Sylvia R. Battle against Walter W. Niece and others to set aside sale under deed of trust, wherein separate cross-complaints to quiet title were filed by certain defendants. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Martin E. Geibel, of Los Angeles, for appellant.

Elliott H. Pentz, of Los Angeles, for respondents.

MARKS, Justice.

This is an action brought by plaintiff to set aside a sale under a deed of trust. She alleges that she acquired an interest in a note secured by a deed of trust, by virtue of certain payments made upon the note, of which she was the maker, and which was held by the Security-First National Trust and Savings Bank of Los Angeles as beneficiary. The defendants Niece denied the material allegations of the complaint and filed a cross-complaint to quiet title to the real property in question. The defendant bank denied the material allegations of the complaint and filed a cross-complaint to quiet title to the note and deed of trust. The trial court found in favor of the defendants and cross-complainants on all material issues, and entered judgment in favor of the defendants Niece quieting title to the real property, and in favor of the defendant bank quieting title to the note and deed of trust in which it was payee and beneficiary.

Plaintiff purchased the real property from the defendants Niece on September 29, 1927, subject to a mortgage in the sum of $1,000 made by a Mr. and Mrs. Britt, payable to the Security Trust and Savings Bank of Los Angeles, predecessor in interest of defendant bank. As a part of the purchase price plaintiff executed a note secured by a deed of trust, in favor of the defendants Niece, dated March 17, 1928. Plaintiff defaulted under this deed of trust and the property was sold through trustee's sale to the defendants Niece. It is this sale that plaintiff seeks to avoid.

On February 15, 1928, plaintiff executed a note in the principal sum of $1,000, secured by a mortgage in which the defendant bank was mortgagee. The court found that this note was given to refinance the Britt note.

On January 17, 1931, a contract extending this mortgage was executed by the plaintiff and the defendant bank. Defendants Niece, who held a subsequent encumbrance, consented to this extension.

On March 14, 1934, a note and deed of trust was executed by plaintiff in favor of the bank as payee and beneficiary. They were made in consideration of the cancellation of the $1,000 note and the release of the mortgage in which the defendant bank was mortgagee.

On August 27, 1934, all of the parties executed an agreement of subordination whereby the Niece deed of trust was subordinated to the bank deed of trust executed on March 4, 1934, so that it would become a first incumbrance on the property.

Thereafter plaintiff made an assignment of rents from the property to the defendant bank. All of the rents were paid to it and applied upon the bank note, together with some additional payments made by plaintiff.

The decree quieting title to the real property in the defendants Niece is based upon the trustee's deed executed under the power of sale contained in the trust deed which was in default. No attack has been made upon the regularity of the trustee's sale.

Plaintiff contends that the execution of the subordination agreement by the parties hereto modified the deed of trust to such an extent that it became necessary to foreclose the trust deed as a mortgage.

[1, 2] The subordination agreement in no way changed or modified the terms of the trust deeds. The agreement was in the usual form and served no other purpose than to continue the priority of the bank lien over that of the Niece deed of trust. When there is no modification of the terms of the deed of trust with power of sale, it need not be foreclosed as a mortgage. Medico-Dental Discount Corp. v. Title Ins., etc., Co., 11 Cal.App.2d 200, 53 P.2d 386.

[3, 4] Plaintiff claims that by virtue of the assignment of rents to the bank, the defendants Niece were estopped from the exercise of the power of sale upon default under their deed of trust. This argument is without merit as no estoppel could arise under these facts. Further, there is ample evidence in the record to show that the defendants Niece had no knowledge of the assignment of rents. A party to be estopped must be apprized of the facts on which the claimed estoppel is based. 10 Cal.Jur. 627.

[5, 6] Plaintiff requested that the cross-complaint of the defendants Niece to quiet title to the property in question be tried by a jury. The court properly denied this request. A trial by jury in an action in equity is not a matter of right where no issue at law is made by the pleadings. Baar v. Smith, 201 Cal. 87, 255 P. 827.

[7] Plaintiff filed a demurrer for nonjoinder of the Nieces in the cross-complaint of the Security-First National Bank of Los Angeles. This demurrer was properly overruled. The cross-complaint of the bank sought a decree quieting the title of the bank to the note and deed of trust made by plaintiff in its favor. The Nieces were in no way interested in that controversy. They were merely beneficiaries under a junior deed of trust upon the same property.

[8] Plaintiff contends that there was no consideration given her by the defendant bank for the execution of the note and deed of trust in favor of the bank, and that by reason of the payments she had made upon the note she became a co-owner thereof. The trial court found that the consideration for the note and deed of trust was the satisfaction of the Britt note and mortgage. This is sufficient consideration. Partial payments could not make her co-owner of the note of which she was maker.

[9] Plaintiff complains of rulings excluding evidence which she offered. If we assume that these rulings were erroneous, they were rendered harmless by subsequent admission of like evidence upon the same question.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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43 Cal.App.2d 506

PEOPLE v. SEERMAN.

Cr. 608.

District Court of Appeal, Fourth District, California.

March 17, 1941.

Rehearing Denied March 31, 1941.

Hearing Denied April 16, 1941.

1. **Receiving stolen goods ⇨8(3)**

Where accused, who was employed by pawn shop, purchased stolen wrist watch from a minor whom accused did not know and who furnished note purporting to give minor, under a fictitious name, authority to sell watch for mother, which note was signed under fictitious name, and accused made no attempt to ascertain whether names were names of actual persons or minor's right of sale, and accused filled out form required by statute describing fictitious person as the seller, evidence warranted conviction of receiving stolen property. Pen.Code, §§ 496, 496bb, subds. 2, 3.

2. **Receiving stolen goods ⇨8(1)**

Under Penal Code section providing that if property is purchased from a person under 18 years of age it shall be presumptive evidence that the property was stolen, a dealer in secondhand merchandise who deals with the minor in the sale of stolen property does so at his own risk, and has the burden, when the sale is challenged, of proving a reasonable inquiry of seller's right of sale. Pen.Code, §§ 496, 496bb, subds. 2, 3.

3. Criminal law ⚿260(11)

In prosecution for receiving stolen property tried to the court without a jury, conflicting evidence of defendant's guilt was for trial court whose findings would not be disturbed on appeal. Pen.Code, §§ 496, 496bb, subds. 2, 3.

4. Criminal law ⚿260(11)

Where prosecution for receiving stolen goods was had before court without a jury, no prejudice could be presumed from certain comments made by the trial judge during trial.

5. Criminal law ⚿260(7)

The trial court's failure to correct transcript relative to proceedings and offers made on motion for new trial was not harmful, where proffered evidence was immaterial or cumulative.

◆

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Felix Seerman was convicted of receiving stolen property, and from a judgment of conviction and order denying motion for new trial, he appeals.

Order and judgment affirmed.

C. E. Crowley, of Ontario, and Newel S. Crowley, of Upland, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant was charged with the crime of receiving stolen property, pleaded not guilty, and in person waived his right to a jury trial. The trial court found the appellant guilty and his motion for a new trial was denied. This appeal is from the judgment, and from the order denying the motion for new trial on the ground of the insufficiency of the evidence and alleged errors of law.

On the first day of July, 1940, a fourteen-year-old high school boy named Jack Detter entered a house in Ontario, California, the residence of Mrs. Dorothy D. Lucas, and took, among other things, a gold wrist watch. On the 2nd or 3rd of July, 1940, he sold this wrist watch at a pawn shop known as the Diamond Loan and Jewelry Company, in Ontario, which was operated by the appellant as general agent. The boy first went into the shop and talked with a lady, Mrs. Golden, the mother of the appellant. She told him to obtain his mother's consent to the sale of the watch and return later. On the second visit the boy brought a note which purported to give authority to him, under the fictitious name of John Dodge, to sell the watch for his mother, which note was signed under the fictitious name of Dolores Dodge. In purchasing the watch appellant made out a report of the sale on the form required by law. This form required a description of the person "making the sale". Instead of describing the boy, appellant filled out the form describing the fictitious person, Dolores Dodge, giving her weight, complexion, color of hair, sex, height, occupation and the style of dress. The boy testified that this was filled in by the appellant and the appellant's mother without any information being given to them by him. The boy, however, did write the name Dolores Dodge right under the fictitious name John Dodge. The appellant issued a check in the sum of $2.50 and made payable to C. A. Dodge who, it was claimed by the boy, was his father. The endorsement was forged by Jack and the check was cashed by him. The watch was four years old and originally cost $32 with the wrist band. Appellant took the stand in his own defense and admitted that he was not acquainted with Jack and had never seen him before he bought the watch, and that he had never heard of any person by the name of Dolores Dodge. He admitted that the boy had given him the address where he lived, and admitted further that he made no investigation to determine whether Dolores Dodge lived at that address, nor did he make any investigation to determine whether Dolores Dodge was an existing person. The appellant also admitted that Jack told him he was only 14 years of age and further admitted that the only investigation he made was by questions asked of the boy himself. Section 496 of the Penal Code provides in part that "Every person who for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to have been stolen * * * is punishable," etc. Section

496bb, subdivision 2 of the Penal Code provides: "Every person whose principal business is dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of such person, who buys or receives any property which has been stolen * * *, under such circumstances as should cause such person * * * to make reasonable inquiry to ascertain that the person from whom such property was bought or received had the legal right to so sell or deliver it, without making such reasonable inquiry, shall be presumed to have bought or received such property knowing it to have been so stolen or obtained. This presumption may, however, be rebutted by proof." Subdivision 3 provides in part: "* * * the burden shall be upon the defendant to show that before so buying * * * he made such reasonable inquiry to ascertain that the person so selling or delivering the same to him had the legal right to so sell or deliver it".

Appellant contends (1) that notwithstanding the presumptions in the case, his acts established his good faith and absence of guilty intent because, although there was no dispute that the watch was stolen, he did not know it was stolen nor was this knowledge established; (2) that he made due inquiry; (3) that he believed the mother's note to be genuine; (4) that he made the check payable to the boy's father; (5) that he was an employee and did not personally profit by the deal; (6) that he reported the transaction to the police department; and (7) that the essential elements of the crime were not established and that there was a complete lack of proof of guilty knowledge or criminal intent on the part of appellant (citing People v. Ward, 105 Cal. 652, 39 P. 33; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505; Wolf v. United States., 2 Cir., 290 F. 738; 22 Cal.Jur. 555, sec. 1 et seq.; People v. Wong Sang Lung, 3 Cal.App. 221, 84 P. 843; and Dalton v. United States, 7 Cir., 154 F. 461). Sec. 496bb of the Penal Code requires reasonable inquiry to be made to ascertain that the person from whom property is bought had the legal right to sell it. The appellant admitted that he had never seen the boy before he bought the watch. Appellant therefore had no independent knowledge about the boy and made no attempt to get any independent information.

[1] There is no evidence in the record to show any inquiry to ascertain that the person from whom the watch was purchased had the legal right to sell it. The only questions asked were asked of the boy. He had given appellant his address and three fictitious names. There is no showing that appellant made the slightest attempt to ascertain whether those names were fictitious or were the names of actual persons. This action took place in Ontario, a relatively small community. It would not have been difficult to find some independent source of verification. If inquiry of the seller alone were sufficient in and of itself, the requirement of the section would be of little force or effect. The appellant suspected the boy's right of sale but made no inquiry to ascertain the boy's legal right of sale. The presumption that the appellant knew that the property was stolen, therefore, had to be rebutted by proof as required by Penal Code, section 496bb, subdivision 2. Furthermore, the prosecution showed that appellant's principal business was dealing in secondhand merchandise, and that he bought a stolen watch from a person he suspected. The burden was upon appellant, therefore, to prove a reasonable inquiry of the seller's legal right of sale before he purchased the watch. Penal Code, sec. 496bb, subd. 3. No such evidence appears in the record. The presumption of guilty knowledge was determined not to have been overcome. The evidence, although in conflict, was legally sufficient to support the finding of the court. People v. Rossi, 15 Cal.App.2d 180, 183, 59 P.2d 206.

In People v. De Vaughn, 136 Cal.App. 746, at page 751, 29 P.2d 914, at page 916, it was said: "It is true that the evidence does not show that defendant was told in direct terms that the goods were stolen. Proof of his knowledge of that fact rests entirely upon the evidence of the circumstances under which he bought the property. We think that the evidence in this case justified the jury in its inference, to the effect that the defendant knew that the goods were stolen, and that, if he did not have that knowledge by direct evidence thereof, this must have been because he willfully refrained from making inquiries which under the circumstances should have been made by him." See also, People v. Moore, 137 Cal.App. 130, 30 P.2d 79.

[2, 3] The principal circumstance showing guilty knowledge is that the boy testified that no information was asked of him except his address. He testified that the identification and description of the party

selling the property was all filled in by the appellant or the appellant's mother without asking any questions of him. The description filled in was the description of the fictitious person, Dolores Dodge, whom appellant never saw. He admits he never knew such a person. The form of the report was such as to require a detailed description of the person making the sale, regardless of the ownership of the articles sold. A description of some person other than the person making the sale renders the report of no avail for the purpose for which it was intended and is a very suspicious circumstance. A person deals with a minor at his own risk. In the instant case the boy who sold the appellant the watch told him he was only 14 years of age. Section 496 of the Penal Code provides that if property is purchased from a person under 18 years of age it shall be presumptive evidence that the property was stolen. It seems clear that these circumstances were such as to put a reasonable man on notice and such as should have put the appellant on notice that a reasonable inquiry was required. These circumstances and presumptions, opposed to the appellant's evidence, create only a conflict. The determination of this conflict was for the trial court and under the well-known principles of law this court will not disturb that finding on appeal. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

[4] Appellant's claimed errors of law were predicated upon certain comments made by the trial judge during the trial of the action, which comments we have examined and find no prejudicial error. The trial was had before the court without a jury. No prejudice can be presumed thereby.

[5] Appellant contends that it was error to deny his motion for a new trial because the evidence was insufficient to support the judgment, and complains of the refusal of the court "to correct the transcript relative to the proceedings and offers made at the time the motion for new trial was had". We have examined the proffered evidence and find that the court's conclusion that it was immaterial or cumulative must be sustained.

The order denying the motion for new trial and the judgment are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

43 Cal.App.2d 519

PIERSON v. BRADFIELD et al.

Civ. 2571.

District Court of Appeal, Fourth District, California.

March 18, 1941.

1. Boundaries ⚷20(1)

Generally, the word "lot" in a deed does not include a portion of the street bordering the lot.

See Words and Phrases, Permanent Edition, for all other definitions of "Lot".

2. Evidence ⚷461(2)

In quiet title action involving controversy over boundary, evidence regarding intention of common grantor was admissible, not for purpose of changing or adding to deed, but for sole purpose of explaining language therein contained.

3. Evidence ⚷456

In quiet title action involving controversy over boundary, if the word "block", as used by the common grantor in subdivision map and several deeds executed pursuant thereto, was intended by him to have a particular meaning, it was competent to permit the introduction of parol evidence to establish that meaning.

4. Evidence ⚷89

A rebuttable presumption may be rebutted by evidence opposed to it.

5. Appeal and error ⚷1010(1)

Where evidence opposed to a rebuttable presumption is substantial, a finding by court thereon will not be disturbed on appeal.

6. Boundaries ⚷37(3)

In quiet title action involving controversy over boundary, evidence sustained finding that location of dividing line between east and west halves of lot was midway between easterly boundary and center of roadway on west of lot rather than midway between easterly boundary and the property line along the roadway.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Quiet title action by Julia C. Pierson against Homer Q. Bradfield and others and C. B. Bare and others. From an adverse judgment, Homer Q. Bradfield and others appeal.

Affirmed.

Young & Wooldridge, of Bakersfield, for appellants.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent obtained judgment in a quiet title action against defendants and appellants. The case concerned a controversy over the boundary between the eastern portion of lot 4, of Kern Citrus Tract, and the western portion of that lot. Respondent owns the eastern portion of the lot and the several appellants own several pieces of land that constitute the western portion of it. This suit to quiet title involves a strip of land fifteen feet in length. The common predecessors in title of all parties here involved were W. E. Van Meter and Anna Van Meter. On January 21, 1926, the above parties as grantors deeded to G. G. Pierson and Julia C. Pierson as joint tenants, "all of the easterly one-half of lot four (4), in the Kern Citrus Tract, according to the map of said tract filed on January 14, 1910, and recorded in book 1, page 132 of maps". Respondent at the time of suit was the sole owner of the above property by right of survivorship. The aforesaid Van Meters, as grantors, on January 21, 1926, deeded to H. E. Metzner "all the westerly one-half of lot four (4) in the 'Kern Citrus Tract' ", according to the same map. The Metzners on May 4, 1936, deeded to Homer Q. Bradfield and wife as joint tenants "The North 234.54 feet of the West half of Lot 4 of Kern Citrus Tract", according to the same map, "Excepting an undivided ⅓ interest in and to that certain pumping plant site described as follows: Commencing at a point on the East line of the West half of said Lot 4, at a distance of 113 feet South of the Northeast Corner of said West half of said Lot 4; thence at right angles West 25 feet; thence at right angles South 25 feet; thence at right angles East 25 feet to the East line of the West half of said Lot; thence North along said East Line 25 feet to the point of beginning; Reserving an easement for road purposes over the East 30 feet of the West half of said Lot 4".

For a period of approximately ten years prior to 1936 respondent and Metzner were coterminus owners of the east and west halves of said lot 4. The official recorded plat of the tract is in evidence. It shows a roadway along the west side of lot 4 and the east-west measurements, both on the north and south sides of the lot, are from the center of said roadway. The width of the roadway is 60 feet. The north-south dimensions of the lot include the south half of a roadway 60 feet wide along the northerly side of the lot. The acreage of lot 4 shown on the map is 10 acres. By computation it is necessary to include half of each roadway in order to arrive at this acreage, and when so computed, the acreage as stated on the plat is correct with an excess of about 8 square feet. Whereas, if the roadways are excluded the acreage would be short about 38,000 square feet or nearly an acre. The lot is undoubtedly measured on the official plat from the center of the streets.

The question in the case is whether the east and west halves of lot 4, on the west side of which there is a roadway, are divided by a line midway between the property line along said roadway and the easterly boundary of the lot, or by a line midway between the easterly boundary and the center of said roadway.

Respondent contends and the court found that the location of the dividing line was midway between the easterly boundary and the center of the roadway.

For a period of ten years Metzner and respondent did certain things which respondent contended amounted to a practical construction of their respective deeds as to the lands conveyed thereby and as to the location of the dividing lines. It is claimed and the evidence supports the argument, that the parties tacitly agreed that the dividing line of their property was, as respondent contends, midway between the easterly boundary and the center of the roadway on the west. Each used and occupied that land up to such time. They jointly put in a pumping plant which, under either construction, was entirely on the west half of the lot. They drew up a contract concerning the plant describing the site by metes and bounds and making the easterly side of the site coincide with the dividing line as contended for by respondent. The testimony shows that if the dividing line is as respondent contends the well would be at the approximate center of the site, while if the line is as contended for by appellants the well would be outside of the pumping plant site.

The record shows that in 1936 Metzner, with the purpose of subdividing the west half of the lot, employed a surveyor to survey and stake the dividing line. Metzner and his son attempted to survey the line themselves. Finding that the son was not licensed and that his survey would not be accepted for official purposes, Metzner employed a licensed surveyor. He informed the licensed surveyor where he and his son had surveyed the line. Metzner told the surveyor approximately where he and his son had placed the line. The surveyor found the stakes set by Metzner and found that each one of them was approximately on the line midway between the easterly boundary line and the center of the road on the west.

A different situation arises as to the deeds to the several appellants. The deed to the Bradfields contained no east-west dimension and placed the east boundary of the property conveyed to the Bradfields as coinciding with the east boundary line of pumping plant site. The deeds to the Bollingers and Kirkpatrick contained an east-west dimension of 315.76 feet. It is conceded by respondent that the deeds by Metzner to Kirkpatrick and the Bollingers' predecessor in interest purport to convey property extending 15 feet over the dividing line as claimed to have been established by Metzner and respondent. As to such two conveyances the question is whether Kirkpatrick and the Bollingers received any title to the easterly 15 feet of the property purporting to be conveyed by their deeds.

The trial court found generally "* * * that the acreage (10 acres) stated on said map for said lot requires the inclusion of one-half of said roadways or streets"; that "during the time the property was held by plaintiff and her husband as to the East Half of said lot and by defendant H. E. Metzner as to the West Half of said lot under the deeds * * * said owners determined the boundary line dividing their said property by a survey fixing said boundary line mid-distance between the Easterly boundary of said lot and the Westerly boundary thereof as established by the center line of * * * the roadway or street on the Westerly side of said lot, and fixed said line on the ground by said survey; and thereafter the parties acquiesced in the same as the boundary line between their respective property and used and occupied up to the same on either side thereof"; that "said conveyances severally conveying portions of the westerly portion of said lot inaccurately described the conveyed property * * *; that at the time of making said conveyances last above mentioned the Westerly boundary line of plaintiff's land * * * had been surveyed and fixed by the said Metzners and by plaintiff and her said husband as being the line equally dividing said lot into East and West halves, measuring from and including to the center of highways bounding said lot on the North and West; that at the time defendants * * * purchased said property from * * * Metzner the said boundary line between the East and West half, being the Westerly boundary of plaintiff's land * * * had been fixed upon the ground by stakes set along said line and at the corners of the respective parcels of land constituting the West half of said lot; that when said Metzner conveyed to the other defendants it was understood by all of the grantees in said conveyances that their Easterly boundary lines coincided with the West boundary of plaintiff's land as described * * * that when deeds were drawn whereby * * * Metzner conveyed the West half of said lot in several parcels to certain of defendants * * * such deeds were drawn in such manner as to leave it uncertain in the descriptions in such conveyances as to whether the East and West dimensions of the several parcels of land were to be measured from the center of" said road "or from the property line along the East side of" that road; "that said conveyances were drawn arbitrarily and in disregard of the fact that the line dividing said lot in the center had been fixed by survey and on the ground by stakes as aforesaid and under the erroneous belief that said line should be fixed arbitrarily as midway between the East and West boundary lines of the usable portion of said lot, but each and all of the defendants who claim under said Metzners knew of the location of the line as fixed by the survey and stakes on the ground and none of them understood or believed that said conveyances conveyed anything Easterly of the Westerly line of plaintiff's property * * * that the several defendants * * * receiving conveyances of said several parcels of the West half of said lot, accepted said conveyances with the knowledge, belief and understanding that they conveyed properties respectively bounded on the East by the Westerly boundary of plaintiffs land as" claimed by her.

[1] Appellants rely principally upon Earl v. Dutour, 181 Cal. 58, 183 P. 438, 6 A.L.R. 1163, which decision is based upon the general and customary use of the word "lot" as not including a portion of the street bordering the lot. It was there held that: "In the absence, * * * of any circumstance indicating that a more unusual and technical meaning of the word 'lot' was contemplated and intended by the grantor, it will be presumed that the grant of a fractional part * * * of land conveys the given fractional part * * * which is set apart for private use and occupancy."

[2] The case of Peake v. Azusa Valley Savings Bank, 37 Cal.App.2d 296, 301, 99 P.2d 382, is also cited. There is some factual similarity between the instant case and the cited cases. However, in the instant case additional evidence was produced as bearing on the intention of the parties and under the circumstances a distinction has been drawn and the exception to the presumption has been well defined and stated in Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950, 951, where under similar circumstances it was held that the decision in Earl v. Dutour, supra, was not applicable because the record in the Earl case, as in the instant case, was "replete with evidence sustaining the findings of the court below and irrefutably indicating that the common grantor intended, by the respective deeds to the predecessors in interest of the parties hereto, to convey fractional parts of block 195 as measured from the center line of the adjoining streets", and that such evidence is admissible, not for the purpose of changing or adding to the deed, but for the sole purpose of explaining the language therein contained.

[3-6] If the word "block", as used by the common grantor in the subdivision map and several deeds executed pursuant thereto, was intended by him to have a particular and peculiar meaning, it was competent for the court below to permit the introduction of parol evidence to establish that meaning. Norton v. Farmers' Automobile Inter-Insurance Exchange, Cal.App., 105 P.2d 136; and see, also, Anderson v. Citizens' Savings, etc., Co., 185 Cal. 386, 197 P. 113. The case of Earl v. Dutour, supra, merely states that the facts there existing created a rebuttable presumption, and its applicability depended upon the particular facts of each separate case. A rebuttable presumption may be rebutted by evidence opposed to it, and when the evidence is substantial a finding by the court thereon will not be disturbed on appeal. Duehren v. Stewart, 39 Cal.App.2d 201, 102 P.2d 784. The evidence here substantiates the court's findings, and the judgment based thereon is not only reasonable but in accordance with equitable principles.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

DONNELLY v. SOUTHERN PAC. CO.*

Civ. 11450.

District Court of Appeal, First District,
Division 2, California.

March 17, 1941.

Hearing Granted May 15, 1941.

1. Commerce 🔑8(12)

The effect of release of railroad company from liability for injuries to passenger by provisions of free pass, used by her in making interstate trip on company's train, is controlled solely by applicable federal statutes. Interstate Commerce Act § 1(7), as amended by Hepburn Act, 49 U.S.C.A. § 1(7).

2. Negligence 🔑13

Federal courts do not draw distinction between "slight negligence", "ordinary negligence", and "gross negligence", as do state courts.

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Negligence", "Ordinary Negligence", and "Slight Negligence".

3. Negligence 🔑11

Both state and federal courts draw distinction between acts of "negligence" and "willful or wanton acts".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence" and "Willful or Wanton Acts".

4. Negligence 🔑4, 11

"Negligence" rests on failure to exercise due care, while "willful or wanton acts" are acts of offender's volition.

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*Subsequent opinion 118 P.2d 465.

5. Carriers ⚷307(2)

The Hepburn Act, by which Congress first exercised its constitutional power to legislate regarding issuance of free passes by common carriers to passengers, was enacted in interest of interstate commerce and not addressed to willful or wanton acts of such carriers. Interstate Commerce Act, § 1(7), as amended by Hepburn Act, 49 U.S.C.A. § 1(7).

6. Commerce ⚷8(12)

The Hepburn Act, by which Congress first exercised its constitutional power to legislate regarding issuance of free interstate passes by common carriers to passengers, became law on such subject, inclusive and exclusive. Interstate Commerce Act § 1 (7), as amended by Hepburn Act, 49 U.S.C.A. § 1(7).

7. Commerce ⚷8(12)

The Hepburn Act concerning issuance of free interstate passes by common carriers to passengers governs such passes in their entirety, including not only their permission and use, but limitations and conditions on such use or users' relation to carrier issuing them, fact and measure of responsibility carrier incurs by their issuance, and extent of right acquired by users. Interstate Commerce Act § 1(7), as amended by Hepburn Act, 49 U.S.C.A. § 1(7).

8. Carriers ⚷307(2)

Under the Hepburn Act, a railroad company can control its responsibility to users of free interstate passes issued by it and rights of such users by conditions in passes. Interstate Commerce Act § 1(7), as amended by Hepburn Act, 49 U.S.C.A. § 1(7).

9. Commerce ⚷8(12)

The incidents and consequences of free interstate pass, issued to railroad company's employee under federal act, are controlled by such act to exclusion of state laws and policies. Interstate Commerce Act § 1(7), as amended by Hepburn Act, 49 U.S.C.A. § 1(7).

10. Carriers ⚷307(6)

A railroad employee's wife, using free pass, issued to her by railroad company, in making interstate trip on its train when injured in collision with another train, may not claim that company did not exercise due care and claim compensation therefrom for negligence, as distinguished from willful or wanton acts. Interstate Commerce Act § 1 (7), as amended by Hepburn Act, 49 U.S.C.A. § 1(7).

11. Carriers ⚷321(1)

In action against railroad company for injuries to passenger, using free pass, issued to her as wife of defendant's employee, in making interstate trip on defendant's train when it collided with another train, court erred in giving instruction to find for plaintiff, if jury found from evidence that defendant was guilty of gross negligence. Interstate Commerce Act § 1(7), as amended by Hepburn Act, 49 U.S.C.A. § 1(7).

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Joelene Donnelly against the Southern Pacific Company for personal injuries. Judgment for plaintiff, and defendant appeals.

Reversed.

Elliott Johnson, of Oakland, for appellant.

Hildebrand & Bills and James R. Agee, all of Oakland, for respondent.

STURTEVANT, Justice.

This is an action brought to recover damages for injuries suffered in a head-on train collision. The jury returned a verdict against the defendant and, from the judgment entered thereon, the defendant has appealed.

In the early morning of September 20, 1938, plaintiff was a gratuitous passenger riding on a westbound Southern Pacific Company train between El Paso, Texas, and Los Angeles, California. Her ultimate destination was her home city of Sacramento, California. The pass had been issued to her through the fact that her husband was an employee of the appellant. Her trip was purely one on her personal affairs. At a siding known as Tortuga, located in California near the Arizona boundary, an eastbound train was stopped, awaiting the passage of the train upon which plaintiff was riding. A brakeman of the stationary train whose duty it was to properly align the tracks, threw the switch so that the westbound train turned from the main line into the siding and ran into the train it had intended to pass.

Plaintiff's pass which she had signed contained the following language: "Conditions. * * * This is a free pass based upon no consideration whatever. The person accepting and using this pass, in consideration of receiving the same, agrees that the Southern Pacific Company shall not be liable under any circumstances for any injury to the person, or for any loss or damage to the property of the individual using this pass, and that as to such person the company shall not be considered as a common carrier or liable as such. This pass will not be honored unless signed by the holder in ink or indelible pencil. * * *"

[1] At the outset of a discussion of the law it should be noted that this case is controlled solely by the federal statutes applicable to the situation. The trip was of an interstate nature and as such was governed by the acts of congress. This subject is mentioned because of the fact that various state jurisdictions have arrived at a variety of conclusions upon the effect of such a release when dealing with intrastate commerce.

In her complaint the plaintiff alleged that defendant was guilty of gross negligence. In its answer the defendant admitted it was negligent but denied it was guilty of gross negligence. When the plaintiff had closed her case the defendant made a motion which was as follows: "I now move the court for a judgment of nonsuit in favor of defendant Southern Pacific Company on the ground that, first, there is no evidence sufficient to sustain a finding of gross negligence upon the part of the Southern Pacific and, secondly, even assuming that there is sufficient evidence to justify a finding of such gross negligence, the trip which the plaintiff took was interstate and was made under and by virtue of a free pass containing a release signed by the plaintiff releasing the Southern Pacific Company from liability, and under the law governing such a situation, such release was valid and binding and prevents a recovery by the plaintiff." That motion was denied. When instructing the jury the trial court, among others, gave the following instructions:

(1) "If you find from the evidence in this case that the defendant Southern Pacific Company was guilty of gross negligence, as defined in these instructions, then your verdict must be against the defendant Southern Pacific Company and in favor of the plaintiff.

(2) "Gross negligence is not presumed but must be proven.

(3) "You are further instructed that the term 'gross negligence' as used in these instructions is defined as follows: 'Gross negligence is that entire want of care which would raise a presumption of conscious indifference to consequences; an entire want of care, or such a slight degree of care as to justify the belief that there was an entire disregard for and indifference to the safety and welfare of others.'

(4) "It is not necessary that there be a wilful intent to harm another person in order to constitute 'gross negligence'.

(5) "If you find from the evidence that the defendant Southern Pacific Company was guilty of 'ordinary' negligence only, then your verdict must be against the plaintiff and in favor of defendant Southern Pacific Company.

(6) "Ordinary negligence is defined as the omission to do something which an ordinarily prudent person would have done under the same situation, or doing something which such person would not have done in the same situation."

The defendant contends that there was no evidence it was negligent in any respect otherwise than this, that it did not prevent a collision. That contention must be conceded and later we will further discuss such fact, whether considered as gross negligence or otherwise, as material to this case. Continuing the defendant asserts that even though it was guilty of gross negligence it was not liable to the plaintiff who was riding on a free pass on a train being operated in interstate commerce.

The defendant claims the plaintiff was a licensee and that it was under no obligation to her except not to injure her by any wilful or wanton act. Giannini v. Campodonico, 176 Cal. 548, 169 P. 80; Currier v. Trustees of Dartmouth College, 1 Cir., 117 F. 44. The plaintiff modifies that claim by adding that defendant, under the facts, was bound to exercise ordinary care. Yoshiko Yamauchi v. O'Neill, 38 Cal.App.2d 703, 102 P.2d 365. The defendant replies that, accepting the modification, it was not liable. It cites and relies on the provisions of the Hepburn Act, 34 U.S. Stats. at Large, 584. It thus appears the entire case is to be determined on that statute and the decisions of the federal courts.

[2-4] That, in referring to want of care, in this state and many other jurisdictions, a distinction is made between slight negligence, ordinary negligence, and gross negligence will be conceded at once. Cooper

v. Kellogg, 2 Cal.2d 504, 511, 42 P.2d 59. But it must also be conceded that from an early date it has been the settled rule in the federal courts that they do not draw that distinction. New York C. Railroad Co. v. Lockwood, 17 Wall. 357, 382, 21 L. Ed. 627. However, both of the above classes of courts draw a distinction between acts of negligence, on the one hand, and acts of a wilful or wanton nature, on the other hand. The first class rests on failure to exercise due care, the second involves acts of the volition of the offender. In none of the cited cases is it held that an act of gross negligence is synonymous with a wilful or wanton act. The two are in this state distinctly different. Kastel v. Stiever, 215 Cal. 37, 46, 8 P.2d 474. There is no claim that the instant case involved a wilful or wanton act and cases which did involve such questions, New York Central R. Co. v. Mohney, 252 U.S. 152, 40 S.Ct. 287, 64 L.Ed. 502, 9 A.L.R. 496; Virginia Beach Bus Line v. Campbell, 4 Cir., 73 F.2d 97, do not require discussion.

[5-10] Many of the arguments in favor of this plaintiff had been refuted by the United States Supreme Court in its decisions rendered prior to the enactment of the Hepburn Act, 34 U.S.Stats. at Large, 584. But the enactment of that statute in 1906 was most material to the specific issue presented in the instant case. Manifestly said statute was enacted in the interest of interstate commerce. It was in no manner addressed to wilful or wanton acts. As amended by the Hepburn Act, the Interstate Commerce Act, U.S.C.A. Tit. 49, sec. 1, subd. 7, provides: "(7) *Free transportation for passengers prohibited; exceptions; penalty.* No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families * * *. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than $100 nor more than $2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty." Down to the date of the enactment of the Hepburn Act the congress had not exercised its constitutional power to legislate regarding "free passes". Under fundamental rules when it did speak on the subject such legislation became the law on that subject—inclusive and exclusive. Later the case entitled Kansas City Southern R. Co. v. Van Zant, 260 U.S. 459, 43 S.Ct. 176, 177, 67 L.Ed. 348, arose. In that case the court quoted from the amended statute and then it said:

"The provision for passes, with its sanction in penalties, is a regulation of interstate commerce, to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use; or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. Northern P. R. Co. v. Adams, 192 U.S. 440, 24 S.Ct. 408, 48 L. Ed. 513; Boering v. Chesapeake Beach R. Co., 193 U.S. 442, 24 S.Ct. 515, 48 L.Ed. 742.

"Those cases were considered and applied as giving validity to the stipulations of passes issued under the act in Charleston & W. C. R. Co. v. Thompson, 234 U.S. 576, 34 S.Ct. 964, 58 L.Ed. 1476, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. In this case the prayer was for $25,000; the recovery was for $8,000. Circumstances might have made it the larger sum; and this, it is the contention and decision, is the determination of state laws which could neither permit nor forbid the gift. We cannot assent. The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act, to the exclusion of state laws and state policies, and such is the effect of the cited cases."

Manifestly, construing the terms of plaintiff's free pass as directed by the foregoing decision, the plaintiff may not claim the defendant did not exercise due care and claim compensation for negligence as distinguished from wilful or wanton acts.

But, the plaintiff argues, the question is not an open one in this state. She cites and relies on Walther v. Southern Pacific Co., 159 Cal. 769, 116 P. 51, 37 L.R.A.,N.S., 235. However we think it is sufficient to state that the "free pass" involved in that case was issued and was outstanding when the Hepburn Act took effect. Obviously an act of congress would not operate to impair contracts made prior to its enactment.

[11] From what we have said it follows that the trial court erred in denying the defendant's motion for a nonsuit; that it erred in giving the instruction which we have marked (1); and that the judgment should be reversed.

It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

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43 Cal.App.2d 659

BERYLWOOD INV. CO. v. GRAHAM et al.

SAME v. LOS ANGELES FIRST NAT. TRUST & SAVINGS BANK.

Civ. 11312.

District Court of Appeal, First District, Division 1, California.

March 26, 1941.

Rehearing Denied April 25, 1941.

Hearing Denied May 22, 1941.

1. Internal revenue 🔑1745

Where all the stock of a corporation was sold by agreement effective July 1, 1928, in order to give buyer control of certain oil leases and related properties which were not assignable without lessors' consent, but corporation's other property, referred to in the sale agreement as "reserved properties", was transferred to new corporation owned by old corporation's stockholders, and stockholders agreed to "pay or cause to be paid * * * all money due to any person, firm or corporation on account of any matters or things whatsoever relating to said reserved properties," stockholders were liable to buyer and buyer's assignee for amount of federal income tax paid by buyer on income for the first half of 1928 from the operation of both "transferred properties" and "reserved properties". Code Civ.Proc. §§ 938, 1860; Civ.Code, §§ 1647, 1650.

2. Internal revenue 🔑1745

In agreement by stockholders to sell all stock of the corporation, providing that stockholders would pay or cause to be paid all money due on account of any "matters or things whatsoever" relating to certain properties of the corporation, the quoted phrase was broad enough to cover federal income taxes on income partially derived from operation of such properties.

See Words and Phrases, Permanent Edition, for all other definitions of "Matters or Things Whatsoever".

3. Internal revenue 🔑1745

Under agreement by stockholders to sell all stock of the corporation, providing that stockholders would pay money due on account of properties reserved by the corporation, in determining stockholders' liability for income taxes for first half of the year during which agreement was made, whether regulations applicable to affiliation of corporations during taxable year covered the situation, and whether filing of return for portion of year was mandatory or optional, was immaterial, where separate tax return for portion of year was filed and government accepted the tax without objection.

4. Contracts 🔑159

Though the words "due" and "accrued", referring to a liability, mean, respectively, immediately payable and payable immediately or later, the second interpretation may be adopted by considering the use of the word in the agreement, in light of surrounding circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Due" and "Accrued".

5. Contracts 🔑143

In interpretation of a contract, all of the writing must be read together and every part interpreted with reference to the whole, so that each provision therein will be effective for its general purpose.

6. Contracts 🔑159

The word "due" when read in connection with its context may cover an obligation to become payable at a future time.

7. Contracts ⇨169

In construing a contract, court may resort to subject of instrument and circumstances surrounding its making, in order to ascertain the intention of the parties. Civ. Code, § 1647; Code Civ.Proc. § 1860.

8. Internal revenue ⇨1745

Under contract for sale of all corporation's stock, providing that selling stockholders would pay or cause to be paid all bills incurred, money borrowed before specified date, and all money due on account of any matters or things whatsoever relating to reserved properties, tax on income prior to such date was "due", and hence stockholders were liable therefor, though title to the stock did not pass until later date.

9. Internal revenue ⇨1745

Under contract for sale of all of corporation's stock providing that selling stockholders would pay or cause to be paid all money due from corporation to any "person, firm or corporation", federal income tax was included as against contention that the federal government was not a "person, firm or corporation", since designation of the party to be paid was incidental and subordinate to the general intent. Civ.Code, § 1650.

See Words and Phrases, Permanent Edition, for all other definitions of "Person, Firm or Corporation".

10. Internal revenue ⇨1745

Under contract for sale of all of corporation's stock, effective July 1, 1928, providing that selling stockholders would pay or cause to be paid money due on account of matters "relating to said reserved properties", and defining "reserved properties" as comprising oil leases and other property which had been transferred to a new corporation in order to prevent control thereof from passing to buyer of the stock, federal tax on income from all of corporation's properties prior to July 1, 1928, was payable by stockholders rather than by buyer, since property for the period in which buyer had no interest was "reserved property" within terms of the contract, and full amount of obligation for tax thereon was proven, though earnings and income tax payable were not segregated as between types of properties.

See Words and Phrases, Permanent Edition, for all other definitions of "Reserved Properties".

11. Internal revenue ⇨1745

Under contract for sale of all of corporation's stock, providing that selling stockholders would pay amounts due on account of matters relating to reserved properties, which comprised oil leases and other property that had been transferred to new corporation to prevent buyer of stock from gaining control thereof, income from operations prior to effective date of the contract arose partly from the reserved property, and hence federal income tax measured by such income was an obligation "relating to" reserved property within reasonable meaning of the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Relating to".

12. Internal revenue ⇨232

Income tax is technically not a tax on income on the property from which it is derived, but a personal tax measured by income.

13. Contribution ⇨6

Where a joint and several judgment was rendered against numerous defendants, and one defendant paid the judgment and took an assignment thereof, such defendant thereby substituted a limited loss for an uncertain total liability, and was not a "volunteer".

See Words and Phrases, Permanent Edition, for all other definitions of "Volunteer".

14. Appeal and error ⇨151(2)

Where a joint and several judgment was rendered against several defendants, defendant who paid the judgment and took an assignment was an "aggrieved party" having right to appeal from an order modifying the judgment so as to eliminate another defendant from all liability. Code Civ.Proc. § 938.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

15. Appeal and error ⇨151(2)

A co-obligor paying in full or compromising an obligation has right to appeal to determine legal correctness of a modified judgment eliminating from liability one of the alleged obligors. Code Civ.Proc. § 938.

16. Judgment ⇨704

Generally, parties to a judgment are not bound by it as between themselves, unless they were adversary parties in the original or prior proceedings.

17. Judgment ⇨704

During trial of action against numerous defendants to obtain joint and several judgments, the interests of particular defendants were not "adverse" so as to make judgment binding as between such defendants, but upon modification of the judgment so as to exonerate one defendant from all liability, the interests of all defendants became "adverse" to that of exonerated defendant, and upon substitution and assignment of the judgment to another defendant, its interest became "adverse" to all other defendants, and hence such judgment would be conclusive as between such parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse".

18. Banks and banking 🔑258

National banks, in the sphere of ordinary banking business, have no greater powers than those expressly conferred by statute, and incidental powers necessary to carry on the business of banking, with limitation upon business of buying and selling investment securities. 12 U.S.C.A. § 24.

19. Banks and banking 🔑260(1)

A national bank's contract for sale of corporate stock held by it, providing that seller would pay certain of corporation's debts, though ultra vires if executed in bank's general banking capacity, upon the general theory of protection to depositors, stockholders and public from hazards of contingent liability, might or might not be ultra vires depending upon circumstances, if made by the bank in its representative capacity as trustee with the consent of interested parties, such as beneficiaries of the trust. 12 U.S.C.A. § 24.

20. Banks and banking 🔑260(1)

Under statutes authorizing national banks to operate through trust departments and as fiduciaries, national banks should be allowed to compete with state banks, but there should be substantial compliance with state requirements. 12 U.S.C.A. § 24; Federal Reserve Act, § 11(k), as amended in 1918, 12 U.S.C.A. § 248(k).

21. Banks and banking 🔑260(1)

Any effort of state to curtail powers of national banks is unconstitutional, but national bank is confined in its activities to powers granted state banks within the same jurisdiction. 12 U.S.C.A. § 24; Federal Reserve Act § 11(k), as amended in 1918, 12 U.S.C.A. § 248(k).

22. Banks and banking 🔑258

Generally, failure to expressly grant power to national banks negatives its existence. 12 U.S.C.A. § 24; Federal Reserve Act § 11(k), as amended in 1918, 12 U.S.C.A. § 248(k).

23. Banks and banking 🔑260(1)

National banks are not free from all restrictions when acting in trust capacity, and where there would be no difference in hazard of loss so far as interests of depositors were concerned whether bank engaged in activity in its trust or regular banking capacity, as where general assets are available to satisfy obligations arising from trust activities, there may be reason to relieve a bank from liability upon theory that depositors and stockholders are entitled to primary consideration. 12 U.S.C.A. § 24; Federal Reserve Act § 11(k), as amended in 1918, 12 U.S.C.A. § 248(k).

24. Banks and banking 🔑260(4)

A guarantee or direct primary obligation of national bank to pay speculative amounts is "ultra vires" when depositors or stockholders of the bank will be held liable. Federal Reserve Act § 11(k), as amended in 1918, 12 U.S.C.A. § 248(k).

See Words and Phrases, Permanent Edition, for all other definitions of "Ultra Vires".

25. Banks and banking 🔑260(1)

Where national bank, acting as trustee, agreed to sell corporate stock comprising trust assets under contract providing that it would pay certain debts of the corporation, including unascertained income tax liability, but any gain or loss was to be credited or debited to the particular testamentary trust, and in ordinary course of business bank could not lose money on the transaction, the contract was not "ultra vires," and was enforceable. St.1923, p. 173, § 90; 12 U.S.C.A. § 24; Federal Reserve Act § 11(k), as amended in 1918, 12 U.S.C.A. § 248(k).

26. Appeal and error 🔑843(2)

On appeal from modified judgment holding that national bank was not liable on contract because contract was ultra vires, wherein reviewing court held that contract was not ultra vires because executed in trust capacity without danger of loss to depositors and stockholders, court could not consider possible future litigation based on facts not disclosed by the record, that trust had been closed and assets distributed to beneficiaries, who allegedly should contribute.

Appeals from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Italo Petroleum Corporation of America against Harland B. Graham and others, for reformation of sales contract and for moneys expended for use and benefit of defendants in payment of income taxes, wherein judgment was entered denying reformation of the contract but awarding money judgment, but such judgment was modified in favor of defendant, the Los Angeles First National Trust & Savings Bank. From the original money judgment for plaintiff, Harland B. Graham and others appeal, and from the modification of the judgment, the Berylwood Investment Company, as substituted plaintiff, appeals.

Reversed in part, and affirmed in part.

Farrand & Slosson, of Los Angeles, for appellant Berylwood Inv. Co.

Loeb, Walker & Loeb and Herman F. Slevin, all of Los Angeles, for appellants Graham, Loftus and Peoples Savings & Trust Co. of Pittsburgh.

Jennings & Belcher and Frank B. Belcher, all of Los Angeles, for respondent Los Angeles First Nat. Trust & Savings Bank.

Robert M. Clarke, of Los Angeles, for respondents Bard, McKevett and Teague.

WARD, Justice.

Two separate appeals are presented from a judgment as modified on defendants' motion for new trial. The first involves the construction of an agreement as it bears upon the liability of vending stockholders for federal income tax for a period antedating the sale; and the second, assuming such liability, the question whether the act of a national bank in participating in such agreement as testamentary trustee under the will of one of such stockholders, was ultra vires.

The facts of the case are as follows: Prior to July, 1928, the Italo Petroleum Corporation of America, hereinafter referred to as Italo, made an offer to purchase certain oil leases held by the Graham-Loftus Oil Company, hereinafter referred to as the Graham-Loftus or old company, at a price of approximately $3,000,000. During negotiations it was discovered that some of the leases were assignable only with the consent of the lessors and to facilitate the acquisition by Italo a plan was formed whereby all property of the old company other than the particular oil leases desired by Italo, and certain personalty used in connection therewith, should be transferred to a new organization to be known as the Graham-Loftus Oil Corporation, the stock of which was to be issued to the stockholders of the old company. The property transferred to this new company was described as "reserved properties" because, although transferred to the new company, it had been reserved to the stockholders of the old. The properties retained by the old company, consisting of leases, etc., desired by Italo, were referred to as "transfer properties". An agreement was thereafter entered into between the stockholders of the old company and Italo for the sale and purchase of all the outstanding stock of the old company, now divested of the reserved properties, at a price of $441.18 a share, or a total of $3,000,000, payable as follows: The first instalment upon the execution of the contract; the second, on September 20, 1928, and the balance in monthly payments to be completed on August 20, 1929. Title to the stock was to pass on payment of the second instalment, but the stock was to remain in escrow until payment in full had been made; also the defendants were to retain management and the control of the company until the purchase price was paid in full. Italo was to take charge of the physical operation of the oil properties on payment of the second instalment, the purchaser's occupation, however, to be "deemed occupation by and for the old company". The agreement was executed on August 13, 1928, but by its terms it was to be effective as of July 1, 1928.

The agreement provided that "In connection with its operations in and about certain of the properties described and/or referred to in the hereinabove enumerated documents, the old company is the owner of certain personal property located upon certain of said properties. Said personal property and the rights and interests of vendors in and under the documents hereinabove enumerated, in so far as said rights and interests relate to a period subsequent to July 1, 1928 (but excluding any money that the old company may have received and/or may be entitled to receive by reason of its operations and/or activities prior to July 1, 1828, and also all oil and the proceeds from all oil that belonged to the old company and that was in storage at the expiration of June 30, 1928), are hereinafter sometimes referred to as the 'transfer properties'. The old company is the owner of certain property, real and personal, and certain rights and interests in addition to the transfer properties and such other property is hereinafter sometimes designated for convenience as the 'reserved property'."

Irrespective of the date of the contract, or the time of the payment of the second instalment, the business of the company for the year 1928 was divided into two units, that prior to July 1st, and that for the balance of the year. Money on hand as of June 30, 1928, as well as that to which it was entitled by reason of its operations prior to such date, were reserved to the Graham-Loftus company. Italo as the new owner of the stock was entitled to all earnings from and after July 1st, and the provisions of the agreement required dividends declared from net income after such date to be applied toward the purchase price of the stock.

The action arises in connection with an income tax return filed in 1929 by defendants while they were still in control of the management of the Graham-Loftus company, showing the company's net income for a period from January 1, 1928, to July 1, 1928, to be the sum of $598,263.43, on which amount a tax of $71,787.61 was computed and paid by the company. The return covered earnings from both "reserved" and "transfer" properties for the first half of 1928, but the tax was paid from proceeds of its operations during the second half of the year. Subsequently the revenue department of the United States found an additional tax of $7,938.07 to be due on a corrected total net income of $689,235.22. The Italo paid the additional tax after defendants refused to pay.

The action was originally commenced by Italo against a number of defendant stockholders of the Graham-Loftus company, including the Berylwood Investment Company, for the reformation of the contract of sale executed by the litigants. The case was partly tried upon this theory. Subsequently the complaint was amended and reamended by adding two common counts for moneys laid out and expended by Italo for the use and benefit of defendants in the payment of income taxes as above set forth. Judgment was entered denying plaintiff's request for reformation of the contract, but decreeing that under the two common counts plaintiff Italo recover a money judgment against the appealing defendants in the sum of $120,740.67. On motion of defendants for a different judgment, the judgment was modified so as to relieve the Los Angeles First National Trust & Savings Bank from all liability upon the theory that as a national banking association its participation as a stockholder in the agreement of August 13, 1928, was ultra vires and not binding upon it. The bank was the holder of certain stock as testamentary trustee under the will of a deceased stockholder. This modification of the judgment is the subject of a separate appeal by the Berylwood Investment Company and will be discussed later. Prior to determination of a motion by defendants for a new trial, the Berylwood company, on behalf of itself and for defendants other than those now appealing, compromised the judgment by paying about 50 per cent thereof, took an assignment of the judgment and caused itself to be substituted as party plaintiff in place of Italo. The defendant stockholders who were not parties to the compromise between Italo and the Berylwood company have appealed from that part of the original and amended money judgment in favor of plaintiff; the Berylwood company appeals from the remainder of the judgment.

The Berylwood company, as substituted plaintiff, and respondent on this particular appeal, states its position as follows: "As the result of this purchase and substitution Berylwood Investment Company, the substituted plaintiff and appellant, ceased to be a defendant and becomes entitled, under equitable principles and the provisions of the California Code, merely to enforce the judgment so as to secure contribution from any other defendants to the extent of their ratable proportion of the purchase price of the judgment with interest thereon. The judgment therefore, in equity, is no longer a joint and several judgment against the defendants. In other words, the sum of $60,000 paid for the judgment, with interest, will be divided amongst the substituted plaintiff and the remaining solvent judgment defendants in the proportion that their several stock holdings bore to each other."

Defendant-appellants (Graham et al.) contend that a finding that they agreed to pay the old company's income tax, and that Italo expended money to their use is without support in the evidence. The particular provision of the agreement presented for interpretation in this connection reads as follows: "Promptly after the payment of said second installments of the purchase price, vendors agree that they will pay or cause to be paid all bills incurred for labor or material supplied to the old company prior to July 1, 1928, and as well all money, if any, borrowed by the old company in connection with its operations prior to July 1, 1928, and all money due to any person, firm or corporation on account of any matters or things whatsoever relating to said reserved properties, except and unless such obligations relating to said reserved properties have been assumed by the new corporation."

[1] In support of their contention that the payments they agreed to make do not include income taxes, it is specifically claimed that, at the time the contract was executed, any income tax payable by the old company was not due; that even if due at that time in connection with "transferred properties", it was not due in connection with "reserved properties", earnings from both properties constituting the 1928 income of the company; that even if due, it was due to the United States and therefore not due a "person, firm or corporation", and, finally, that the payment of income taxes was not one of the obligations "assumed by the new corporation" formed by the stockholders of the old. The vital question presented is, should provisions of the agreement of the stockholders to "pay or cause to be paid * * * all money due to any person, firm or corporation on account of any matters or things whatsoever relating to said reserved properties" be construed to cover this income tax?

[2] Defendant-appellants contend that until the end of the year 1928 the amount of income tax for that year could not be ascertained; further, that until the amount may be computed it does not accrue, and if it has not accrued, it is not due. They admit that the net income up to July 1, 1928, could be ascertained, but contend that such income might be materially affected by losses sustained during the remainder of the year. The record does not show such a situation in this case. The income tax paid by Italo in connection with earnings for the second half of 1928 amounted to approximately the same figure as for the first half. The wording of the contract does not definitely indicate that "money due * * * on account of any matters or things whatsoever" embraces income taxes. However, while income taxes are not specifically mentioned, in our opinion the expression "matters or things whatsoever" is broad enough to cover such taxes. The liability, if any, of the selling stockholders for the payment of income taxes arises from their assumption of obligations as set forth in the agreement.

[3] The respective parties discuss the effect of Regulation 74, Revenue Act of 1928. As a rule income taxes are assessed for the entire year. However, certain regulations have been promulgated relative to the filing of separate returns by corporations becoming affiliated with others during the year to cover their respective periods of activity. Whether the regulations covered this particular situation, and whether the filing of a return for a portion of the year was mandatory or optional, is immaterial in the present case. Defendants filed a separate tax return for a portion of the year and the government accepted the tax without objection. Despite the fact that title did not pass until September 20, 1928, the date adopted for determining the rights in income and property was July 1, 1928. For purposes of income tax that was the agreed date of operation by the new owners.

[4-6] While the words "due" and "accrued", referring to a liability, mean respectively immediately payable (United States v. Anderson, 269 U.S. 422, 46 S.Ct. 131, 70 L.Ed. 347; United States v. Woodward, 256 U.S. 632, 41 S.Ct. 615, 65 L.Ed. 1131), and, payable immediately or later, the second interpretation may be adopted by considering the use of the word in the agreement, in the light of surrounding circumstances. In Ghirardelli v. Peninsula Properties Company, Cal.Sup., 107 P.2d 41, 43, the court said: "In the interpretation of a contract, it is a fundamental rule that all of the writing must be read together and every part interpreted with reference to the whole, so that each provision therein will be effective for its general purpose." The word "due" when read in connection with its context may cover an obligation to become payable at a future time. Gelgud v. Los Angeles Rock, etc., Co., 14 Cal.App. 2d 604, 58 P.2d 673; Joy v. Rousseau, 72 Cal.App. 179, 236 P. 972; Ahlgren v. Walsh, 173 Cal. 27, 158 P. 748, Ann.Cas. 1918E, 751; 19 Cor.Jur. 818; Terminal Investment Co. v. Pope Estate Co., 122 Cal. App. 281, 10 P.2d 139. In United States v Anderson, supra, cited by appellant, the

court (269 U.S. at pages 440, 441, 46 S.Ct. at page 134, 70 L.Ed. 347) said: "Only a word need be said with reference to the contention that the tax upon munitions manufactured and sold in 1916 did not accrue until 1917. In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued." National Bank v. Minary, 221 Ky. 798, 299 S.W. 985.

[7] The amount "due" was not an amount agreed upon, but was left to future computation in the ordinary course of business. Likewise "bills incurred for labor or material supplied" and "all money, if any, borrowed by the old company in connection with its operations prior to July 1, 1928", the amounts of which evidently had not been ascertained, all of which indicates that the vendor stockholders agreed to pay any such indebtedness unless the obligation had "been assumed by the new corporation". The contract herein seems to be definite that the vendor stockholders assumed obligation for the payment of money due prior to a designated date, but, assuming that it did not, in specific terms, then we may resort to the subject of the instrument and the circumstances surrounding its making. The purpose of construing contracts in the light of the circumstances under which they were made is to ascertain the intention of the parties. Civ.Code, sec. 1647; Code Civ.Proc. sec. 1860.

[8] The general plan called for the stockholders of the old company to bear the expenses of operation prior to July 1, 1928, but no part of such expenses for the remainder of the year. Italo was to have no interest in profits from operations prior to July 1, 1928, and was to bear no part of the expenses incident to operation prior to that date. To adopt defendant-appellants' view would result in interpreting the agreement as permitting funds derived from operations subsequent to July 1, 1928, to be applied to the payment of a tax on income from operations prior to that date. In other words, that Italo pay an income tax on income received by the stockholders of the old company. Reading the entire document and considering the surrounding circumstances, it is clear, whether income taxes were mentioned or even thought of during the agreement negotiations, that "promptly after the payment of the said second installment" the stockholders were to pay or cause to be paid all bills incurred for labor and material as well as all money borrowed by the old company in connection with its operations prior to July 1, 1928, and "all money due to any person, firm or corporation on account of any matters or things whatsoever relating to said reserved properties", which we believe would reasonably include the tax on income prior to said date.

Defendant-appellants suggest that the return for the nonaffiliated portions of the year would extend to September 20, 1928, the period of payment of the second instalment, since until that date title to the stock did not pass to Italo. Despite the fact that title did not pass, the date specified in the agreement, July 1, 1928, was adopted as the date of determination of the rights, obligations and benefits of each party to the contract. Sanborn v. Pacific Mutual Life Ins. Co., 42 Cal.App.2d 99, 108 P.2d 458.

[9] The contract recites—"all money due to any person, firm or corporation". It is contended that the federal government does not come under any of these classifications, and citations are given in support of such contention, among others. Vrooman v. City of St. Louis, 337 Mo. 933, 88 S.W.2d 189; United States v. Fox, 94 U.S. 315, 24 L.Ed. 192; Davis v. Pringle, 4 Cir., 1 F.2d 860, affirmed 268 U.S. 315, 45 S.Ct. 549, 69 L.Ed. 974. Plaintiff-appellant calls attention to authorities holding that the federal government and other governmental subdivisions may be persons within the meaning of a statute. Miller v. Johnson, 4 Cal.2d 265, 48 P.2d 956; Ohio v. Helvering, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307; Stanley v. Schwalby, 147 U.S. 508, 13 S.Ct. 418, 37 L.Ed. 259. In re Tidewater Coal Exchange, 2 Cir., 280 F. 648, the terms of a contract disclose that the intention of the parties thereto was that outstanding obligations of indebtedness should be paid. If payment is made to a party legally entitled thereto, it is immaterial whether such party is a governmental agency, a corporation or a person. The designation of the party to

be paid is incidental and subordinate to the general intent, as expressed in the writing. Civ.Code, sec. 1650. Here the undertaking is to pay any indebtedness "relating to said reserved properties, except and unless such obligations relating to said *reserved properties* have been assumed by the new corporation." (Italics added.)

[10] The "reserved properties" included, as we have seen, those transferred by the old company to the new corporation. Since certain oil leases were not thus transferred to the new corporation, but retained and held by the old company after its stock had been acquired by Italo, appellants argue that a tax computed on income from operation of such leases did not arise from reserved properties, but rather from properties which Italo desired to and actually acquired. Or, in the words of defendant-appellants in their opening brief: "If we assume that on July 1, 1928, the old company's liability for income taxes on its earnings for the first half of 1928 had accrued and become due it would still be necessary, to bring it within the category of debts assumed by the stockholders, to show that it was 'money due * * * on account of any matters or things * * * relating to said reserved properties'. And only to the extent of such showing would there be any liability on the defendants." There was no attempt made to segregate the earnings and the income tax payable thereon as between properties retained (the transfer properties) and those reserved. All that was shown was that the tax was assessed and paid on all earnings of the old company for the first half of 1928.

[11, 12] It is further argued that the right to a money judgment is not established where the existence only of the obligation is proven and not its amount. Byron Jackson Co. v. Woods, 41 Cal.App.2d 777, 107 P. 2d 639. The full amount of the obligation, that is the tax, was proven. The term "transfer" as applied to certain of the properties relates to a condition which arose on July 1, 1928. The tax was imposed on the income prior to that date. Whether it arose from earnings on "reserved" properties or otherwise, appellants have not presented any reasonable theory why Italo should assume taxes on income of which it received no part. The scheme or plan of the agreement was to enable Italo to acquire the leases without necessity of obtaining the consent of the lessors to the transfer. The income from operations prior to July 1, 1928, was in fact from the entire property of defendant-appellants, and therefore, of course, arose partly from the reserved property, and to that extent a tax measured by such income is an obligation "relating to" such property within the reasonable meaning of the contract, notwithstanding that income tax is technically not a tax on income on the property from which it is derived, but a personal tax measured by income. Whether it be considered as a personal tax measured by income or a tax on income derived from property, in this case it was an obligation to pay from income on property for a period in which Italo had no interest, and it therefore falls within the classification of "reserved" property as that term was used in the contract. Appellants recognized this condition of affairs by filing an income tax return for the first half of the year 1928 without claim of segregation relative to liability for the tax. The tax, except the additional amount assessed by the revenue department, was paid by defendants during 1929, and while they were still in control of the old company, out of the proceeds of its operation during the second half of the year. Under the terms of the contract such proceeds belonged to plaintiff Italo for application on the agreed purchase price. Proceeds which should have been available as dividends to that company were expended by defendants in the payment of their income tax. Considering all the surrounding facts and circumstances, defendants, by necessary implication from the provisions of the contract, were obligated to pay the tax without resort to funds which under the contract belonged to Italo. The finding that plaintiff expended money for the use of defendants is supported by the fact that defendants diverted funds belonging to Italo to the payment of their tax. The judgment against defendant-appellants should be affirmed.

We now take up the question of the separate appeal brought by the Berylwood company "from so much of the said amended judgment as orders, adjudges and decrees that plaintiff take nothing from defendant Los Angeles First National Trust & Savings Bank". Defendant bank, as successor of Pacific Southwest Trust and Savings Bank, held stock in the Graham-Loftus Oil Company as trustee of the estate of David T. Perkins; it participated in the agreement above referred to between Italo and the stockholders of the Graham-Loftus company, and its position until the modification of the judgment was identical with that of the other defendants. It states its position as follows: "We have studied the opening brief filed upon behalf of the appellants Harland B. Graham, etc., et al., in their said separate appeal from the judgment. We find such brief to express our views of the law exactly. Rather than to repeat the arguments therein set forth in this brief as constituting reasons why the judgment in favor of this respondent should be affirmed, we hereby adopt the arguments of said opening brief of appellants, Harland B. Graham, etc., et al., in toto, and request their consideration by the court upon our behalf."

Several points raised by respondent bank should be disposed of prior to consideration of its main point on appeal. It contends that this appeal by the Berylwood company is ineffective, in that the elements necessary to the right of contribution do not exist because the right, if any, is based on a claimed right of equitable contribution; that the situation of respondent differs sharply from that of its original codefendants; that the Berylwood company does not stand in "equali juri" to enforce contribution against this respondent; that, whatever may have been the rights of Italo to a reversal of the judgment in favor of respondent, the substituted plaintiff Berylwood company, a former defendant, is without the right of appeal.

[13-15] The judgment in favor of Italo is referred to as joint and several. The Berylwood company as a defendant was liable, subject to affirmance or reversal on appeal, for the full amount thereof, as were all other defendants in the action. By paying the judgment Berylwood substituted for an uncertain total liability, a limited loss. Under such circumstances in making payment and taking an assignment of the judgment it was not a volunteer. In Tucker v. Nicholson, 12 Cal.2d 427, 84 P.2d 1045, an action brought by a coobligor, who had satisfied a judgment and taken an assignment thereof, to compel the other judgment debtors to pay their proportionate shares, it was held that the judgment was kept alive in equity to be used by the paying debtor to recover from his co-obligors their proportions thereof, which, in an action against them for contribution, may not be held to be more than their respective proportions of the debt in the absence of a showing of insolvency of one or more of the co-obligors. The court said (12 Cal.2d at page 433, 84 P.2d at page 1049): "A creditor by suing less than all of those jointly liable to him cannot deprive a debtor paying him of the right to hold each of his co-obligors for their proportion of the debt." In the present case by modification the judgment eliminates the respondent as an obligor. It is respondent bank's theory that by reason of such elimination its codefendant, as assignee of Italo, may not maintain this appeal. This is not an appeal from a judgment assessing proportionate liability, but from the order eliminating respondent from all liability. If a creditor may not deprive a paying debtor of the right to hold co-obligors who were not named as defendants in an original proceeding, then there is no hesitancy in holding the right of appeal to a co-obligor, paying in full or compromising the obligation, to determine the legal correctness of a modified judgment eliminating from liability one of the original alleged obligors. 13 Am.Jur. pp. 57, 58, § 63.

[16, 17] It is a general rule that parties to a judgment are not bound by it as between themselves unless they were adversary parties in the original or prior proceeding. Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797. During the trial of the action brought by Italo, the interests of the Berylwood company and respondent were not adverse. Upon modification of the judgment, the interests of all defendants, including the Berylwood company, became adverse to that of the exonerated bank. Upon substitution and assignment of the judgment to the Berylwood company, its interest became adverse to all other defendants held liable for the indebtedness, their interests being to establish nonliability. It is to the advantage of the Berylwood company under the assignment of the judgment, or under its original position as a codefendant, that the maximum number of parties be held liable, since in a proceeding for contribution the loss is divided among the solvent obligors. Upon exoneration by the amended judgment, respondent bank had no material interest in the appeal by the other obligors except in the event its elimination should be held erroneous. However, respondent, realizing this contingency, has adopted the position of the other defendant obligors and requested consideration on its behalf of the contentions urged by them on their appeal. To that extent what has been said on the appeal

first considered herein is applicable to respondent.

The elimination of respondent from the judgment created an adverse situation between it and the Berylwood company and placed the latter in the position of an aggrieved party and therefore entitled to appeal. Code Civ.Proc., sec. 938; Luckenbach v. Laer, 190 Cal. 395, 212 P. 918, 920, cited by respondent, is not in point. In that case "appellants were not parties to the proceedings resulting in the original orders".

The appeals herein, when finally determined, will be conclusive as between the substituted plaintiff and the defendant obligors on the question of the existence of a liability, which must be shown to exist before there can be a right of contribution. Questions of whether a debtor's situation is such that he should not be called upon to contribute, depending upon such factors as the propriety of the sum paid to the creditor in discharge of the debt, whether a particular obligor has been legally discharged of the indebtedness other than upon points raised on this appeal, and the solvency of the several debtors, are not involved on this appeal. Such questions may or may not be pertinent in a subsequent proceeding for contribution upon joint liability. Civ.Code, sec. 1432.

The main question presented on the present appeal may be stated as follows: Was the participation of respondent, a national bank, in the contract of August 13, 1928, ultra vires? Respondent seeks to demonstrate that the bank had no power to make a contract such as the agreement herein to pay certain debts, although it is not contended that the bank as trustee was without power to sell the stock. The bank signed the agreement "Los Angeles-First National Trust & Savings Bank, by C. J. Hall, Vice-President". Appellant Berylwood company contends that the bank was acting as trustee for the David T. Perkins estate, and respondent bank admits that this "statement is correct". The bank filed its brief as trustee and accordingly we assume that its position is such.

[18] National banks, in the sphere of ordinary banking business, have such powers as they are given by statutes enacted by Congress. Their powers can be no greater than those which the statute expressly confers, and "all such incidental powers as shall be necessary to carry on the business of banking; * * * *Provided*, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation * * *" R.S. sec. 5136, July 1, 1922, chap. 257, sec. 1, 42 Stat. 767, Feb. 25, 1927, chap. 191, sec. 2, 44 Stat. 1226, 12 U.S.C.A. § 24.

[19] Respondent contends that under the terms of the agreement the sale of stock was not "without recourse". Conceding that the contract would be ultra vires in toto if executed by a national bank in its general banking capacity, upon the general theory of protection to depositors, stockholders and the public from hazards of contingent liability, and that it was not within the scope of the powers of the bank to perform it under any circumstances (Awotin v. Atlas Exchange Nat. Bank, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am.Dec. 300; National Bank & Loan Co. v. Petrie, 189 U.S. 423, 23 S.Ct. 512, 47 L.Ed. 879; McCormick v. Market Nat. Bank, 165 U.S. 538, 17 S.Ct. 433, 41 L.Ed. 817; California Nat. Bank v. Kennedy, 167 U.S. 362, 17 S.Ct. 831, 42 L.Ed. 198; Standard Livestock Co. v. Bank of California, 67 Cal.App. 381, 227 P. 962; Colley v. Chowchilla Nat. Bank, 200 Cal. 760, 769, 255 P. 188, 52 A.L.R. 569), still if the contract was entered into by the bank in its representative capacity as trustee, with the consent of the interested parties, such as the beneficiaries of the trust, it may or may not be ultra vires depending upon the circumstances of the case. Colley v. Chowchilla Nat. Bank, supra.

[20-22] Prior to 1913, by statute and judicial construction thereof, a stringent rule in reference to the capacity of national banks to enter into contracts was in effect. In that year under the Federal Reserve Act, 38 Stat. 251, chap. 6, permission and power were granted national banks to operate through trust departments, and this enlargement of activity was held to be constitutional. First National Bank v. Fellows ex rel. Union Trust Co., 244 U.S. 416, 37 S.Ct. 734, 61 L.Ed. 1233, L.R.A. 1918C, 283, Ann.Cas.1918D, 1169. In 1918 the activity of national banks as fiduciaries was expanded by the grant of power to act in "any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted

to act under the laws of the State in which the national bank is located". Federal Reserve Act 1918, sec. 11(k), 40 Stat. 968, chap. 177, sec. 2, 12 U.S.C.A. § 248(k). In a word, that national banks should be allowed to compete with state banks but in so doing there should be a substantial compliance with state requirements. In re Estate of Wellings, 192 Cal. 506, 221 P. 628; State of Missouri v. Duncan, 265 U.S. 17, 44 S.Ct. 427, 68 L.Ed. 881; First National Bank v. Fellows ex rel. Union Trust Co., supra. The enabling act of 1918 directed that trust funds should be segregated and kept apart from the general funds of the bank. Of course, any effort on the part of the state to curtail national banks' powers is unconstitutional. However, the national bank is confined in its activities to powers granted state banks within the same jurisdiction. Fidelity & Deposit Co. v. Deposit Guaranty B. & T. Co., 164 Miss. 286, 144 So. 700, 85 A.L.R. 860; Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A.L.R. 871; Dunn v. McCoy, 3 Cir., 113 F.2d 587. Generally the rule in relation to national banks is that failure to expressly grant power negatives its existence, but different regulations in various states forced the federal government, in its purpose to permit national banks acting in a trust capacity to compete with state banks, to place them on a parity; that is, give the former privileges and powers of the state bank, which, however, presupposes their assumption of like obligations. Otherwise successful competition would be difficult of realization. If members of the public doing business with a national bank in trust matters are denied rights and the benefit of obligations enjoyed by them in respect to state trust companies, there would in all probability be a gradual cessation of business with national trust concerns.

It is true that the national trust company did not receive the proceeds of the sale of the stock for itself, but it was paid in the ordinary course of business to manage the trust. An individual trustee would have been liable on the contract. In California the officer qualifying on behalf of a trust corporation "shall be liable for the failure of such trust company to perform any of the duties required by law to be performed by an individual acting in the capacity and subject to like penalties". Stats.1923, chap. 93, sec. 90 p. 173. Since an individual acting as trustee would have capacity to enter into such an assumption of debt liability as that herein under consideration, it follows that a trust company may be liable depending "upon the circumstances of the case". Colley v. Chowchilla Nat. Bank, supra [200 Cal. 760, 255 P. 191, 52 A.L.R. 569].

[23] It is not to be understood that the effect of the analysis herein is to free national banks from all restrictions when acting in a trust capacity. It may be possible that as regards the hazard of loss there would be no difference in so far as the interests of depositors are concerned whether the bank engaged in an activity in its trust or its regular banking capacity. If general assets of a national bank are available to satisfy its obligations arising from trust activities, then there may be, depending upon the facts of a case, some good reason to relieve the bank, upon the theory that the depositors and stockholders are entitled to primary consideration, and so we return to a consideration of the rule set forth in the Chowchilla case, namely, liability depending upon the facts of the case.

What, in fact, occurred in the present case? Respondent, with co-obligors, agreed to assume individual full liability for all bills incurred for labor or material, all money borrowed and moneys due on account of any matters or things whatsoever relating to certain property prior to a certain date. Respondent's position seems to be that the contract is only ultra vires when interpreted as applying to the tax liability. If the arguments in that respect are sound, they would apply equally to bills for labor and material and responsibility for borrowed money. The liability for the tax would not seem to be more speculative than amounts for other indebtedness. The difficulty in ascertaining the amount of the income tax was more fancied than real as demonstrated by the filing of the income tax return covering the period in dispute. It appears to have been an easy matter to compute the tax on the first six months' income. The contingency was not as to the amount of the tax, but as to the amount each stockholder would finally pay through adjustment of contribution.

[24, 25] Guarantee, or, as in this case, a direct primary obligation (First National Bank of Chattanooga v. Bell, 6 Cir., 97 F.2d 683) on the part of a national bank to pay speculative amounts is ultra vires when depositors or stockholders of the bank will be held liable. Eliminating subsequent

events, which will be referred to hereafter, at the time of the execution of the agreement, the bank, as a trust corporation, did not impose any liability upon the depositors or stockholders of the national bank. The trust corporation as trustee appeared as an agent for the beneficiaries of the trust fund. Whatever gain or loss occurred was to be credited or debited to the particular testamentary trust. All operations of the Perkins trust while under the management of the bank were approved by the son of the trustor, who was also a stockholder and director of the old Graham-Loftus company. The amounts guaranteed were not speculative but ascertainable. Viewing the contract, and the surrounding circumstances, the bank, the bank as trustee, the trust itself, could not in the ordinary course of business lose money on this transaction so far as the trust was concerned, assuming that the trust funds were kept intact. The contract was within the scope of the bank to perform under the circumstances and facts in this case and therefore not ultra vires.

Up to this point the contract and the surrounding circumstances have been viewed as they appear in the record, including the rendition of the original judgment, wherein this respondent was held liable to Italo. The assignment of the judgment by Italo to the Berylwood company in fact has benefited respondent's position by decreasing the amount of liability.

Appellant Berylwood contends that a vendor to a contract of sale who has received and retained the benefits of full execution by the vendee cannot repudiate obligations while retaining the benefits; that want of capacity to enter into the contract sued upon is waived by failure to plead it and that the doctrine of estoppel is available to it. In view of the conclusion reached on the questions already discussed, it is not necessary to consider these points.

[26] Respondent states, though the record is silent thereon, that the trust has been closed and the assets distributed to the beneficiaries; that if contribution is proper it should be by contribution from the trust beneficiaries. We are not permitted to consider the suggestion on this appeal. The contract was not ultra vires respondent. Possible future litigation is of no concern on this appeal.

The portion of the judgment in favor of the respondent bank is reversed; the balance of the judgment is affirmed. The trial court is directed to take such action as may be necessary to conform to the views herein expressed.

We concur: PETERS, P. J.; KNIGHT, J.

GROLEMUND v. CAFFERATA et al.

S. F. 15958.

Supreme Court of California.
March 28, 1941.
Rehearing Denied April 25, 1941.

1. Husband and wife ⇨268(1)

Prior to enactment in 1927 of statute defining interests of spouses in community property, community property was liable for husband's debts. Civ.Code, § 161a.

2. Husband and wife ⇨249

Under presumption in favor of community property, the blending of separate and community property so that each is indistinguishable from the other renders the mass "community property". Civ.Code, § 164.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

3. Husband and wife ⇨247

The respective rights of husband and wife in community realty were governed by the law in force at time of acquisition thereof.

4. Husband and wife ⇨268(2)

The statutes giving to husband the management and control of community personalty and realty subject the community personalty, with the exception of wife's earnings, and the community realty, to all contracts of husband as well as to judgments arising out of his torts. Civ.Code, §§ 168, 172, 172a.

5. Husband and wife ⇨265

The 1927 statute defining interests of spouses in community property did not change existing rule vesting in husband the entire management and control of community property, in view of express recognition in 1927 statute of existing statutory provisions giving management and control to husband. Civ.Code, §§ 161a, 172, 172a.

6. Husband and wife ⇨265

The failure of statutes exempting wife's earnings and separate property from liability for husband's debts to make any provision in regard to liability of husband's separate property, husband's earnings, or balance of community property, aside from wife's earnings, for obligation created by husband's tort, indicated legislative intent that husband should retain power to divest parties of their community property, so long as he made no gift of community property without consideration. Civ.Code, §§ 168, 171.

7. Bankruptcy ⇨151

A trustee in bankruptcy not only has the right of the bankrupt, but also the rights of the judgment and other creditors. Bankr. Act § 47, sub. a(2), 11 U.S.C.A. § 75, sub. a(2).

8. Husband and wife ⇨265

The provision of Probate Code, that community property passing from husband's control by reason of death or testamentary disposition by wife is subject to his debts and to administration, indicated that Legislature did not intend by enactment of statute defining interests of spouses in community property to alter existing rule that husband has right of full management and control of community property. Probate Code, § 202; Civ.Code, § 161a.

9. Husband and wife ⇨268(1)

The term "debts of the husband" within statutory provision that earnings of wife should not be liable for debts of the husband includes, unless otherwise qualified, debts incurred by husband for benefit of community as well as his own separate debts. Civ.Code, § 168.

See Words and Phrases, Permanent Edition, for all other definitions of "Debts of the Husband".

10. Husband and wife ⇨268(2)

Community property consisting of leasehold interest and furniture of rooming house purchased in 1926 with funds consisting of earnings of husband commingled with separate funds of wife, of furniture purchased after year 1927 with money received from operation of rooming house, and of realty purchased with commingled funds in 1930, was properly subjected to judgment against husband for his tort. Civ.Code, §§ 161a, 172, 172a.

Department 2.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Lena Grolemund and another against Emilio Cafferata and others, to restrain the defendants from proceeding with execution sales of property. Judgment for defendants, and the named plaintiff appeals.

Judgment affirmed.

Rehearing denied; EDMONDS and CARTER, JJ., voted for a hearing in bank.

Thos. D. Aitken, of San Francisco, for appellant.

Ernest I. Spiegl, of San Francisco, for respondents.

CURTIS, Justice.

Lena Grolemund and Caesaer Grolemund, her husband, instituted this action against Emilio Cafferata and the respective sheriffs of the city and county of San Francisco and the county of San Mateo, for the purpose of procuring a permanent injunction restraining defendants from proceeding with the sale of certain personal property in San Francisco and certain real property in San Mateo county pursuant to executions issued on a judgment in favor of defendant Emilio Cafferata and others, as plaintiffs, and against plaintiff Caesaer Grolemund, as defendant. From a final judgment in favor of defendants, plaintiff Lena Grolemund appeals.

The parties are in substantial agreement as to the facts forming the basis of this action and the significance of their chronological order, which we shall here detail: In 1926 plaintiffs acquired the leasehold interest and furniture of a 38-room rooming-house in San Francisco. Payment was made from funds which they had jointly accumulated, earnings of the husband commingled with separate funds of the wife. As various pieces of furniture therein became outworn and useless over the years, they were replaced with new furniture bought sometime after the year 1927 with money received from operation of the rooming-house. In 1930 plaintiffs bought with commingled funds certain real property in the county of San Mateo.

On April 17, 1935, Emilio Cafferata and others recovered a judgment in an action prosecuted in the superior court of San Francisco against Caesaer Grolemund because of damages sustained on August 6, 1933, in an automobile collision, wherein the defendant was adjudged negligent in the operation of his car. In accordance with executions issued by the trial court on April 18, 1935, for the satisfaction of this judgment, levies were made by the respective sheriffs of the city and county of San Francisco and of San Mateo county on the above-mentioned property of plaintiffs in these counties. On May 31, 1935, third party claims as to each of these properties were filed with the respective sheriffs, Lena Grolemund asserting ownership of the San Francisco personal property and one Herman Weibel asserting ownership of the realty in San Mateo county by virtue of a deed executed in his favor by plaintiffs, who received no consideration therefor. After hearing on a petition to determine title on June 13, 1935, the trial court in the above-mentioned tort action made its order declaring this real and personal property to be community property of Caesaer Grolemund, the judgment debtor, and Lena Grolemund, his wife.

On July 2, 1935, plaintiffs filed in the present proceeding their first amended complaint, wherein, as basis for issuance of the desired injunction, appeared the following allegations: that this real and personal property was acquired by them subsequent to the year 1927 and their community ownership of it was declared by the court order of June 13, 1935; that the tort judgment was entered against Caesaer Grolemund alone; and that sheriff sales of these properties, held under executions to satisfy this judgment, were impending. Thereupon, all proceedings in connection with the execution levies were stayed until sixty days after final disposition of the instant action. By their answer the defendants put in issue the character of the properties and the date of their acquisition. This action, being equitable in its nature, was tried by the court sitting without a jury, and resulted in a judgment in favor of defendants. From the findings of fact the court concluded that all of the plaintiffs' property involved herein was their community property, of which the personal property in San Francisco was acquired by the parties prior to 1927 and the real property in San Mateo county, having been purchased in 1930, had all the characteristics of community property acquired subsequent to 1927. Thereupon the court ordered the preliminary injunction dissolved and adjudged Emilio Cafferata entitled to levy execution upon the real and personal property described in plaintiffs' amended complaint and to continue with the sale of those properties, the proceeds to be applied upon the judgment against plaintiff Caesaer Grolemund.

[1] The principal question to be decided on this appeal is whether community property may be subjected to the satisfaction of a judgment against the husband for his tort. Fundamental to our determination of this basic issue is consideration of the change wrought in our community system by enactment in 1927 of section 161a of the Civil Code. The general rule that community property in California acquired prior to 1927 has always been held liable for the

husband's debts (Cal.Jur.Supp., vol. 3, p. 663, sec. 146) was given unqualified recognition by this court in the celebrated case of Spreckels v. Spreckels, 116 Cal. 339, 343, 48 P. 228, 36 L.R.A. 497, 58 Am.St.Rep. 170, wherein it is stated that the creditor of the husband could, at his option, sell under execution either the husband's separate property or the community property. The rule announced in that case has never been departed from by any decision of this court to which our attention has been called. Appellant claims, however, that by virtue of the enactment in 1927 of section 161a of the Civil Code, the wife now has a vested interest in the community property, of which she cannot be deprived because of the debt of the husband alone. Respondents resist this contention as contrary to the statutes and prior decisions of the courts of this state. Because of the emphasis placed by the parties on this enactment as it reflects on the instant issue, we shall consider first its effect upon the property of the Grolemunds acquired subsequent to the enactment of said section 161a.

[2, 3] The evidence amply supports the trial court's conclusion that the real property in San Mateo county was acquired by the Grolemunds from commingled funds, "the source and amount of which cannot be ascertained" and "that said property being purchased in 1930, has all the characteristics of community property acquired subsequent to 1927". As to the blending of separate and community property, the general rule is that the confusion of these, so that each is indistinguishable from the other, renders the mass community property for the reason that the separate owner is not able to establish his separate right to any article of the mass, nor prove his right to a computable share of it (McKay, Community Property, second edition, sec. 308, pp. 215-216.; Cal.Jur.Supp., vol. 3, p. 524, sec. 40), and the presumption in favor of community property applies so that it will all be community property, Civ.Code, sec. 164; Cal.Jur.Supp., vol. 3, p. 553, sec. 61. Since our analysis of the respective rights of the Grolemunds in this community real property must be governed by the law enforced at the time of the acquisition in 1930, we shall refer briefly to relevant statutory provisions enacted prior to 1927, with which section 161a must be correlated.

[4] Section 172 of the Civil Code, while it does not specifically create a liability or an exemption for any particular type of community property, gives to the husband "the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate". It reasonably follows from the express language above quoted that this section in effect subjects the entire community personalty (with the exception of the wife's earnings, Civ.Code, sec. 168) to any and all contracts of the husband, as well as to judgments arising out of his tort. Furthermore, since the only limitation upon the husband is to refrain from making a gift of such property without consideration, he is not limited from paying it out in compromise or satisfaction of a tort claim, for payment of a tort claim is not payment without consideration.

[5] Section 172a of the Civil Code gives the husband "the management and control of the community real property", subject to the proviso that in regard to conveyances the wife must join with him in executing the necessary instruments. Since this restriction concerns only voluntary transfers, it has no application to the instant case involving the satisfaction of a judgment by levy of execution, so that for all practical purposes herein the husband's power of management and control of the community real property involved here is as absolute and complete as it is with respect to community personal property, as outlined in section 172. That the addition in 1927 of section 161a, defining the interests of the spouses in community property, did not change the rule vesting in the husband the entire management and control of the community property is manifest by the express recognition accorded sections 172 and 172a in the later statute. Cal.Jur.Supp., vol. 3, p. 608, sec. 98; Beemer v. Roher, 1934, 137 Cal.App. 293, 30 P.2d 547; Hannah v. Swift, 9 Cir., 1932, 61 F.2d 307, 310.

[6] With reference to California legislation on the question of liability or exemption of property of the spouses for payment of obligations arising out of the husband's tort, the sole enactments are section 168, which exempts the wife's earnings (community property) from liability for debts of the husband, and section 171, which extends the same exemption in respect to the wife's separate property. It is significant to note that nothing is said in regard to the liability of the husband's separate property, the husband's earnings, or the balance of the community property (the

wife's earnings excepted by Civ.Code, sec. 168) in regard to an obligation created by the husband's tort. From this silence of the legislature it logically can be inferred that it was thereby intended that the husband, as agent of the community, should retain the power to divest the parties of their community property by his own act in the same manner that he might divest himself of his separate property, so long as he did not make a gift of the former without consideration. To hold that the husband could not subject the community property to liability for his tort would be to hold that he could not manage and control the same. To illustrate, suppose that the tort action had never been instituted by Emilio Cafferata and his coplaintiffs, but that Caesaer Grolemund, after injuring these parties, had made a voluntary settlement of his liability. It cannot be said that the husband would be without power to use common funds to pay for the damages sustained by the injured persons because of his negligent act. Or let us suppose that the damage suit was brought and judgment had gone against Caesaer Grolemund, as here, but that no execution had been levied, it is obvious that the husband could satisfy such judgment voluntarily from a bank account under his control but which consisted of community funds. The foregoing analysis compels us to conclude that there is no logical distinction to be drawn between satisfaction of a judgment against the husband by levy of execution against the community property and satisfaction of a like judgment by the husband's voluntary payment from community funds. To hold otherwise would be to deny in toto the operation of sections 172 and 172a of the Civil Code, which would be contrary to the express terms of section 161a.

In this connection it should be noted that the legislature by section 167 of the Civil Code specifically exempted the community property from liability for the contracts of the wife made after marriage. This section does not settle the question of liability of the community property for the torts of the wife. However, by enactment in 1913 of section 171a of the Civil Code it was provided: "For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist." This section was considered in Smedberg v. Bevilockway, 1935, 7 Cal.App.2d 578, 46 P.2d 820, which appellant cites in support of her contention that the community property is exempt from liability for torts of either spouse, because by virtue of section 161a the husband and wife hold the title as an entirety.

[7] In the Smedberg case a judgment for damages had been recovered against the wife for personal injuries sustained through her negligence and upon her subsequent voluntary bankruptcy, the trustee sued the husband to establish a lien upon her one-half interest in the community property. The District Court of Appeal held that such a lien could not be so impressed, reasoning that no authority therefor could be found in the absence of a showing that she had a right to a present, separate and divisible interest in such property as the result (1) of a voluntary agreement executed between the spouses, or (2) of divorce proceedings in which a division of community property was sought and obtained by the wife. Careful examination of the opinion in that case reveals that the court did not decide the precise question of whether the community property was liable for the wife's torts, since the plaintiff there, trustee in bankruptcy, did not seek to impress a lien upon all the community property but only the wife's interest therein. Though the court in the Smedberg case did not discuss the effect of section 161a, it reasonably can be inferred from that decision that the District Court of Appeal was of the opinion that section 161a of the Civil Code does not change the nature of the wife's interest to a vested one so as to give her creditors the right of sequestration by attachment, execution or any other legal proceeding. Otherwise, her half of the community property would have been subjected to a lien by the trustee in bankruptcy, for not only has he under the Bankruptcy Act the right of the bankrupt, but also the rights of the judgment and other creditors. Bankruptcy Act, § 47, sub. a (2), 36 Stat. [1910] 838, 840, 11 U.S.C.A. § 75, sub. a (2); Remington, Bankruptcy, [1923] sec. 1552; Noyes v. Bank of Italy, 1929, 206 Cal. 266, 274 P. 68. Furthermore, by this decision the husband's power and right of management and control are preserved, for the opinion points out that since neither the husband nor the wife had taken steps toward a partition of the community property, so as to free the wife's interest from the management and control of the husband, she had no power to deal with her interest in any way, hence no power to that end was available to the trustee in bankruptcy.

For the foregoing reasons, it is manifest that there is nothing in the Smedberg case inconsistent with respondents' contention that the community property is responsible in its entirety for the separate debts of the husband, whose right to control and manage such property as provided in sections 172 and 172a of the Civil Code stands unimpaired by section 161a.

[8] As lending additional support to their argument, respondents call attention to the enactment in 1931 of section 202 of the Probate Code, which provides, in part, that "community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration * * *". This section is antagonistic to the construction appellant places on section 161a of the Civil Code, whereby she urges that the wife in 1927 was given a vested right in and to the community property, which no act of the husband could affect. Yet by section 202 of the Probate Code the legislature has made the entire community property subject to administration for the husband's debts, and from this premise respondents reason that if during life the husband may create an obligation which may be satisfied out of community funds after his death, it consistently should be said that that same obligation may be satisfied out of community funds during his life. The logic of this argument finds considerable support in a recent decision cited by respondents, Sampson v. Welch, 1938, 23 F.Supp. 271, an action arising in the Federal Court for the Southern District of California on a matter of taxation, the question being whether certain portions of the community property belonged to the husband's estate or not. In its opinion, wherein it is clear from the lengthy discussion of the nature of the change which the adoption of section 161a affected in the wife's interest in community property in California, indicating that the court had this 1927 enactment emphatically brought before it, the following cogent language relative to the liability of the community property on administration of the husband's estate appears in 23 F.Supp. at page 281 of the opinion: "Section 202 subjects all community property passing from the control of the husband, by his death or otherwise, to administration, to *his* debts, and to certain other charges. This is a provision more or less typical of the law in all community property states and *should be construed as correlative to the principle that during the husband's life the community property is subject to his debts.* Both are apparently corollaries to his right of management and control." (Italics ours.) To like effect, see In re Estate of Haselbud, 26 Cal.App.2d 375, 383, 79 P.2d 443; Cal.Jur.Supp., volume 3, pages 688–689, section 162. Thus, we have another illustration that the legislature did not intend by enactment of section 161a to alter the situation in regard to the husband's right of full management and control of the community property.

[9] Appellant advances the argument that the statutes of Washington and the statutes of California regarding community property are the same, and, therefore, the rules announced in decisions of the Washington courts interpreting their code sections should be followed here. This contention is singularly devoid of merit in view of the fact that the underlying theories of the community system in the two states are entirely distinct. The Washington statutes are based on the theory of tenancy by entireties, with its fundamental concept of "community debts", and in that state the community property is not liable for the separate debts of the husband, much less of the wife, but is liable only for so-called "community debts". Cal.Jur.Supp., vol. 3, p. 665, sec. 147, and cases there cited. For example, in Sun Life Assur. Co. v. Outler, 172 Wash. 540, at page 544, 20 P.2d 1110, at page 1112, the Washington court said: "The test of a community obligation is: 'Was the transaction carried on for the benefit of the community?'" Thus, in Washington where the system makes the community property responsible only for "community debts" or "community liabilities", the community property cannot be reached for the individual tort of either the husband or wife. But in California there is no like concept of "community debts", though occasionally the courts in this state refer to such, overlooking the fact that the phrase is not appropriate to the California system. Cal.Jur.Supp., vol. 3, p. 666, sec. 147. A complete reading of all our code sections on community property clearly demonstrates that our community system is based upon the principle that all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property (with the single exception of the wife's earnings, which are exempted from certain types of debt, Civ.Code, sec. 168).

This proposition was confirmed in Street v. Bertolone, 193 Cal. 751, 753, 226 P. 913: "The term 'the debts of the husband,' unless otherwise qualified, includes debts incurred by the husband for the benefit of the community as well as his own separate debts." Since in this state there is strictly no such thing as "community debts" in the sense in which they exist in Washington, the decisions of the latter state lose force as a precedent here.

It would serve no useful purpose to extend this opinion with prolonged discussion of the many income tax and inheritance tax authorities cited by appellant to uphold her theory. As example of these, we take occasion to make brief comment on the leading case of United States v. Malcolm, 282 U.S. 792, 51 S.Ct. 184, 75 L.Ed. 714, which expresses the prevailing view of the federal courts in its holding that the wife in California has such a present and vested interest in the community property that she may file a separate income tax return. We do not dispute the controlling effect of the rule announced in that decision on taxation questions involving like legal principles, but it has no bearing on the totally different situation presented here requiring determination of whether the wife's interest is such as will exclude the theory that the husband may manage and control, as well as create a liability against community property. Sampson v. Welch, supra; Hirsch v. United States, 9 Cir., 62 F.2d 128.

Likewise, there is no merit in appellant's emphasis on the comparable operation of the homestead and community property laws. True, by the express language of our code, the most important exemption from execution is that of the homestead, Civ. Code, §§ 1240, 1241, but in the absence of such a specific limitation in the community property statutes, we fail to see the analogy advanced by appellant. The point is too clear for extended discussion.

[10] Since it is our opinion that the enactment of section 161a of the Civil Code, defining the interests of the spouses in community property, has not altered the situation with respect to the wife's interest remaining subject to the husband's power of management and control, all community property, whether acquired prior to or subsequent to July 29, 1927 (the effective date of this statute), is liable for satisfaction of the husband's debts. As the date of acquisition is immaterial here, the preceding discussion applies with equal force to the personal property in San Francisco purchased by the Grolemunds in 1926 and eliminates any necessity for separate treatment of that phase of this proceeding.

Our conclusion in the instant case is not only in conformity with legal principles, but is consonant with practical considerations and public policy as well, for otherwise a person injured by the separate act of the husband would fail to gain redress for his damage in such case where the only property of the spouses is community. This obviously unfair and unjust result would have a disastrous effect on the very foundation of our community system and would be entirely out of harmony with the general rule that the community property is liable for the husband's debts. The trial court properly held that respondents may proceed to levy execution upon both the community real and personal property of the Grolemunds, and sell the same in satisfaction of the tort judgment obtained against the husband alone.

The judgment appealed from is accordingly affirmed.

We concur: TRAYNOR, J.; SHENK, J.

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17 Cal.2d 690

WISEMAN et al. v. SIERRA HIGHLAND MINING CO. et al. (THORNE et al., Interveners).

S. F. 15971.

Supreme Court of California.

March 31, 1941.

1. Corporations ⇨614(5)

In suit for appointment of receiver to sell corporate property and wind up corporate affairs, evidence sustained finding that managing officers honestly conducted affairs of company and fully and fairly accounted for all moneys received and disbursed, and justified judgment denying relief to minority stockholders.

2. Corporations ⇨619

After the suspension of franchise of California corporation, its directors become "trustees" to wind up its business.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustees".

3. Corporations 🔑612

Generally, courts have no jurisdiction to restrain the operations of corporations or to wind up their affairs, or to appoint receiver for that purpose in a suit by a private person.

4. Corporations 🔑619

The power of directors as trustees of assets of a California corporation, franchise of which had been suspended, includes the power to sell corporate property whenever in their judgment it becomes necessary for the settlement of the corporate affairs.

5. Corporations 🔑1

Evidence was insufficient to establish liability on part of dominant stockholder to minority stockholders on theory that dominant stockholder was alter ego of corporation and that he used corporate entity for his own enrichment to detriment of other stockholders.

6. Corporations 🔑1

The mere fact that investment company owned 75 per cent. of outstanding stock and rights in mining company and that an individual owned a large majority of outstanding stock of the investment company did not place stamp of fraud on activities which were not consummated for a dishonest or fraudulent purpose.

7. Corporations 🔑1

The mere fact that a corporation is the alter ego of an individual is not sufficient to entitle minority stockholders to relief under the "alter ego doctrine", but fraud must be proved before relief may be accorded.

See Words and Phrases, Permanent Edition, for all other definitions of "Alter Ego Doctrine".

8. Corporations 🔑1

Where it is shown that separate entity of corporation was fabricated and assumed for purpose of perpetrating a fraud, a court of equity is justified in disregarding the corporate fiction in order to reach individual and fasten upon him liability for his fraudulent action.

9. Corporations 🔑1

Corporations cannot be used as cover for fraud and courts will look through the form of the corporate entity to ascertain its actual purpose and intent.

10. Corporations 🔑1

Before the acts and obligations of a corporation may be recognized as those of a particular person under the "alter ego doctrine", it must be shown that an adherence to the corporate entity under the particular circumstances would sanction a fraud or promote injustice.

11. Corporations 🔑614(5)

In minority stockholders' suit for appointment of a receiver to sell corporate property and wind up corporate affairs, to declare a trust, and to obtain an accounting, evidence justified conclusion that delay in sale of properties of corporation, franchise of which had been suspended, was due to depressed state of market, and to circumstances beyond control of directors, and that directors were not guilty of any breach or dereliction of duty or fraud, so as to entitle minority stockholders to relief.

Department 1.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Quiet title action by A. L. Wiseman and others against the Sierra Highland Mining Company and others, wherein Julia M. Thorne and others intervened. From a judgment for defendants, plaintiffs and interveners appeal.

Plaintiffs' appeal dismissed, and judgment against interveners affirmed.

Wm. F. Rose, of San Francisco, and Paul C. Thorne, of Mill Valley, for appellants.

J. B. Zimdars, of San Francisco, for respondents.

SHENK, Justice.

This action was brought by the plaintiffs, claiming to be minority stockholders in the defendant corporations, to quiet title to gold mining claims in Sierra county, to declare a trust, to obtain an accounting, for injunctive relief, and for the appointment of a receiver to sell the corporate property and wind up the corporate affairs. Other alleged minority stockholders intervened in the action, seeking the same relief and, in addition, a judgment against defendant E. Morris Vail, alleged to be the alter ego of the corporate defendants. A change of venue was ordered to the superior court in and for the city and county of San Francisco. Judgment was entered in favor of the defendants, against the plaintiffs and the interveners. The plaintiffs and the interveners appealed. The plaintiffs have requested that their appeal be dismissed, and the only question presented is whether the court correctly concluded that the interveners were not entitled to relief. The facts found by the trial court are without substantial dispute.

In 1920, Sierra Poorman Mining Company owned 14 mining claims in Sierra county. In that year intervener Paul C. Thorne obtained an option to purchase those claims for $25,000. He procured $5,000 from the plaintiff Wiseman for a promise to issue to him 50,000 shares of promotion stock in a corporation to be organized under the name of Sierra Highland Mining Co. He was also paid $4,000 by intervener Mary L. Roberts for promotion stock, and certain sums from other persons on similar promises. On December 1, 1921, Mr. Thorne organized the Sierra Highland Mining Co., a domestic corporation, with $1,500,000 capital, divided into 1,500,000 shares at $1 each. To this corporation Mr. Thorne transferred the option to purchase the 14 claims from the Sierra Poorman Mining Co. For the transfer of the option he took 50,000 shares of promotion stock. During this period Mr. Thorne, with the assistance of engineers, located and filed claims to 20 additional mining properties in the vicinity of the Sierra Poorman claims. He transferred these additional claims to the Sierra Highland Mining Company for 600,000 shares of promotion stock. The original permit issued by the corporation commissioner authorized 100,500 shares to be sold at $1 per share, which by amended permits was reduced to 100,000 shares at 50 cents per share. Other provisions related to the issuance of a proportion of the promotion stock to Paul C. Thorne, the balance to be held subject to the commission's order. The effectiveness of the permit was made dependent upon the corporation's ownership of the mining properties fully paid for and unencumbered.

A final payment of $20,750 on the purchase price of the Poorman claims was to become due on August 1, 1923. Some time prior to that date Mr. Thorne importuned the defendant E. Morris Vail to come into the company. Mr. Vail refused until a new agreement should be obtained providing for monthly payments on the balance due to the Poorman Company. With two others he advanced two monthly payments and joined Thorne in the effort to sell stock. Mr. Vail then discovered the limitation in the amended permit and ceased stock selling operations until payment of the option purchase price was completed. He became a member of the board of directors and, with Mr. Seyms as secretary undertook the management of the company. He personally financed its operations, advanced moneys to pay for the properties, satisfied judgments, tax claims and other obligations. On February 28, 1928, the permit to issue or sell stock was withdrawn.

In 1929, Mr. Vail and Mr. Thorne discussed a plan to lease the property and form a new corporation to take over the lease. They agreed to present that plan to the board of directors for consideration. At the subsequent meeting of the board, Mr. Thorne had ready for presentation to the directors a lease running to his nominee, Mr. Goard. Through a committee the board investigated and rejected the lease. Mr. Vail thereupon submitted a 15-year lease running to himself as lessee, with an additional feature calling for an option to purchase at a price of $200,000. After consideration the directors accepted this lease. A company called Western Investment Development Company was organized in Nevada, capitalized at $50,000, divided into 5,000,000 shares at 1 cent each, 3,500,000 of which were designated as Class A, and 1,500,000 as Class B, the latter having exclusive voting power, but both classes participating in distribution of profits. Mr. Vail's lease with the Sierra Highland Mining Company was assigned to that company. In return therefor Mr. Vail received 700,000 shares Class A stock at 10 cents, with 15 cents additional subject to call, and 850,000 shares of Class B stock, together with an option for 100,000 shares of Class A for cash at 25 cents or to exchange for 50,000 shares of issued Sierra Highland Mining Company treasury stock at 50 cents. Seventy-five per cent of the rights to promotion stock of the Sierra Highland Mining Company were acquired by exchange for stock in the Nevada corporation and assigned to the latter corporation. Of the 50,000 shares of issued stock of Sierra Highland Mining Company 37,260 shares were acquired by the Western Investment Development Company in exchange for its fully paid Class A stock. At the time of trial there was outstanding an additional block of 80,000 shares of Class A stock, on which 15 cents per share or $12,000, was callable.

Subleases of the properties were made, including a lease to one Ulin and his associates. Subsequently, and in 1932, the exercise of the corporate rights and privileges of the Sierra Highland Mining Company was suspended for nonpayment of the California Franchise Tax.

Various sublessees, including Ulin, jumped or attempted to jump or relocate the claims. All of the claims were recovered, with the exception of one considered worthless, and were held by Vail in his own name. Title to the claims was cleared, except as against the asserted interests of Ulin and his associates. Vail held title to the recovered claims in trust for the company. Vail also obtained a deed in his own name to certain lands and a natural water basin thereon designated as Lake Hawley, the rights to the waters of which Thorne had formerly attempted to acquire. Vail held the deed to Lake Hawley for the use and account of the company and had applied to the appropriate department for a permit to use the waters in the operation of the mining claims. At the trial it appeared that a sale of the mining claims or the lease, or the financing of the mining operations, could not be consummated until the title was cleared of the claims of others.

Until 1932 Vail drew $75 a month from the company or was given a credit for that amount, for services as manager and for office expenses; and Seyms, as secretary, drew similarly $25 per month. No salary was drawn or charged by either of them subsequent to that year. About the time the present action was commenced in July, 1936, there was due to Vail for advances and salary, less amounts received in stock, the sum of $30,785.08; to Seyms, $4,392.50, and to a Mr. Catto, $1,803.87. After the commencement of the action suit was brought in Catto's name to obtain a judgment on the foregoing obligations, which, however, the parties agreed to have satisfied only out of the first net profits from mining operations or in stock of the company.

In December, 1939, after the filing of the appellants' opening brief, the plaintiffs, as above stated, requested the dismissal of their appeal. The prosecution of the appeal was continued on behalf of the interveners, who will be referred to as the appellants.

The appellants had not exchanged their rights to promotion stock of Sierra Highland Mining Company for stock in the Western Investment Development Company. Julia M. Thorne, the wife of Paul C. Thorne, held so-called rights to 120,000 shares of Sierra Highland Mining Company, assigned to her by her husband. Paul C. Thorne, who was a director of the Sierra Highland Mining Co., retained only 100 qualifying shares. Mary L. Roberts held 300 shares of that company and rights to some 30,000 shares, for which she paid $4,000 to Mr. Thorne. The appellants were not stockholders in the Nevada corporation.

Vail at the time of trial held 4,985 shares of Sierra Highland Mining Company stock, and 648,000 shares of Class A and 349,250 shares of Class B stock of the Nevada corporation, and a claim for $30,785.08 against the company. Defendant Seyms held 225 shares of the Sierra Highland Mining Company stock, 22,500 Class B and 2,300 Class A shares of the Nevada corporation, with a claim against the Sierra Highland Mining Company for $4,392.50. Defendant C. W. Whitney owned 100 shares of Sierra Highland Mining Company stock, and 4,000 shares Class B stock of the Nevada corporation. Defendant H. H. Linney owned 100 shares of Sierra Highland Mining Company stock and 4,000 Class B shares of the Nevada corporation. P. W. King owned 100 shares of the Sierra Highland Mining Company and 16,000 Class B and 3,800 Class A stock of the Nevada corporation. James Catto held a claim for $1,803.87 against the California corporation. There remained in the treasury of the Nevada corporation unissued 2,725,680 shares of Class A and 650,000 shares of Class B stock.

On the charges of domination and fraud on the part of the defendants, and especially the defendant Vail, the court found that the agreement of the claimants Vail, Seyms and Catto to look to payment of their claims from royalties and sales of stock had not been repudiated but was in full force and effect; that the Sierra Highland Mining Company was the owner of the mining properties which were the subject of the lease assigned by Vail to Western Investment Development Company, and that all the necessary assessment work had been done thereon; that since 1932 defendants Vail and Seyms had given their services as manager and secretary to the defendant corporations without charge; that Vail and Seyms, in addition to their claims above mentioned, invested, respectively, $16,910 and $862.50 in stock; that Vail was holding the deed to land and waters of Lake Hawley for the Nevada corporation's account and had made application for the use of the waters on the mining property; that Vail and Seyms and the other directors of the corporations have carried on the business of the corporations as directors and as trustees in a proper and lawful manner and as required by them as directors and trustees; that none of them acted dishonestly or fraudulently in any of the transactions involved nor had any of them manipulated the interests or properties of the corporation for his own benefit or enrichment to the detriment of the corporations or any of the stockholders thereof; that the directors had been free to act independently and were not dominated by Vail; that the lease to Vail assigned to Western Investment Development Company was not a fraud or imposition upon any one and was not made for the purpose of cheating or defrauding anybody and that no one had been cheated or defrauded thereby; that the incorporation of Western Investment Development Company was not for the purpose of defrauding any one, but that its purpose was to facilitate the financing and operation of the properties; that Vail has not exercised any control or domination except such as his official position and his stock interests lawfully entitled him to exercise, and that all of his dealings were entirely for the benefit of the corporations and the enterprise, and that none who exchanged stock or rights in the Sierra Highland Mining Company for stock in the Western Investment Development Company had been defrauded thereby; that defendant Vail made no false or fraudulent representations to anyone in connection with the enterprise or sales or transfers of stock; that Vail and Seyms honestly conducted the affairs of the companies and fully and fairly accounted for all moneys received or disbursed, and for all of their acts in the management of the affairs thereof; that they were fully competent to manage the affairs of the companies; that it was not necessary to restrain or enjoin anyone in the management thereof. The court concluded that plaintiffs and interveners were not entitled to any of the relief sought by them.

[1-4] It is claimed by the appellants that the evidence does not support the findings and that an affirmance of the judgment would have the effect of upholding illegal corporate acts, alleged to be the transaction of business in this state by the Nevada corporation without first obtaining the requisite permit. The evidence shows, however, that the lease to Vail was executed by the Sierra Highland Mining Company before the exercise of its rights and privileges was declared to be suspended pursuant to the statute. There was no showing pertinent to this case that the Nevada corporation was exercising any of its rights or privileges in this state. After the suspension of the franchise of the California corporation, its directors became trustees to wind up its business. Rossi v. Caire, 174 Cal. 74, 161 P. 1161; Turney v. Morrissey, 22 Cal. App. 271, 134 P. 335. It is the general rule, with certain exceptions not applicable here, that the courts have no jurisdiction to restrain the operations of corporations or to wind up their affairs or to appoint a receiver for that purpose in a suit by a private person. Neall v. Hill, 16 Cal. 145, 146, 76 Am.Dec. 508; La Societe Francaise d'Epargnes v. District Court, 53 Cal. 495; Fischer v. Superior Court, 110 Cal. 129, 42 P. 561; Elliott v. Superior Court, 168 Cal. 727, 145 P. 101; Taylor v. Exnicious, 197 Cal. 443, 241 P. 397; Hatfield v. Peoples Water Co., 25 Cal.App. 502, 144 P. 300. The power of the directors as trustees of the assets of the California corporation includes the power to sell the corporate property whenever in their judgment it becomes necessary for the settlement of the corporate affairs. Anthony v. Janssen, 183 Cal. 329, 334, 191 P. 538.

[5, 6] It is not seriously claimed by the appellants that the court had jurisdiction to enjoin any of the acts of the defendants either as directors or trustees of the California corporation, or as directors of the Nevada corporation, regardless of where it transacted its business, in the absence of a showing of fraud on the part of the defendants, and the appellants present no authority that in the absence of fraud the court may act under the circumstances here involved. The appellants attempt to fasten liability upon the defendant Vail by charging that the evidence shows that Vail was the alter ego of the corporations and that he used the corporate entities for his own enrichment to the detriment of the other stockholders. The only pertinent issue which, if proved, would entitle the plaintiffs to the relief sought, is that of fraud on the part of the defendants. The mere fact that the Western Investment Development Company owned 75 per cent of the outstanding stock and rights in the Sierra

Highland Mining Company, and that Vail owned a large majority of the outstanding stock of the former corporation, would not place the stamp of fraud on activities which in fact, as the court found, were not consummated for a dishonest or fraudulent purpose. In their reliance on the alter ego doctrine to support their contentions of fraud, the interveners cite and quote from Clark v. Millsap, 197 Cal. 765, 781, 242 P. 918; Sunset Farms, Inc. v. Superior Court, 9 Cal.App.2d 389, 406, 50 P.2d 106, 114, and other cases.

[7-9] In such cases the courts have recognized that fraud must be proved before relief may be accorded; that the mere fact that a corporation is the alter ego of an individual is not sufficient, but that when it is shown that the separate entity was "fabricated and assumed for the purpose of perpetrating a fraud, a court of equity is justified in disregarding the corporate fiction in order to reach the individual and fasten upon him liability for his fraudulent action". Sunset Farms, Inc. v. Superior Court, supra. Corporations cannot be used as cover for fraud and the court will look through the form of the corporate entity to ascertain its actual purpose and intent. Clark v. Millsap, supra.

[10, 11] The trial court has looked through the form of the corporate entity. It found the intent and purpose of the defendants to be free from the fraud charged by the appellants. Before the acts and obligations of a corporation may be recognized as those of a particular person under the alter ego doctrine, it must be shown that an adherence to the corporate entity under the particular circumstances would sanction a fraud or promote injustice. Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673; Sunset Farms, Inc. v. Superior Court, supra. In this case the court was justified in concluding in effect that the delay in the sale of the corporate properties was due to the depressed state of the market and otherwise to circumstances beyond the control of the defendants; likewise that the directors and trustees were not guilty of any breach or dereliction of duty or any fraud so as to entitle the appellants to relief.

Pursuant to their request, the appeal of the plaintiffs is dismissed. The judgment against the interveners is affirmed.

We concur: CARTER, J.; EDMONDS, J.

STATE v. MARIN MUNICIPAL WATER DIST.

S. F. 16447.

Supreme Court of California.

April 2, 1941.

As Corrected on Denial of Rehearing

May 1, 1941.

1. Waters and water courses 🔑192

In action by state to recover from municipal water district cost of relocation of water main maintained by district under state highway, evidence supported finding that the main in its original location interfered with construction of state highway and that its relocation was necessary to permit improvement of highway and to insure safety of traveling public. Gen.Laws 1937, Act 5243; St.1937, p. 2560, § 680.

2. Waters and water courses 🔑192

Where municipal water district acquired all assets and property of its predecessor in interest but the predecessor in interest possessed no more than a franchise from board of supervisors of county for construction of water main along street, the district acquired no rights greater than a franchise. Gen.Laws 1937, Act 5243; St.1937, p. 2560, § 680.

3. Waters and water courses 🔑192

A municipal water district organized to supply water to a defined area, including both incorporated and unincorporated territory and having power of taxation, was a "municipal corporation" within meaning of statutes conferring right on municipal corporation to construct and operate pipe line along public highways of state. Gen.Laws 1937, Act 5193; Act 5194, § 1; Act 5243, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Corporation".

4. Waters and water courses 🔑192

The right conferred by Legislature on municipal corporations including municipal water district to construct and operate pipe lines along public highway of state constituted a "franchise" within statute authorizing department of public works to require holder of franchise to relocate pipe line. Gen.Laws 1937, Act 5193; Act 5194, § 1; Act 5243, § 19; St.1937, p. 2560, § 680.

See Words and Phrases, Permanent Edition, for all other definitions of "Franchise".

5. Statutes ⚷233

General words in a statute will not be construed to limit the otherwise valid power of the state or its subdivisions unless that result was specifically intended by the legislature.

6. Waters and water courses ⚷192

A municipal water district does not have authority to maintain pipes on highway in a position which does not afford security to life or property. Gen.Laws 1937, Act 5194, § 1, Act 5193, Act 5243, § 19.

7. Waters and water courses ⚷192

Statute authorizing state Department of Public Works to require any "person" who maintains pipe line, etc., in state highway to relocate line at owner's expense, when necessary to insure safety of traveling public, or to permit improvement of highway, is applicable to municipal water district organized under statute conferring on district right to maintain pipe line along highways only in such manner as to afford security for life and property. Gen.Laws 1937, Act 5194, § 1, Act 5193, Act 5243, § 19; St.1937, p. 2560, § 680.

See Words and Phrases, Permanent Edition, for all other definitions of "Person".

8. Waters and water courses ⚷192

Statute authorizing state public works department to require person who had placed pipe line "upon" state highway to relocate line at its own expense applied to water main of municipal water district notwithstanding the main was below the surface, since the word "upon" means not only on top of but also in or into the position of being supported by something. St.1937, p. 2560, § 680.

See Words and Phrases, Permanent Edition, for all other definitions of "Upon".

9. Constitutional law ⚷42

A municipal corporation whether acting in a so-called governmental capacity or proprietary capacity has no standing to invoke the impairment of contract clause or the provisions of Fourteenth Amendment of Federal Constitution in opposition to acts of State Legislature.

10. Constitutional law ⚷117, 278(1)

The determination of whether a statute constitutes a taking of property without "due process of law" or an "impairment of obligation of contract" consists in balancing the burden placed on the individual or corporation on the one hand against the benefits which will accrue to the public as a whole on the other, and, if the benefit to the public outweighs the burden on the individual, the statute is a valid exercise of the police power.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Impairment of Obligation of Contract".

11. Waters and water courses ⚷182

Statute authorizing state department of public works to require person who maintains pipe line, etc., on state highway to relocate such structures at his own expense, when necessary to permit improvement of highway or to insure safety of traveling public, is valid exercise of "police power" as applied to municipal water district required to relocate water main, where court found that the relocation of main was necessary to insure safety of traveling public and to permit construction of highway. St. 1937, p. 2560, § 680.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

◆

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the State of California acting by and through its Department of Public Works against Marin Municipal Water District to recover cost of removal and relocation of portion of water main. From an adverse judgment, defendant appeals.

Affirmed.

For prior opinion of District Court of Appeals, see 101 P.2d 1112.

Duke & Cowen, Robert D. Duke, and Lawrence A. Cowen, all of San Rafael, for appellant.

C. C. Carleton, Chief Atty., Department of Public Works, Frank B. Durkee, Robert E. Reed, and C. R. Montgomery, Attys., Department of Public Works, all of Sacramento, for respondent.

TRAYNOR, Justice.

In 1909 the Marin County Water and Power Company, a private corporation, acquired from the board of supervisors of Marin county the right to place a twelve-inch water main along the south side of

Bolinas street between Madrone and Grove streets in Marin county. In 1920 the Marin Municipal Water District, organized under the Municipal Water District Act (Stats.1911, p. 1290; Deering's General Laws, Act No. 5243), acquired from the Power Company full title to the water main which it thereafter maintained and operated. In 1936, when the California state highway was under construction northward from the Golden Gate bridge, the construction plans called for incorporating Bolinas street as part of the highway, and the engineers found that a relocation of the water main would be necessary. Accordingly, the Department of Public Works of the state of California, acting pursuant to section 680 of the Streets and Highways Code, on May 22, 1936, served upon the Water District a written demand that it relocate its water main. When the Water District failed to comply, the Department of Public Works proceeded to move the water main and relocate it in a different position on the same highway. The state then instituted this action to recover from the Water District the cost of material, labor, and equipment required for the removal and relocation of the water main.

The trial court awarded plaintiff a judgment for $3,618.14. Defendant has appealed, contending that section 680 is not applicable in the present situation, and that it violates the due process and impairment of contracts provisions of the state and federal constitutions.

Section 680 of the Streets and Highways Code, upon which plaintiff's action is based, provided in 1935 as follows:

"Whenever a franchise shall have been granted by any county or city in any public highway which has been or is subsequently constituted a State highway, the department may enforce any obligations of the grantee or holder of such franchise in respect to the repair of the highway. The department may require any person who has placed and maintained any pole, pole line, pipe, pipe line, conduit, street railroad tracks, or other structures or facilities upon any State highway, whether under such or any franchise, to move the same at his own cost and expense to such different location in the highway as is specified in a written demand of the department, whenever necessary to insure the safety of the traveling public or to permit of the improvement of the highway; provided, that no such change of location shall be required for a temporary purpose. The department shall specify in the demand a reasonable time within which the work of relocation must be commenced and the grantee or owner must commence such relocation within the time specified in said demand and thereafter diligently prosecute the same to completion.

"The department may likewise serve such a demand on the owner of any encroachment to require its removal entirely from the right of way, where the owner does not have an existing franchise right to place and maintain the same therein.

"In case the owner fails to comply with any such demand, the encroachments specified in the demand become subject to the provisions of Article 3 of this chapter. St. 1935, p. 290.

[1] There is ample evidence to support the finding of the trial court that the main in its original location interfered with the construction of the state highway and that its removal and relocation were necessary to permit the construction and improvement of the highway and insure the safety of the traveling public. Defendant points out, however, that section 680 applies only to holders of a franchise, and defendant contends that its right to maintain water mains along Bolinas street is not a franchise.

[2] Its right is derived from several sources. First, it acquired all of the assets and property of its predecessor in interest, the Marin County Water and Power Company, but since the Power Company possessed no more than a franchise from the board of supervisors of the county, defendant could acquire no right greater than a franchise from this source.

Secondly, the legislature in 1911 adopted an act (Stats.1911, p. 852, Deering's General Laws, Act No. 5194), section one of which provides in part as follows: "That there is granted to every municipal corporation of the State of California, the right to construct, operate and maintain water * * * pipes, mains or conduits * * * along or upon any road, street, * * * or highway, or across any railway * * *, in such manner as to afford security for life and property * * *." In 1923 another statute was enacted granting similar privileges to municipal corporations to construct facilities within highways. (Stats.1923, p. 147; Deering's General Laws, Act No. 5193.)

[3] Defendant must be considered a municipal corporation within the meaning of these enactments. Its functions are

substantially the same as those of water districts operated by cities or counties. It is a corporate body organized to supply water to a defined area including both incorporated and unincorporated territory, and it has the power of taxation. It is reasonable to construe these statutes as granting a right of way in state highways to public water corporations of this type as well as to those operated by cities and counties. See Morrison v. Smith Brothers, 211 Cal. 36, 293 P. 53; Henshaw v. Foster, 176 Cal. 507, 169 P. 82; In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004.

Finally, the act under which defendant was organized (Stats.1911, p. 1290; Deering's General Laws, Act No. 5243), provides: "The board of directors shall have power to construct works across any stream of water, watercourse, street, avenue, highway, railway, canal, ditch, or flume which the route of said works may intersect or cross; provided, such works are constructed in such manner as to afford security for life and property, and said board of directors shall restore the crossings and intersections to their former state as near as may be, or in a manner not to have impaired unnecessarily their usefulness. Every company whose right of way shall be intersected or crossed by said works shall unite with said board of directors in forming said intersections and crossings and grant the rights therefor. The right of way is hereby given, dedicated and set apart to locate, construct and maintain said works over and through any of the lands which are now or may be the property of this state, and to have the same rights and privileges appertaining thereto as have been or may be granted to municipalities within the state." Section 19.

The first part of this provision confers upon defendant only a right to cross public highways. The last part confers a right of way over and through state lands. Since this right is no greater than that already obtained by defendant under the acts of 1911 and 1923, it is unnecessary to determine whether the state lands over which a right of way is given include state highways.

[4] The right obtained by defendant from these sources is a right conferred by the legislature to construct and operate pipe lines along the public highways of the state. Such a grant by the state to a public utility of the right to use the public streets and highways for the maintenance of equipment has always been considered a franchise by the courts of this state. The right granted to municipal corporations by the statute of 1923 to use the public highways was held a franchise in Los Angeles v. South Gate, 108 Cal.App. 398, 291 P. 654. The right granted to public utilities by article XI, section 19 of the California Constitution to use city streets for laying down and maintaining pipes was held a franchise in San Jose Gas Co. v. January, 57 Cal. 614. See, also, Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 83 P. 54, 5 L.R.A.,N.S., 174, 7 Ann.Cas. 511; Clark v. Los Angeles, 160 Cal. 30, 116 P. 722. The right granted to telephone and telegraph companies by Civil Code section 536 to maintain pole lines on highways was held a franchise in Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 116 P. 557; Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265, 118 P. 796; and Postal Telegraph-Cable Co. v. Los Angeles, 164 Cal. 156, 128 P. 19. The right granted to irrigation districts by a 1923 statute (Stats. 1923, p. 449) to use the streets and highways for power lines was held a franchise in Winkie v. Turlock Irrigation Dist., 24 Cal.App.2d 1, 74 P.2d 302. In the present case the defendant's right of way in the state highway is likewise a franchise.

[5-7] Section 680 provides that any person may be required by the Department of Public Works to move his pipeline. Section 19 of the same Code, St.1935, p. 249, defines a person as "any person, firm, partnership, association, corporation, organization or business trust." Defendant contends, however, that section 680 cannot apply to it because it is a subdivision of the State. It is a well established doctrine that general words in a statute will not be construed to limit the otherwise valid power of the State or its subdivisions unless that result was specifically intended by the Legislature. Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838; Balthaser v. Pacific Electric Ry. Co., 187 Cal. 302, 202 P. 37, 19 A.L.R. 452; Mayrhofer v. Board of Education, 89 Cal. 110, 26 P. 646, 23 Am.St.Rep. 451; Dollar Savings Bank v. United States, U. S. 1873, 19 Wall. 227, 22 L.Ed. 80. Defendant derived its franchise by virtue of its existence as a subdivision of the State from the Statutes of 1911 and 1923, supra. These statutes confer upon it a right to maintain a pipeline along the streets and highways of the State only "in such manner as to afford security for life and property." Section 680 of the Streets

and Highways Code gives the Department of Public Works the authority to require removal of a pipeline at the owner's expense when "necessary to insure the safety of the traveling public or to permit of the improvement of the highway." It is clear that neither defendant nor any other municipal water district has the authority to maintain pipes on the highway in a position which does not afford security for life or property, and therefore that the application of section 680 to municipal water districts would not result in a limitation upon their otherwise valid power, but would operate only to prevent them from exercising their franchises in a manner contrary to law. It is reasonable to assume that the Legislature intended to provide some method for the enforcement of this restriction upon municipal water districts. Section 680 supplies the means for such enforcement. The most consistent interpretation of the section, therefore, is that the Legislature intended to include municipal water districts within its application.

[8] Defendant also contends that section 680 which refers only to pipe lines upon the state highway, does not apply to it because its own main is below the surface. Such a limited construction would be manifestly unreasonable. The word "upon" means not only "on top of" but also "in or into the position of being supported by * * * something". Webster's New International Dictionary. Article 2, chapter 3, division 1, § 670 et seq., of the Streets and Highways Code, wherein section 680 appears, is concerned with the general subject of encroachments on state highways, and the last paragraph of section 680 refers to pipe lines, telephone lines, etc., referred to in the earlier part of the section as encroachments. Section 660(b) of the Streets and Highways Code defines encroachments as including "any * * * pipe, pipe line * * * which is placed in, under or over any portion of the highway". Defendant's pipe line is thus clearly within the purview of section 680.

[9-11] The final contention urged by defendant is that section 680 cannot make it bear the expense of relocating its own water main without violating the provisions of the state and federal constitutions against impairing the obligation of contracts and taking property without due process of law. The United States Supreme Court has held that a municipal corporation whether acting in a so-called "governmental" capacity or "proprietary" capacity has no standing to invoke the impairment of contracts clause or the provisions of the fourteenth amendment of the United States Constitution in opposition to acts of the state legislature. Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937, 29 A.L.R. 1471; Coleman v. Miller, 307 U.S. 433, at page 441, 59 S.Ct. 972, 83 L.Ed. 1385, 122 A.L.R. 695. Whether or not the like guarantees in the California Constitution apply as between the state and its subdivisions (cf. Beverly Hills v. Los Angeles, 175 Cal. 311, 165 P. 924), the legislation here in question is clearly within that residuary power of the state to protect the health, safety, and morals of its inhabitants known as the "police power". The determination of whether a statute constitutes a taking of property without due process of law or an impairment of the obligation of a contract consists in balancing the burden placed on the individual or corporation on the one hand against the benefit which will accrue to the public as a whole on the other. If the benefit to the public outweighs the burden on the individual, the statute is a valid exercise of the "police power". Section 680 requires the relocation of pipe lines only when necessary to permit the improvement of the highway or to insure the safety of the traveling public. The trial court found in the present case that the removal and relocation of defendant's main was necessary to insure the safety of the traveling public and to permit the construction of the highway. Defendant has not been deprived of its franchise; it has simply been required to bear the expense of removing its mains to a location on the highway consonant with public welfare. The benefit to the public as a whole thus clearly outweighs the burden imposed upon defendant, and the legislation is therefore valid. Merced Falls Gas & Electric Co. v. Turner, 2 Cal.App. 720, 84 P. 239; New Orleans Gas Light Co. v. Drainage Comm., 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831. Furthermore, the statutes of 1911 and 1923, upon which defendant relies to establish its right of way in the highway, grant the right to maintain a pipe line "in such manner as to afford security for life and property" (Stats.1911, p. 1290), and thereby outlaw the maintenance of such pipe lines in a manner injurious to life or property.

The judgment is affirmed.

We concur: EDMONDS, J.; CURTIS, J.; SHENK, J.

44 Cal.App.2d 1

O'CONNOR v. O'CONNOR, RICE & BARNES, Inc., et al.

Civ. 2631.

District Court of Appeal, Fourth District, California.

April 2, 1941.

1. Fraudulent conveyances ⚷150, 151, 153

Although a writing may constitute evidence of a transfer of personal property, a visible, actual, continued change of possession thereof is necessary under statute in order to defeat rights of transferror's creditors. Civ.Code, § 3440.

2. Fraudulent conveyances ⚷147(1)

Under rule that recorded bills of sale are insufficient notice and proof of immediate delivery and change of possession of personal property to meet statutory requirements with respect to rights of transferror's creditors, the pasting on books of labels showing new ownership thereof would be insufficient to defeat rights of creditors, where books remained in physical possession and custody of officers of corporation, by which they were formerly owned, and were used for the same purposes as before sale. Civ. Code, § 3440.

3. Fraudulent conveyances ⚷150

Where map books, which were transferred by corporation in payment for services rendered, remained in possession of officers of corporation, who used them for same purpose as before sale, and while in possession of president were levied upon under writ of attachment in action against corporation, there was not such an "actual change of possession" as required by statute to defeat rights of transferror's creditors. Civ. Code, § 3440.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Change of Possession".

4. Fraudulent conveyances ⚷149(1), 150, 153

Where a transfer of personal property is not accompanied by an immediate delivery and followed by an actual and continued change of possession, such transfer is conclusively presumed to be fraudulent and therefore void as against creditors of transferror. Civ.Code, § 3440.

5. Fraudulent conveyances ⚷150

"Actual", as used in statute requiring that nonfraudulent transfers of personal property as respects rights of creditors be accompanied by actual change of possession, means existing in act, and truly and absolutely so, really acted, acting, or carried out, as opposed to potential, possible, or theoretical. Civ.Code, § 3440.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual".

6. Fraudulent conveyances ⚷147(2)

Rule that where property is bulky and not readily transferred by actual manual delivery, a constructive delivery may be sufficient to meet requirements of statute dealing with transfers of personal property, was not applicable to defeat right of creditors of transferror of maps and map books, which were permitted to remain in possession of transferror. Civ.Code, § 3440.

7. Appeal and error ⚷842(7)

Where facts as to actual delivery and change of possession of personal property were admitted, and no conflicting inferences could be drawn from the evidence with respect thereto, whether there had been the actual delivery and change of possession required by statute was a "question of law" which could be determined on appeal contrary to finding of trial court. Civ.Code, § 3440.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Jerome B. O'Connor against O'Connor, Rice & Barnes, Incorporated, wherein Robert F. Shippee claimed the right to possession of certain map books and maps levied upon by sheriff under a writ of attachment. From a judgment awarding custody of the books to Shippee, the plaintiff appeals.

Judgment reversed.

Arthur J. Mullen, Raymond Tremaine, and Franklin L. Knox, Jr., all of Los Angeles, for appellant.

Robert F. Shippee, of Los Angeles, in pro. per.

MARKS, Justice.

This is an appeal from a judgment awarding certain map books and maps, levied upon by the sheriff of Los Angeles county, to Robert F. Shippee, the third party claimant.

It is admitted that both plaintiff and Shippee were creditors of O'Connor, Rice & Barnes, Inc., the former owners and possessors of the books and maps, at the time of their sale to Shippee by the corporation. The only question presented is whether there was an immediate delivery followed by an actual and continued change of possession of the personal property sufficient to satisfy the provisions of section 3440 of the Civil Code.

The corporation was lessee of property belonging to plaintiff and defaulted in the payment of the rent. O'Connor brought an action against it which was compromised by a contract dated April 4, 1938. Silas P. Rice was the secretary-treasurer, and P. T. Barnes was the president of the corporation and the owners of its stock.

Shippee represented the corporation which could not pay his fee. Immediately after April 4, 1938, it was agreed that the map books and maps be sold to him and their value applied on his fee. The amount to be credited does not appear in the record. The books and maps were in the possession of the corporation, were used by it in its business and remained in its possession until about June, 1938, when Barnes secured the consent of Shippee to use the books himself. They were in his possession when they were taken by the sheriff under a writ of execution issued in this case.

The only evidence of change of ownership or possession were labels pasted on the books and maps, upon each of which was written, "This is the property of Robert F. Shippee." The books and maps had a value of less than $200.

It is the theory of Shippee, which must have been adopted by the trial court, that the sale was made in good faith, for a valuable consideration, without any actual intent to defraud; that while, prior to the sale, the property belonged to the corporation and was in its possession through the physical possession of Rice and Barnes, title was passed to him by the sale; that (until the next June) possession passed to him through the actual possession of Rice and Barnes who held the books and maps for him as his agents; that after June, possession remained in him through the actual possession of Barnes as his agent until the books and maps were taken by the sheriff; that the labels on the books and maps gave sufficient notice of change of ownership and change of possession.

The case of Lilienthal v. Ballou, 125 Cal. 183, 57 P. 897, 898, is decisive of the question presented here. A merchandising business had been conducted by Phillips Bros. & Co., and was managed by Adolph Phillips. Owing to financial difficulties the owners made an assignment of the property to trustees for the benefit of all but one of their creditors. Attachments on the store were released and it was reopened. It was operated by Adolph Phillips with the same employees as before except the bookkeeper. The signs of Phillips Bros. & Co., were permitted to remain but another sign was displayed containing the names of the trustees, under which appeared, "Trustees, Successors to Phillips Bros. & Company." The money received in the business was deposited in a bank under the names of the trustees. The old bill heads were used with the addition of the names of the trustees by means of a rubber stamp.

In holding that these facts failed to show sufficient delivery and change of possession to satisfy the requirements of the Civil Code, the Supreme Court said: "A change of possession is not affected merely by having the former owner manage the property as the servant, agent, or clerk of the pledgee; and this is especially so where there is so little outward sign of a change of ownership. Public policy requires a real and substantial compliance with the statute, and a failure should not be condoned for the hardships of a particular case."

This case involved a pledge, not a sale of personal property. On the question of the necessity for an actual delivery and change of possession, the Supreme Court said: "The delivery must be as complete as is required in case of sales of personal property by section 3440 of the Civil Code, and change of possession must be continuous and open. George v. Pierce [123 Cal. 172], 55 P. 775 [56 P. 53]."

[1] In discussing a similar question in George v. Pierce, supra [123 Cal. 172, 55 P. 777], it was said: "The transaction pertaining to this transfer was enveloped in writings, which was well enough for the purpose of evidencing the rights of the respective parties to it; but the statute which deals with the change of possession sufficient to defeat creditors does not contemplate writings, but acts. No writings pertaining to a transfer of personal property, regardless of their number or character, can create an actual and continued change

of possession as to creditors of the pledgor. Acts only can do it. A visible, actual, continued change of possession must be had, and the law will be satisfied with nothing else. Writings can never accomplish these results."

[2] Before the sale to Shippee the property was in the possession of the corporation and in the physical custody of its officers. After the sale its possession and physical custody was not changed. The books and maps remained where they were before and were used by the same persons and for the same purposes. It is true that after the sale Barnes and Rice might have held the property as agents for Shippee, but that agency arose from a private contract between those parties. There was nothing different in the possession after the sale to notify any creditor of the corporation of the change in the capacity of the possession. The labels might have been evidence of change of title but they were not sufficient in themselves to establish change of possession. They had more bearing on title than on possession.

If recorded bills of sales and other such documents are not sufficient to serve as notice and proof of immediate delivery and change of possession, certainly the labels could not have had that effect here. See, Gray v. Corey, 48 Cal. 208; Bunting v. Saltz, 84 Cal. 168, 24 P. 167; Howe v. Johnson, 107 Cal. 67, 40 P. 42; McKee Stair Bldg. Co. v. Martin, 126 Cal. 557, 58 P. 1044; Ross v. Thomas, 24 Cal.App. 734, 142 P. 102; Lamanet v. Lamanet, 18 Cal. App.2d 402, 63 P.2d 1195; Hepner v. Hepner, 32 Cal.App.2d 582, 90 P.2d 321.

[3-5] The change of possession here does not measure up to the requirements of an actual change of possession as defined in Bunting v. Saltz, supra [84 Cal. 168, 24 P. 168]: "If the transfer was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, it is conclusively presumed to be fraudulent, and therefore void as against the creditors of the vendor. Civil Code, § 3440. 'Actual' means existing in act, and truly and absolutely so; really acted or acting; carried out; opposed to potential, possible, virtual, or theoretical."

The third party claimant seeks to support the holding of the trial court under the case of Hassell v. Bunge, 167 Cal. 365, 139 P. 800, 801, and the many cases citing it with approval. There the seller had one J. F. Jones, its employee, in possession of the property prior to the sale. After the sale the purchaser employed Mr. Jones and placed him in possession. The property was on a mining claim operated by the Black Tom Mining Company through Lucellus Smith, its president. Prior to the sale, Smith closed the mine down and left it, placing Jones in charge. The sale to the purchaser was held valid as against creditors of the mining company. The property sold consisted of "mining and other machinery, some iron and steel, 10 tons of concentrates, 30 tons of hay, 80 cords of wood, 3 horses, 3 sets of harness, and a wagon".

[6] It is thoroughly established that where property is bulky and not readily transferable by actual manual delivery there may be a constructive delivery, but this is not true where the goods are of such a character as to permit of an actual passing of physical possession. See, Sequeira v. Collins, 153 Cal. 426, 95 P. 876; Guthrie v. Carney, 19 Cal.App. 144, 124 P. 1045. This rule, together with the fact that the mine had been closed down by the mining company which had abandoned the property except as to keeper Jones, removes any conflict between these cases and the others we have cited.

[7] The third party claimant also urges that as it was held in Hassell v. Bunge, supra, that the question of the efficacy of the delivery was primarily one for the trial court, and as the trial court impliedly found an actual delivery and change of possession in the instant case, that finding is final and conclusive here.

This rule set forth in the Hassell case, and the many following it, cannot be questioned but its application here is doubtful. Where there is conflicting evidence or conflicting inferences to be drawn from the evidence on the question of actual delivery and change of possession, certainly the finding of the trial court on that question should be conclusive on appeal. But where, as here, the facts are all admitted, and there is no conflict in the evidence, and no conflicting inferences may be drawn from it, the question becomes one of law that may be decided on appeal.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

43 Cal.App.2d 823

PEOPLE v. DUVERNAY.

Cr. 3434.

District Court of Appeal, Second District, Division 1, California.

March 31, 1941.

1. Witnesses 🔑345(1)

Questions on cross-examination as to whether witness had ever had any trouble with police officers in any way in connection with narcotics, and questions whether the police had ever arrested the witness, and the dates of such arrests, were clearly incompetent, since only a previous conviction of a felony may be shown by way of impeachment

2. Criminal law 🔑1186(4)

In prosecution for sale of narcotics, statement in argument to jury by district attorney that he did not know whether defendant was a user or not, that the defendant had many of the characteristics of a user of narcotics, called for a stern rebuke from the court and constituted prejudicial "misconduct" which was not removed by court's statement that he thought that had better be omitted and that the jury would disregard the reference to defendant's characteristics. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

3. Criminal law 🔑1186(4)

Constitutional provision relating to formal errors was not intended to mean that merely because the evidence may legally support a judgment that is sufficient reason in all cases for refusing to set aside the judgment. Const. art. 6, § 4½.

4. Criminal law 🔑1186(4)

The phrase "miscarriage of justice" as used in constitutional provision relating to formal errors does not simply mean that a guilty man has escaped or that an innocent man has been convicted, but it is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

5. Criminal law 🔑1186(4)

The right of the accused in a given case to a fair trial conducted substantially according to law is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. Const. art. 6, § 4½.

6. Criminal law 🔑1186(4)

It is an essential part of justice that the question of guilt or innocence of accused shall be determined by an orderly procedure in which the substantial right belonging to accused shall be respected. Const. art. 6, § 4½.

7. Criminal law 🔑1186(4)

In prosecution for sale of narcotics, evidence was not sufficient to put into operation the provisions of Constitution relating to formal errors so as to require affirmance of conviction notwithstanding misconduct of district attorney because even convincing proof of a defendant's guilt does not necessarily mean under all circumstances that there has been no "miscarriage of justice". Const. art. 6, § 4½.

8. Constitutional law 🔑268

When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of "due process of law".

See Words and Phrases, Permanent Edition, for all other definiions of "Due Process of Law".

9. Criminal law 🔑633(1)

It is the bounden duty of court to insist that a defendant be fairly convicted because, if he is not so convicted, he should not be convicted at all and to hold otherwise would be to provide ways and means for the conviction of the innocent.

10. Criminal law 🔑633(1)

The fact that the evidence may point rather conclusively to defendant's guilt does not take from the latter his right to a fair and impartial trial.

11. Criminal law 🔑1186(4)

The conduct of criminal prosecutions should not be had with an eye to the saving grace of constitutional provision relating to formal errors. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Lawrence Duvernay was convicted of selling narcotics, and he appeals.

Judgment reversed and cause remanded for a new trial.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

WHITE, Justice.

An information filed by the district attorney of Los Angeles county charged the defendant with the crime of violation of section 11036 of the Health and Safety Code, St.1939, p. 756, of the state of California, which section limits and regulates, among other things, the right to sell, furnish, give away or transport narcotics. Following trial before a jury, the defendant was found guilty. This appeal is from the judgment.

Because appellant bases his grounds for reversal upon claimed misconduct of the district attorney and errors of the trial court in the admission of evidence, it becomes necessary to epitomize the factual background surrounding this litigation.

From the record we learn that a police officer assigned to the narcotic detail, accompanied by an operator employed by the police department, first met the defendant on June 3, 1940, upon which occasion the officer had a conversation with reference to the purchase of narcotics. After some discussion the officer gave six dollars to the operator, who departed with the defendant after the latter had instructed the officer to remain in his automobile. Within a period of five minutes the operator returned with a package containing marihuana. Again on June 7, the police officer contacted appellant and inquired of him whether he had any "stuff", to which appellant replied that he would not deal with the officer because he did not know him, and that if he wanted to get any "stuff" he would have to get Tommy (referring to the operator) to get it for him; that appellant would deal only with Tommy, and that he sold only to some three or four "guys". Thereafter, on June 11, 1940, the officer, accompanied by Tommy Jefferson, the operator, parked his automobile on 42nd street near Central avenue. Defendant drove up and parked his automobile across the street. The police operator then went over to defendant's car, and following a short conversation returned to the officer's automobile. Defendant left, but within a short time returned to his car. Thereupon the police operator walked over to the defendant, and then returned to the officer, the latter of whom gave the operator six one-dollar bills, the serial numbers of which were recorded by the policeman. The operator delivered the money to the defendant and then returned to the car and directed the officer to drive to 42nd place, where they waited about ten minutes, when the defendant drove up directly behind the officer's car and sounded his horn. The operator went over to defendant's automobile, whereupon the latter reached down on the seat of the car and handed a package to the operator and immediately drove away. When the operator delivered the package to the officer, examination by the latter disclosed the contents thereof to be marihuana. A short time later on the same day defendant was placed under arrest and the officers found upon his person three of the one-dollar bills theretofore given to the operator and testified by the latter to have been paid to the defendant. The identification of the money was made by comparison with the serial numbers previously recorded by the officer. Upon being asked what had become of the other three one-dollar bills, defendant stated that he had probably lost them in a "crap" game.

Defendant denied his guilt and produced evidence that on the day of his arrest he was in his automobile, which was parked near 42nd street and Central avenue, with two other men, when the police operator approached the car, but had no conversation about narcotics; that defendant then drove his two friends to their respective homes and himself went to the home of his mother-in-law in company with another friend, where he remained until nearly eight o'clock, and was then on his way to a prize fight when he was arrested. Several witnesses corroborated defendant in his alibi that he did not return to 42nd place and make delivery of a package to the police operator.

In support of his claim that the district attorney was guilty of prejudicial misconduct, appellant directs attention to that portion of the record wherein appears the following, which occurred during the cross-examination of a witness for the defense:

"Q. (By the Deputy District Attorney.) Have you ever made any deliveries for Duvernay? A. I did not.

"Q. At any time?

"Mr. Gordon (Defense Counsel): I submit this line of questions is incompetent, irrelevant and immaterial; it is not proper cross-examination.

"(Deputy District Attorney): This is to show the interest of the witness.

"Mr. Gordon: Interest? You are assuming a fact not in evidence. I make my objection on that ground.

"The Court: Oh, it is overruled.

"Q. (By Deputy District Attorney) Have you ever delivered anything for Duvernay? A. I did not.

"Q. Have you collected money for him? A. I did not.

"Q. You have been in trouble in connection with narcotics yourself, haven't you?

"Mr. Gordon: Just a moment. I object to this line of questioning as improper.

"The Court: Objection sustained.

"Q. (By Deputy District Attorney) Have you had trouble with the police officers in any way in connection with narcotics?

"Mr. Gordon: Just a moment. Your Honor, at this time I would like to assign the remarks of the district attorney as misconduct on the ground that the objection has already been sustained. He is pursuing a line of questions that he knows is prejudicial. He knows it is wrong, and I ask that the jury be admonished to disregard such questioning, and the jury not to draw any inferences therefrom, and I ask that the district attorney be admonished.

"The Court: Well, I think probably the first part of that question as to the trouble with the police officers might be proper. The rest of it will be disregarded and no inference drawn from that phase of it.

"Q. (By Deputy District Attorney) Have the police officers arrested you? A. They did.

"Q And how long ago? A. In '38, '38, March of '38—I don't exactly know the date.

"Q. Was that in connection with anything you were doing with this defendant, Duvernay? A. It was not."

[1] The questions as to whether the witness had ever "had trouble with the police officers in any way in connection with narcotics", as well as the interrogation as to whether the police had ever arrested the witness and the dates of such arrests, were all clearly incompetent. It is not previous arrest or "trouble with the police" that may be used as the basis of impeachment of a witness, but only the previous conviction of a felony may be shown.

The vice of this line of questioning was aggravated when during his argument to the jury the deputy district attorney said:

"In this case, if the court please, and ladies and gentlemen of the jury, the defendant is charged with selling narcotics, the information reading, according to the provisions of the law, 'that the defendant did, on or about the 11th day of June, 1940, at and in the county of Los Angeles, state of California, wilfully, knowingly and feloniously sell, furnish and give away, flowering tops and leaves of Indian hemp, cannabis sativa, in violation of section 11036 of the Health and Safety Code of the State of California'. That, in the legal phraseology, is the offense of selling narcotics—probably the most depraved and lowest thing that I think a human being can do, because it destroys the mentality of the people who use it. *I don't know whether this defendant is a user or not. The characteristics of one who uses narcotics habitually are pretty well known and recognized by one who has any knowledge at all of the matter. The defendant has many of the characteristics of a user of narcotics*—

"Mr. Gordon: At this time I wish to cite the remark of counsel as misconduct, as attempting to appeal to the prejudice of these jurors, and I wish that the jury be admonished to disregard his statement, and that he be admonished again. I feel that this is characteristic of his entire prosecution of this case."

Following this objection, the court said: "Well, I think that had better be omitted and the jury will disregard the reference as to the characteristics of the defendant."

[2] The conduct of the deputy district attorney as just narrated called for a more stern rebuke from the court, and it is doubtful whether any admonition to the jury would have removed the effect of such conduct. It would be an impeachment of the legal learning of counsel for the people to intimate that he did not know the aforesaid questions and argument to be improper, wholly unjustifiable, and peculiarly calculated to prejudice the substantial rights of the defendant. Such conduct prevents a de-

fendant from having that fair and impartial trial to which, whether innocent or guilty, he is entitled. Moreover, it may defeat the punishment of crime by jeopardizing a conviction when a defendant is clearly guilty. The challenged remarks of the district attorney are wholly unsupported by the record, and go far beyond the scope of legitimate argument. It is obvious that they were injected into the case for the manifest purpose of prejudicing the jury against the defendant. Such remarks constituted misconduct, and of the fact that such misconduct was prejudicial there can be little doubt. To entertain a contrary view is to ignore human experience and the dictates of common sense. The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and the members thereof may well have thought that he could prove the innuendo contained in the improper questions and the claims he made in his argument concerning the characteristics of the defendant as indicating an addiction on the latter's part to the use of narcotics, had the prosecutor been allowed to do so.

[3-10] While conceding that "it may be that the prosecuting attorney should have refrained from making the suggestions he did as indicated in the portions of his argument above stated", respondent nevertheless earnestly contends that "such argument did not prejudice the substantial rights of the defendant in view of the conclusiveness of the evidence against him and the instruction to the jury to disregard the reference to the characteristics of the defendant". We are not in accord with the reasoning of the learned attorney general that the saving grace of section 4½ of article VI of the state Constitution should come to the rescue of this conviction. As was stated by this court in People v. Gilliland, 39 Cal.App.2d 250, 252, 264, 103 P.2d 179, 186, "We do not understand section 4½ of article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. People v. Davis, 210 Cal. 540, 556, 293 P. 32." There is creditable authority for the statement that the phrase "miscarriage of justice", as used in the constitutional provision, "does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.'" People v. Wilson, 23 Cal.App. 513, 138 P. 971, 975. In the instant case we do not regard the evidence as sufficient to put into operation the provisions of section 4½ of article VI of the Constitution, because even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice. People v. Mahoney, 201 Cal. 618, 258 P. 607; People v. Patubo, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

In the instant case the evidence is in sharp conflict. All of the material facts testified to by the witnesses for the prosecution were denied and controverted, and the defendant, as heretofore indicated, offered several witnesses in support of his alibi. In venturing these last observations we speak, of course, only from the showing made by the record. It is true that the jury had an opportunity to observe the demeanor of the witnesses, and may have had reason to return the verdicts which were found, irrespective of the errors committed during the trial. As to this, of course, we can say nothing. From the mere record, as we read it, however, the errors may have turned the scale in favor of the prosecution. It is the bounden duty of courts to insist that a defendant be fairly convicted, because if he is not so convicted he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent. The fact that the evidence may point rather conclusively to defendant's guilt does not take from the latter his right to such a fair and impartial trial.

[11] Pertinent indeed to the situation with which we are here confronted are the remarks of the court in People v. Black, 73

Cal.App. 13, 43, 238 P. 374, 387, wherein it was said: "We feel impelled to direct the attention of district attorneys and trial judges to the frequent occasion which is thrust upon us to save judgments of conviction by means of the provisions of section 4½ of article 6 of the Constitution. It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the section. It should be manifest that such a course is improper. In the performance of their respective duties incident to trials, the existence of the section is of no concern to those officers. That part of the organic law of the state is of interest, so far as its application is concerned, if we except proceedings on motion for a new trial (see People v. Tomsky, 20 Cal.App. 672, 130 P. 184) only to the courts of review. District attorneys and trial judges should conduct the trial of criminal cases exactly as if the section did not exist. Such a course, if faithfully and diligently pursued, will lessen the number of appeals, will shorten the time necessary for the consideration of appeals which are taken, will lessen the number of retrials by superior courts, and will conduce to the general dispatch of business in both trial and appellate courts."

The judgment is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

CROW v. MADSEN et al.

Civ. 2599.

District Court of Appeal, Fourth District, California.

March 29, 1941.

Stipulations 🔑14(12)

In accordance with stipulation, the District Court of Appeal would order that rehearing be granted, that appeal be dismissed, that neither party recover costs of appeal, and that remittitur issue forthwith.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

On stipulation for rehearing.

Rehearing granted, appeal dismissed.

Prior opinion, 111 P.2d 7.

Chester R. Andrews and John J. Gallagher, both of Fresno, for appellant.

H. E. Barbour and W. B. Backlund, both of Fresno, for respondents.

PER CURIAM.

The parties hereto have stipulated that a rehearing in this case be granted; that the appeal be dismissed; that neither party recover costs on appeal; that the remittitur issue forthwith.

By reason of such stipulation it is ordered that a rehearing in this case be and is hereby granted; that this appeal is dismissed; that neither party recover costs of appeal; that the remittitur issue forthwith.

In re COFFEE'S ESTATE.

COFFEE v. RILEY, State Controller.

Civ. 2610.

District Court of Appeal, Fourth District, California.

March 28, 1941.

As Modified on Denial of Rehearing April 22, 1941.

Hearing Granted May 26, 1941.

1. **Appeal and error** 🔑907(3)

On appeal on judgment roll alone, it must be presumed that findings and judgment based thereon are fully supported by the evidence properly introduced, and it must be assumed that every material fact necessary to support the pleadings and judgment was adequately established at trial.

2. **Taxation** 🔑895(7)
Wills 🔑827

A husband may, by an expression of intent in will, relieve widow's half of community from liability for his debts and administration expenses, and where widow's community half-interest is thus relieved of such liability, in determining market value of husband's property transferred, the deduc-

tions allowable under Inheritance Tax Act, if obligations of husband or his estate and paid by the estate or transferee, may be entirely deducted from husband's community interest for taxation purposes. Probate Code, § 750; St.1935, p. 1270, § 2(11).

3. Taxation 🔑900(5)

In determining market value of property transferred on husband's death, where for inheritance tax purposes, expenses of funeral and last illness, executors' and attorneys' fees, expenses of administration, federal estate tax, taxes due at husband's death and debts of husband were allowed as deductions from husband's separate property or his portion of community property, on appeal on judgment roll alone, presumption existed that husband's will provided that such debts and obligations be paid from his separate estate or community interest so that judgment was required to be affirmed. St.1935, pp. 1266, 1270, §§ 1(2), 2(11).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceedings in the matter of Harry Coffee, deceased, wherein Anna Coffee, etc., filed objections to the report of the inheritance tax appraiser. From an order sustaining objections to the report of the inheritance tax appraiser and fixing the inheritance tax, Harry B. Riley, State Controller, appeals.

Judgment modified, and as modified, affirmed.

James W. Hickey, Inheritance Tax Atty., and Alvin P. Jacobs, Asst. Inheritance Tax Atty., both of Sacramento, for appellant.

Dearing & Jertberg, Gilbert Jertberg, and Kenneth G. Avery, all of Fresno, for respondent.

GRIFFIN, Justice.

This is an appeal by the State Controller on the judgment roll alone, from an order sustaining objections to the report of the inheritance tax appraiser and fixing the inheritance tax. The decedent Harry Coffee died on July 7, 1938, leaving a will. The court found that at the time of the death of the above-named decedent, he and his wife, the said Anna Coffee, owned community property of a total valuation of $201,578.42; that the deceased then owned separate property in the sum of $81,000; that the allowable deductions from this estate for the purpose of determining the inheritance tax were:

"Expenses of funeral and of last illness	$ 537.41
Debts of deceased (being allowed claims)	2,507.87
Taxes due at decedent's death	6,153.74
Executrix's commissions	1,737.30
Fees of attorneys for same	1,737.30
Expenses of administration, being clerk's, notary's appraiser's fees etc.	193.74
Federal Estate Tax	5,253.54
Other deductions	1,302.57
Total deductions	$19,423.47"

that the total value of the property which may in any way be considered for inheritance tax purposes is $134,826.62; that the clear market value of the property of the decedent taxable under the inheritance tax laws of the state of California is $115,403.15; that said property passed to Anna Coffee, wife of the decedent; and that the total tax payable is $3,848.22, which was fixed accordingly.

Two questions are attempted to be presented for our consideration on this appeal. First, on the death of the husband is the entire community property, including the wife's one-half, liable for the husband's debts and expenses of administration along with the husband's separate property? Second, if so, then for the purpose of computation of inheritance tax on the husband's death, should such debts and expenses of administration be deducted in full, as was done in the instant case, solely from the husband's separate property and the husband's half of the community?

[1] This appeal was on the judgment roll alone. We do not have the evidence before us. We find ourselves immediately confronted with the rule that it must be presumed that the findings and the judgment based thereon are fully supported by the evidence, properly introduced and admitted, and we must assume that every material fact necessary to support the pleadings and judgment was adequately established at the trial. Mau v. McManaman, 29 Cal.App.2d 631, 635, 85 P.2d 209; Coyne v. Spellacy, 12 Cal.2d 284, 83 P.2d 715; Rubenstein v. Bank of America, 29 Cal.App.2d 501, 84 P.2d 1056.

The pertinent provisions of the Inheritance Tax Act of 1935 (Stats.1935, p. 1266, chap. 358) will be found in subdivision 2 of section 1, and subdivision 11 of section 2. Subdivision 2 of section 1 provides in part as follows: "* * * the one-half of the community property which belongs to the surviving spouse * * * shall not be subject to the provisions of this act". Subdivision 11 of section 2 provides in part as follows:

"In determining the market value of the property transferred, the following deductions, if obligations of the decedent or his estate and paid by the estate or transferee, and no others, shall be made from the appraised value thereof:

"(a) Debts of decedent * * *,

"(b) Expenses of funeral and last illness;

"(c) All State, county, and municipal taxes * * *;

"(d) The ordinary expenses of administration, including the ordinary fees allowed executors and administrators and the ordinary fees of their attorneys * *;

"(e) The amount due or paid the government of the United States as a Federal inheritance or estate tax * * *".

Subsection (f) of subdivision 11 of section 2 provides: "This subdivision (11) is intended as a limitation on deductions, and it is not its purpose to allow as a deduction anything that does not actually reduce the amount of the inheritance or transfer."

Subdivision 11 of section 2 further provides that these deductions are allowable if they are "obligations of the decedent or his estate and paid by the estate or transferee".

It is appellant's position that the one-half of the community property which is not a part of the decedent's estate is liable for the payment of such deducted items, and therefore such deducted items to that extent cannot be in their entirety "obligations of the decedent or his estate" and cannot be said to be "paid by the estate or transferee" of the estate.

Appellant concedes, as he must, that the decedent or the estate of the decedent is fully liable for all of these debts and expenses. Since the trial court has found in effect that these debts and expenses were paid from the decedent's estate and this finding is not open to attack on the record, they actually reduce the amount of the inheritance.

[2, 3] It must be conceded that under section 750 of the Probate Code, the husband could, by an expression of intent in a will, relieve the widow's half of the community from liability for his debts and administration expenses subject to the provisions of said section, and where her community half interest was thus relieved of such liability, then under the Inheritance Tax Act, in determining the market value of the decedent's property transferred, the deductions allowable under section 2, subdivision 11 of said act, if obligations of the decedent or his estate and paid by the estate or transferee, could be entirely deducted from the husband's community interest for taxation purposes. In re Estate of Marinos, 39 Cal.App.2d 1, 102 P.2d 443; In re Estate of Haselbud, 26 Cal.App.2d 375, 79 P.2d 443. The terms of the will are not before us. In so far as the record is concerned, and in support of the judgment, we might well assume that the deceased's will in the instant case provided that the above-mentioned debts and obligations be paid from his separate estate or his community interest. Under such circumstances, the order allowing the entire stipulated deductions from the deceased husband's estate would be entirely proper. Under this presumption and conclusion the judgment must be affirmed. There is no necessity, then, to determine the other points raised.

Since this appeal was perfected the parties hereto have entered into a stipulation, filed with this court, agreeing that there has been assessed by the federal and state governments against this estate "deficiencies in income tax for the fiscal years ended January 31, 1937, and January 31, 1938, and these deficiencies in income tax, having been paid or credited in full, should be allowed as further deductions in the computation of inheritance tax in this estate". It is further agreed that if this court "decides that respondent is correct in all of her contentions, the trial court judgment should nevertheless be modified to fix the tax at $3,349.07".

In view of the conclusion and stipulation, the judgment is so modified and the tax fixed at $3,349.07, and as so modified, is affirmed. Each party to pay his and her own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

On Motion for Diminution of Record and Petition for Rehearing.

GRIFFIN, Justice.

Appellant, state controller, petitioned this court for a rehearing herein, and in addition thereto, since the rendition of the opinion, has presented a motion for diminution of the record. The judgment roll heretofore considered on appeal did not contain a copy of the will of deceased. Appellant now seeks by said motion, after a determination of the cause, an order directing that a copy of the will be made a part of the clerk's transcript on appeal. In denying this motion, it should be noted that respondent herein, in his brief, more than five months ago, directly called to the attention of this court and to appellant and argues at some length, the fact that "* * this appeal is on the judgment roll alone * * * and it must, therefore, be presumed, if such presumption is necessary to justify the findings of the court, that the debts and expenses of administration were paid out of property of the estate designated by the decedent in his will for such purpose. * * *." Appellant had ample opportunity to discover any claimed deficiencies in the record and present a proper motion for diminution of the record before or at the time the case was argued and submitted for decision. While the record of the will may be very pertinent in the instant case, we are of the opinion that any benefits that might accrue from considering the motion after a determination of the issues before involved and after full opportunity was afforded appellant to present a proper record, would be far outweighed by the evils that might well be expected to follow the setting of such a precedent. Such a procedure would not only impose unnecessary work on the courts, but would work an injustice on the litigants whose cases would be correspondingly delayed. People v. Mills, 41 Cal.App. 2d 260, 106 P.2d 216, 106 P.2d 628. The motion is therefore denied.

It is argued in the petition for rehearing that certain language used in the opinion conflicts with the decision in Grolemund v. Cafferata, Cal.Sup., 111 P.2d 641, decided on the same day the decision in the instant case was filed.

As the language used in that portion of our opinion was unnecessary to the determination of the issues there presented, it may well be considered dicta. Portions of the opinion are ordered stricken.

With this modification of the opinion the petition for rehearing is denied.

We concur: BARNARD, P. J.; MARKS, J.

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43 Cal.App.2d 835

SILVER v. BANK OF AMERICA N. T. & S. A. et al.

Civ. 6563.

District Court of Appeal, Third District, California.

April 1, 1941.

1. Appeal and error 🔑597(3)

Where order for transcript was made on request of appealing defendants and transcripts of clerk and reporter were filed in reviewing court, plaintiff was not entitled to have plaintiff's notice of appeal included in such transcript, and such notice of appeal would be stricken out on defendants' motion. Code Civ.Proc. §§ 951, 952, 953a.

2. Appeal and error 🔑595

Where appeals by defendants and by plaintiff, respectively, though arising out of same action, were for all purposes as separate as though taken from judgments in different actions, each appellant was required to prepare and file his own separate record, in absence of agreement to the contrary. Code Civ.Proc. §§ 951, 952.

3. Appeal and error 🔑595

The statute permitting respondents to require other papers to be inserted in reporter's transcript must be reasonably construed and does not manifest intent that the identical record supplied by clerk under statute shall be duplicated in reporter's transcript. Code Civ.Proc. §§ 951, 952, 953a.

4. Appeal and error 🔑595, 816

Consolidation of appeals is entirely within court's discretion, and such action may be taken in the matter of preparation of briefs and oral argument, but not to the extent of compelling one appellant to supply the record on appeal to another, in absence of stipulation to that effect.

Appeals from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Louis L. Silver against the Bank of America N. T. & S. A. and others for damages, wherein verdict was rendered for plaintiff in part and for defendants in part, and both parties moved for a new trial. From an order granting motion for new trial on one count and from judgment against defendants on other count, defendants appeal, and from adverse orders, plaintiff appeals. On defendants' motion to strike plaintiff's notice of appeal from reporter's transcript, and plaintiff's motion for an order consolidating the appeals.

Motion to strike granted, and motion to consolidate denied.

Burke & Rawles, of Ukiah, for appellants.

Preston & Gibson, of Ukiah, for respondents.

TUTTLE, Justice.

The following judgment was entered in the above-entitled action:

"This action came on regularly for trial on the 29th, 30th, 31st of July, and 1st, 2nd, 5th, 6th, 7th and 8th day of August, 1940. The said parties appeared by their attorneys, Messrs. Burke & Rawles, Esq., counsel for plaintiff, and Messrs. Preston & Gibson for defendant. A jury of twelve persons was regularly empanelled and sworn to try said action. Witnesses on the part of plaintiff and defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say: 'We, the Jury, find in favor of plaintiff, Louis L. Silver, against defendants on Count I of the complaint for the sum of $250.00 compensatory damages and no punitive damages.'

"'We, the Jury, find for the defendant, Bank of America National Trust & Savings Association, a corporation, on Count II of said complaint'. 'We, the Jury, find for the defendant, California Lands, Inc., a corporation, on Count II of said complaint'. 'We, the Jury, find in favor of plaintiff, Louis L. Silver, against the defendants on Count III of the complaint for the sum of $1881.60 compensatory damages.'

"And whereas, a motion for judgment, notwithstanding the verdict having been made and granted as to Count I of the complaint, and the court having ordered judgment entered in favor of defendants under said Count I of the complaint,

"Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff, Louis L. Silver, have and recover nothing from defendants, Bank of America National Trust & Savings Association, a corporation, and California Lands, Inc., a corporation, under Counts I and II of said complaint, and that said plaintiff, Louis L. Silver, have and recover from said defendants, Bank of America National Trust & Savings Association, a corporation, and California Lands, Inc., a coporation, the sum of One Thousand Eight Hundred Eighty-one and 60/100 ($1881.60) Dollars, together with his costs and disbursements incurred in this action, amounting to the sum of $466.85 Dollars."

Thereafter, both parties moved for a new trial. Plaintiff's motion on Count I was denied, and his motion on Count II was granted. Defendants' motion in respect to Count III was denied. Defendants then gave notice of appeal on October 21, 1940, from the order granting the motion for new trial on Count I, and from the judgment on Count III, and on the following day its request for a transcript under section 953a of the Code of Civil Procedure was filed, and an order made pursuant thereto. On December 11, 1940, transcripts of the clerk and reporter were filed in this court (File No. 3, Civ. 6563). On January 17, 1941, plaintiff filed in this court a clerk's transcript pursuant to his notice of appeal. No request for a transcript under said section was ever made by plaintiff, and no order for said transcript was ever made.

At the request of plaintiff, and under the purported authority of the provisions of said section, there was included and inserted in the reporter's transcript, by order of the trial court, the notice of appeal filed by plaintiff which also appears in the clerk's transcript filed later by plaintiff pursuant to the appeal by plaintiff.

Defendants now move this court for an order striking the notice of appeal from the reporter's transcript. Plaintiff also moves for an order consolidating said appeals.

[1-3] We are of the opinion that the motion of defendant should be granted. Although these appeals arise out of the same action, they are, for all purposes, as separate and distinct as though they were taken from judgments rendered in different actions. It is incumbent upon each appellant to prepare and file his own separate record, in the absence of an agreement to the contrary. Although section 953a, supra, permits the respondents, upon the settlement of the reporter's transcript, to "require the insertion therein of such other papers, files, documents, records and proceedings of said cause, including the proceedings on motion for a new trial, as they then desire to have incorporated therein," such language must be reasonably construed, and where the legislature has, under sections 951 and 952, provided for

the certification by the clerk of certain records to be included in his transcript on the appeal, it is unreasonable to presume or hold the legislature ever intended that the identical record supplied by the clerk shall be duplicated in the reporter's transcript. Said last-named sections expressly provide that the clerk's transcript shall contain a copy of the notice of appeal. It follows that the notice of appeal upon the part of plaintiff which appears in the reporter's transcript, filed by defendants, was improperly inserted therein, and should be stricken therefrom.

[4] The motion to consolidate the appeals should also be denied. As plaintiff's authorities indicate, this is a matter entirely within the discretion of the court. Such action may be taken in the matter of the preparation of briefs and oral argument, but we have never gone to the extent of compelling one appellant to supply the record on appeal to another, in the absence of a stipulation to that effect. We doubt our authority to do so.

The motion to strike is granted. The motion to consolidate is denied

We concur: PULLEN, P. J.; THOMPSON, J.

43 Cal.App.2d 759

EDELSON v. HIGGINS.

Civ. 12907.

District Court of Appeal, Second District, Division 2, California.

March 28, 1941.

Rehearing Denied April 21, 1941.

Hearing Denied May 26, 1941.

1. Automobiles 🔑155

A motorist was not bound to sound his horn while driving on private driveway near motorist's home. St.1937, p. 169, § 671.

2. Automobiles 🔑155

Even if motorist while driving automobile on private driveway near motorist's home veered slightly to the left, thereby driving upon pedestrian walk on adjacent property where 5½ year old child lived, such conduct did not constitute actionable negligence which would render motorist liable for injuries sustained when child suddenly ran into side of automobile.

3. Evidence 🔑359(3)

In action for personal injuries, admitting in evidence photographs taken two days after accident was not error, where photographs were offered merely to illustrate testimony, and trial court, in effect, placed such limitation upon offer at time of reception of photographs.

4. Evidence 🔑359(3)

Photographs taken after an accident may be used to illustrate testimony in an action for injuries allegedly sustained in the accident.

5. Evidence 🔑380

Testimony that photographs correctly represented conditions as they existed at time of accident was a sufficient foundation for introduction of photographs in evidence in personal injury action.

6. Automobiles 🔑245(4)

A motorist who was traveling between 3 and 5 miles per hour on motorist's private driveway between homes of motorist and a 5½ year old child was entitled to a directed verdict in action for injuries allegedly sustained when child suddenly ran into side of motorist's automobile, where child was not within motorist's view prior to accident. St.1937, p. 169, § 671.

7. Negligence 🔑4

The law requires only that one act as an ordinarily prudent and cautious person would act under similar circumstances.

8. Trial 🔑178

An order directing jury to return verdict for defendant in action for negligence in effect determined that, granting truth of testimony, it was not sufficient to justify a decision that defendant was negligent.

9. Trial 🔑178

The question presented by a motion for directed verdict is whether, under established rules, in view of circumstances, the evidence is legally sufficient, and comparative value of testimony of witnesses is not involved but only its effect after conceding truth of all witnesses.

10. Negligence 🔑136(14)

Where evidence in action for alleged negligence did not disclose a substantial conflict as to defendant's negligence, a directed verdict for defendant was proper.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Fredele Edelson, etc., against William M. Higgins for personal injuries allegedly sustained when plaintiff was struck by defendant's automobile. From an adverse judgment, plaintiff appeals.

Affirmed.

Albert A. Horn, of Los Angeles, for appellant.

Nourse & Jones, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff, aged 5½ years, by her guardian ad litem, takes this appeal from a judgment following an unfavorably directed verdict in an action for damages for personal injuries.

On Saturday, April 8, 1939, at about 10:30 a. m. defendant drove his car from his garage upon a 97-inch driveway which extended along the side of the flat building in which he resided. Plaintiff's home stands south of the driveway. Between defendant's driveway and plaintiff's home there is a concrete strip used as a pathway for entrance to the rear of plaintiff's home. It is adjacent to the driveway although not a part of defendant's lot. While defendant was moving on the driveway, about forty-five feet from his garage, in low gear, at from about three to five miles per hour, plaintiff ran out from a three-foot space between a cypress tree and the front of her home and into the front door of the defendant's car at the driver's seat. She suffered injuries from the impact.

Defendant did not sound his horn. He had lived in the same flat for seven years and knew that the children played on the front lawns; but he knew also that he was traveling on his own driveway where no one was in view prior to plaintiff's collision with his car. He was traveling so slowly that he stopped within a foot or two.

Plaintiff's mother was not at home at the time of the accident. Plaintiff was disqualified as a witness by reason of her tender years and lack of understanding of the nature of an oath. Her sister, Rita, 12½ years of age, testified that she was in the front room of their flat when the accident occurred; that she heard her sister scream, ran out and saw her bleeding as she lay on the ground alongside the car. She assisted her into the home and rendered first aid. She testified that the car was partly on the walk and partly on the driveway. Mrs. Florence Sonnenberg, who resided nearby, testified that when she arrived at the driveway the car "was standing pretty far into the walk—I wanted to go in through the back * * * I couldn't because there was a tree also in the way and I couldn't get in because the car was standing * * * mostly on the walk". Mrs. Fannie Gallenko, who lived in the Higgins flat building, testified that on hearing screams, she looked and saw Mr. Higgins standing near his car and the child bleeding. "He requested me to call a physician." She also testified that the car was very close to plaintiff's house * * * near the tree.

Plaintiff's contentions are (1) that defendant's failure to sound the horn created an issue as to whether or not he was negligent; (2) that the photographs taken two days after the accident were not competent evidence and were prejudicial; (3) that the plaintiff may not be guilty of contributory negligence by reason of her extreme youth; and (4) that the court erred in directing a verdict.

[1, 2] (1) Section 671 of the Motor Vehicle Code, St.1937, p. 169, in substance provides that the driver of a motor vehicle shall give audible warning with his horn when operating his car upon a highway. There is no basis for the contention that defendant was under duty to sound his horn while driving upon his private driveway. That obligation does not arise while driving upon a public highway except where danger of injuring another is obvious. In Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86, a nine year old boy ran from behind a street car into the path of defendant's truck and was injured by the front wheel before he could be seen by its driver. At page 368 of 111 Cal.App., at page 575 of 295 P., the court said: "* * * there was no danger apparent, therefore, under such circumstances, it cannot be fairly maintained that a duty was imposed upon the driver of the truck as a reasonably prudent person to sound his horn." Even though defendant might have veered a few inches to the left, thereby driving upon the adjacent pedestrian walk, that would not constitute actionable negligence.

[3-5] (2) There was no error in admitting photographs in evidence. They were offered merely for the purpose of illustrating the testimony. The court in effect placed that limitation upon the offer at the time of their reception. It is the rule that photographs taken some time after an accident may be used for the purpose of illustration. Hayes v. Emerson, 110 Cal.App. 470, 294 P. 765; Miller v. Silvester, 140 Cal.App. 345, 35 P.2d 387. Defendant testified that each photograph offered correctly represented the conditions and objects shown as they existed at the time of the accident. This was a sufficient foundation for their introduction. Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Miller v. Silvester, supra.

[6, 7] (3) The contention that the court rules that plaintiff was guilty of contributory negligence is a false issue. There was no intimation from the trial judge that the child was guilty of contributory negligence. The court's order was based upon the want of any negligence on the part of defendant. He acted as an ordinarily prudent and cautious person acts under similar circumstances. That is all the law requires. Gates v. McKinnon, Cal.App. 108 P.2d 934; Allred v. Pioneer, etc., Co., 179 Cal. 315, 176 P. 455.

[8-10] (4) In directing the jury to return a verdict, the effect of the court's order was to determine that, granting the truth of all of the testimony, it was not sufficient to justify a decision that defendant was negligent. The question presented by such motion is whether, under the established standards or guiding rules, in view of the circumstances, the evidence is legally sufficient. The comparative value of the testimony of the several witnesses is not involved but only its effect after conceding the truth of all witnesses. 64 C.J. 421. Since the evidence does not disclose a substantial conflict as to defendant's negligence, the directed verdict was not error.

The attempted appeal from the order denying the motion for new trial is dismissed.

Judgment affirmed.

I concur: McCOMB, J.

WOOD, Justice (dissenting).

I dissent. Since the appeal is from a judgment following a directed verdict the evidence must be considered in the light most favorable to plaintiff. The houses in which the plaintiff and the defendant lived were four-family flat buildings approximately ten feet apart. A concrete pavement covered the ground on all of the space between the buildings, which was divided into four sections each thirty inches in width. The northerly three sections were used by defendant as a driveway and the southerly section, belonging to the property where plaintiff lived, was used as a pedestrian passageway. The pavement was practically level from the northerly to the southerly edge. Although defendant knew that "lots of children" were accustomed to play on the lawns in front of the premises, he did not sound his horn as he drove his car along the driveway. Several witnesses testified that they arrived immediately after the accident and found defendant's car on the pedestrian passageway, one of them stating that it "was very close to the house" where plaintiff lived.

If reasonable minds might draw different conclusions on the question of the alleged negligence of the parties the issues should be left to the determination of the jury. Wise v. Stott, 114 Cal.App. 702, 300 P. 883. Although there is no direct statutory requirement that automobile horns must be sounded in private driveways, it is nevertheless the duty of the driver of an automobile, wheresoever he may be driving, to sound his horn in circumstances which would require a reasonably prudent person to sound a warning of his approach. Moss v. Stubbs, 111 Cal.App. 359, 368, 295 P. 572, 296 P. 86. In my opinion a finding by a jury that defendant was negligent in failing to sound his horn and in driving upon the pedestrian passageway could not be held to be so unreasonable as to require that a verdict based upon such finding be set aside.

POHLE v. CHRISTIAN et al.*

Civ. 6492.

District Court of Appeal, Third District, California.

April 2, 1941.

Rehearing Denied May 2, 1941.

Hearing Granted May 29, 1941.

1. **Officers ⇨72(1)**

Under constitutional and statutory provisions authorizing personnel board to adopt rules of procedure for suspension and dismissal of state civil service employees and declaring that an employee may be laid off only with approval of the board, the executive officer appointed by the board may not suspend or place any employee on the lay-off list without first obtaining consent of the board therefor. St.1933, p. 712, § 14a; Const. art. 24, § 2(b, c), 3(a).

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* Subsequent opinion 130 P.2d 417.

2. Officers 🔑72(1)

Property auditor in the Department of Finance could not be suspended in interest of economy and placed on lay-off list by Director of Finance without approval of personnel board, and was entitled to restoration of position and payment of minimum compensation from date of lay-off, together with pay for accumulated vacation time to which he was entitled. St.1933, p. 712, § 14a; Const. art. 24, §§ 2(b, c), 3(a).

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus proceeding by Edwin W. Pohle against E. H. Christian and others, to compel payment of unpaid salary and to compel reinstatement to a civil service position. From portion of judgment denying reinstatement, the petitioner appeals.

Reversed with directions.

Anthony J. Kennedy, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondents.

THOMPSON, Justice.

The petitioner has appealed from that portion of a judgment which was rendered by the trial court in an application for a writ of mandamus denying him reinstatement to his permanent civil service position as property auditor of the department of finance, and refusing to compensate him for twenty-seven and a half days of service during which he was absent on vacation. In the same proceeding the petitioner was allowed $660 as unpaid salary, being the difference between the amount which he was actually paid and the minimum amount of $205 per month which was fixed as salary for his position. No appeal was taken from the last-mentioned portion of the judgment and it has become final.

The petitioner was appointed November 9, 1931, and served continuously thereafter as property auditor in the department of finance of the state of California until June 30, 1937, when he was notified in writing by the director of finance, pursuant to section 14a of the State Civil Service Act, Stats.1933, chap. 214, p. 712, Deering's Supp. to Laws of Calif. of 1933, p. 1263, Act 1400, that his position "will be abolished in the interests of economy, effective July 1, 1937", and that his name would then be placed on the "lay-off list" of employees as provided by the section of the act last mentioned. No approval of the personnel board to abolish the office of the petitioner was procured.

The chief issue on this appeal is whether an employee may be suspended and placed on the "lay-off list" without the approval of the personnel board.

In support of the contention that the director of finance is authorized to abolish the petitioner's office, without first obtaining the consent of the personnel board, reliance is placed on article XXIV, section 2(c) of the California Constitution which was adopted as an initiative measure in 1934. That article provides for the adoption of a civil service merit system for state employees. It requires the appointment of a state personnel board of three members consisting of the director of finance, the state controller and the legislative counsel of the state. Section 2(b) provides that the board shall annually elect one of its members as president of the board. Section 2(c), upon which the respondents rely, then provides:

"The board shall appoint and fix the compensation of an executive officer who shall be a member of the State civil service but not a member of the board.

"Said executive officer shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder or which hereafter by law may be vested in the board except that the adoption of rules and regulations, the creation and adjustment of classifications and grades, and dismissals, demotions, suspensions and other punitive action for or in the State civil service shall be and remain the duty of the board and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective."

Section 3(a) provides: "Said board shall administer and enforce, and is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any other State officer or agency under, Chapter 590 of the California Statutes of 1913 as amended or any and all other laws relating to the State civil service as said laws may now exist or may hereafter be enacted, amended or repealed by the Legislature."

Section 14a of the Civil Service Act, under which the petitioner was suspended, reads in part: "Whenever it is necessary because of lack of work or lack of funds, or whenever it is advisable in the interests of economy, to reduce the staff of any department or agency in the State service, the appointing power *may with the approval of the commission* lay off employees according to the procedure set forth in this act and the rules and regulations thereunder."

Pursuant to the authorization conferred upon the board by article XXIV, section 2 (c), of the Constitution, rule 16, section 1, was adopted as follows: "When lay-offs may be made. Whenever it is necessary because of lack of work or because of lack of funds, or whenever it is advisable in the interest of economy to reduce the staff of any department or agency in the service, the appointing power may, *with the approval of the board,* lay off employees according to the procedure herein set forth."

[1] We are of the opinion the petitioner was unlawfully placed on the "lay-off list" of employees and thereby deprived of the benefit of his permanent civil service status, on July 1, 1937, without the necessary approval of the personnel board. Art. XXIV, sec. 2(c), Const.; sec. 14a, Civil Service Act; Spaletta v. Kelly, 30 Cal.App.2d 656, 661, 86 P.2d 1074. By the clear terms of the constitutional provision last cited, the board has the exclusive authority to adopt reasonable rules and regulations governing the procedure with respect to the "creation and adjustment of classifications and grades, and dismissals, demotions, *suspensions* and other punitive action". The board actually did adopt rule 16 specifically providing that civil service employees could be laid off or suspended, only "with the approval of the board". That reasonable administrative rule is a mere reiteration of the same requirement provided for by the legislature in section 14a of the Civil Service Act. It will be observed that the authority conferred by article XXIV, section 2(c) of the Constitution upon the executive officer to "perform and discharge all of the powers, duties, purposes, functions and jurisdiction" of the board is specifically limited therein to the exclusive rights of the board above mentioned. Since the Constitution and the statute authorize the board to adopt rules of procedure with respect to suspensions and dismissals of employees, and the legislature has declared that an employee may be laid off only with the approval of the board, it seems clear that the executive officer is without authority to suspend or place an employee upon the lay-off list without first obtaining the consent of the board therefor. This court reached that very conclusion in the Spaletta case, supra, in which a hearing by the Supreme Court was denied.

[2] It follows that the petitioner was wrongfully deprived of his office as property auditor of the department of finance on July 1, 1937, and that he is therefore entitled to be restored to that position as of that date with the minimum compensation of $205 per month which was fixed therefor, together with pay for the accumulated vacation time to which he was entitled, which the court determined was twenty-four and a half days.

That portion of the judgment from which the appeal was perfected is reversed and the court is directed to render judgment in accordance with this opinion.

We concur: PULLEN, P. J.; TUTTLE, J.

43 Cal.App.2d 818

PEOPLE v. CASAGRANDA.

Cr. 3424.

District Court of Appeal, Second District, Division 1, California.

March 31, 1941.

1. Kidnapping 🔑6

In prosecution for child stealing, instructions that the offense involves three necessary elements, including the taking or enticing away of minor child, malicious intent or use of fraud or force, and intent to detain and conceal child from its parents, fully and clearly informed jury on elements of the offense. Pen.Code, § 278.

2. Kidnapping 🔑1

In statute penalizing "maliciously, forcibly or fraudulently" taking or enticing away minor child, "forcibly" does not necessarily imply the use of physical force, and "maliciously" imports a wish to vex, annoy or injure another person, or intent to do a wrongful act established either by proof or presumption of law, and "fraudulently" is very broad in its meaning, and no definite and invariable rule can be laid down as a general proposition defining "fraud", which includes all surprise, trick, cunning, dissembling and other unfair ways by which another is deceived. Pen.Code, § 278.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud", "Fraudulently", "Forcibly" and "Maliciously".

3. Kidnapping ⚷5

Since language of statute penalizing "maliciously, forcibly or fraudulently" taking or enticing away minor child is in the disjunctive, it is sufficient to sustain conviction, if proof shows defendant's act was either malicious, forcible or fraudulent, and prosecution is not bound to prove all three. Pen.Code, § 278.

See Words and Phrases, Permanent Edition, for all other definitions of "Maliciously, Forcibly or Fraudulently".

4. Kidnapping ⚷5

As proof of intent to detain and conceal, as an element of offense of child stealing, jury should consider acts and conduct of parties, together with all circumstances both before and after the acts complained of. Pen.Code, § 278.

5. Criminal law ⚷1173(2)

In prosecution for child stealing, where instructions fully and fairly informed jury of elements involved in the offense, and evidence conclusively established that defendant detained and concealed child, "miscarriage of justice" did not result from failure to instruct that intent to detain and conceal was mentioned in statute in the conjunctive, though court had pointed out that "maliciously, forcibly or fraudulently" in the statute was in the disjunctive. Pen.Code, § 278.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

6. Criminal law ⚷808½, 829(6)

An instruction on the extent to which intoxication is an excuse for crime in the words of a controlling statute was ample, and refusal of requested instruction on the same subject was not prejudicial. Pen.Code, § 22.

7. Criminal law ⚷1023(5)

An attempted appeal from verdict of guilty was dismissed.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Edwin Casagranda was convicted of child stealing, and he appeals from the conviction, the verdict, and the order denying motion for new trial.

Appeal from verdict dismissed, and judgment and order affirmed.

Ward Sullivan, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was convicted by a jury of the offense of child stealing (defined by § 278 of the Penal Code), as charged in an information, to-wit: that he wilfully, unlawfully, feloniously, maliciously, forcibly and fraudulently took and enticed away a five year old boy with intent to detain and conceal such child from his parents. Appellant admitted a prior conviction of the crime of larceny from the person, and prosecutes this appeal from the verdict of the jury finding him guilty of the crime charged, from the judgment of conviction, and also from the order denying his motion for a new trial.

The testimony of two witnesses for the prosecution was to the effect that in the afternoon of July 15, 1940, the child James was seen in company with appellant in the neighborhood where the parents of the child resided; that one of these witnesses was acquainted with the parents and a discussion which he had with them that afternoon resulted in the mother reporting the matter to the police department. Just before six o'clock in the afternoon of that day, four police officers went to room 208 of the Herald Hotel, knocked on the door and heard a child crying. The officers were refused admission and, since the door was locked, they kicked it in. Upon entering, they found appellant partly dressed standing in the center of the room, and the child standing a few feet from him.

The parents testified they were not acquainted with appellant, had never seen him prior to his arrest, and had not given him or anyone else permission to take their child to the said hotel on that day.

Appellant, when questioned after his arrest, denied he had taken the child to his room in the hotel and stated the child followed him; further, that he was drunk and did not know what he was doing.

Officer Gowling testified that he talked to the child in appellant's presence at the time of the arrest and "the boy said the man took him up to his room and then he wanted to go home, and the door was locked and he couldn't get out". This officer also testified that appellant appeared to have been drinking but he could not say whether or not he was drunk. Officer Andrews stated that appellant admitted he committed acts of degeneracy when he was drinking, but denied having touched the child James. So far as is shown by the record, the child was unharmed but frightened.

Appellant took the stand in his own defense and testified that on July 14th, he started drinking around noon; that about three o'clock he went to the apartment of a Mr. Wierman where he remained drinking until about seven o'clock when he left to call upon a woman friend, who lived in the neighborhood, but she was not at home; and that "I hung around the neighborhood then, I was drinking, and was in different beer places drinking and waiting to see if she would come home, up until about eleven o'clock. I kept drinking all evening and she didn't come home, so I decided to get a room down there close and go to see her the next day, so I went to a place, a hotel, and got a room. * * * I slept about three hours, I guess, something like that, and got up around eight o'clock" on Monday morning, July 15, 1940, and started drinking again; that he went to call on his woman friend about noon "and she had to work and told me to go and get some sleep, and that is all I remember * * * I presume it was about 5:30, I don't know, when I woke up, the officers were striking me". He further testified that he had no recollection of having returned to the hotel that afternoon or of seeing the child James.

The witness Mauer, who said she had known appellant for about ten years, testified with regard to appellant's state of intoxication that she spent a couple of hours in his room on the afternoon of July 15th; that he appeared to have been drinking heavily and she did not believe he recognized her; that when she left at five o'clock that day, he "was about at the passing out stage then"; that he was lying on the bed "in a kind of a stupor" with a towel on his head; that because the day was hot the windows in his room were open; that when she went she left the door slightly open. This last bit of evidence was undoubtedly offered to corroborate appellant's statement that the child "followed" him into his room.

Appellant urges (1) that "the court erred in refusing (his) proposed instruction to the effect that even though the jury believed he intended to conceal James * * from his parents, they could not convict him of the offense charged unless they further believed that such intent to conceal was accompanied by an intent to detain him"; and (2) "the court erred in refusing appellant's instruction to the effect that even though the jury believed he enticed away the child, if they believed he was at the time so under the influence of intoxicating liquor that a felonious intent could not be formed in his mind, he was entitled to a verdict of not guilty".

Appellant here maintains, in connection with his first point, that the offense of child stealing, as defined by section 278 of the Penal Code, involves three elements, to-wit:

1. The taking or enticing away of a minor child;

2. A malicious intent, or the use of force or fraud in the taking;

3. An intent to detain and conceal the child from its parents; and that since the court singled out the second element of the offense in instructing the jury that "As the language of the statute is in the disjunctive it is sufficient if the proof showed that the defendant's act was either malicious, forcible or fraudulent. The prosecution is not bound to prove all three"; that he was entitled, as a matter of right, "to the requested instruction which in effect pointed out that the language of the statute, so far as the third element of the offense was concerned, namely, 'an intent to detain and conceal the child from its parents', was in the conjunctive—that both must be found to exist before the jury could return a verdict of guilty".

With respect to this subject, the following instructions were given to the jury by the trial court:

[1] "You are further instructed that every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from his parent, guardian, or other person, having the lawful charge of such child, is a violation of section 278 of the Penal Code, a felony.

(Instruction requested by plaintiff and given.)

"The offense of child stealing as charged in the information involves the following necessary elements:

"(a) The taking or enticing away of a minor child.

"(b) A malicious intent, or the use of fraud or force in the taking.

"(c) An intent to detain and conceal the child from its parents.

"Therefore, if, after a fair and full consideration of all the evidence in this case, you should entertain a reasonable doubt as to the existence of any one or more of these elements of the offense, it will be your duty to find the defendant not guilty. (Instruction requested by defendant and given.)

[2-4] "The word 'forcibly' as used in this statute, does not necessarily imply the use of physical force. The word 'maliciously' as used in the statute, imports a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law. The word 'fraudulently' is very broad in its meaning. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived. As the language of the statute is in the disjunctive it is sufficient if the proof showed that the defendant's act was either malicious, forcible or fraudulent. The prosecution is not bound to prove all three. The statute contains an element 'with intent to detain and conceal'. As proof of that element the jury will consider the acts and conduct of the parties, together with all the circumstances of the case both before and after the act complained of. (Instruction requested by plaintiff and given.)"

[5] These instructions fully and fairly informed the jury with regard to the elements involved in the offense with which appellant was charged, and since the evidence adduced at the trial herein conclusively established the fact that appellant did detain and conceal the child, no miscarriage of justice resulted from the failure of the court to give the instruction requested by appellant.

With respect to appellant's second point, the jury was instructed as to the extent to which intoxication is an excuse for crime in the words of section 22 of the Penal Code, to-wit: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

[6] Since this instruction amply covered the matter, it is clear that appellant was not prejudiced by the court's refusal to give the requested instruction upon the same subject.

[7] The attempted appeal from the verdict is dismissed. The judgment and order appealed from are, and each of them is, affirmed.

We concur: DORAN, J.; WHITE, J.

43 Cal.App.2d 839

STILES v. BODKIN et al.

Civ. 2634.

District Court of Appeal, Fourth District, California.

April 1, 1941.

1. Appeal and error ⚿110

Order denying motion for new trial is not appealable. Code Civ.Proc. § 963.

2. Appeal and error ⚿907(3)

On appeal on judgment roll, the District Court of Appeal was required to presume in support of the judgment that every necessary element not refuted by the judgment roll was adequately proved.

3. Bills and notes ⚿335

Where note representing unpaid purchase price of tract located in proposed subdivision was assigned to assignee who had knowledge of existence of contract under which vendors agreed to construct improvements on the tract and knowledge that the improvements had not been constructed and that subdivision had been practically abandoned, and assignee represented to makers that assignee was holder in due course and induced makers to execute renewal note which the assignee assigned to holder who had full knowledge of the facts, holder and his predecessors in interest were not "purchasers in due course" nor "innocent holders for value", and took subject to all equities in favor of the makers.

See Words and Phrases, Permanent Edition, for all other definitions of "Innocent Holder for Value" and "Purchaser in Due Course".

4. Appeal and error ⚷907(3)

On appeal on judgment roll alone, there being no bill of exceptions or reporter's transcript, the District Court of Appeal was required to assume that trial court's failure to make certain finding was due to fact that there was no evidence produced which would justify such finding.

5. Deeds ⚷94

Where vendors contracted to construct improvements on tract which purchasers had contracted to buy, and later purchasers accepted deed and executed trust deed securing unpaid purchase price, provisions of the contracts were not "merged" in the deed and trust deed which did not refer to the vendors' obligation relating to improvements, so as to preclude purchasers from subsequently relying on the terms of the contract relating to improvements.

See Words and Phrases, Permanent Edition, for all other definitions of "Merge".

6. Estoppel ⚷53, 54

"Waiver" implies a knowledge of an existing right or benefit and an actual intent to abandon it, or circumstances evidencing such an intent.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

7. Estoppel ⚷54

Where a party has no knowledge of facts upon which claim of waiver is based, his conduct generally does not constitute "waiver" of his rights.

8. Vendor and purchaser ⚷42

Where note representing unpaid purchase price of tract located in proposed subdivision was assigned to assignee who had knowledge of existence of contract under which vendors had agreed to construct improvements on tract and knowledge that subdivision had been practically abandoned, and assignee falsely represented to makers that assignee was holder in due course, makers who, in reliance on assignee's misrepresentation, executed renewal note to assignee did not thereby "waive" right to claim failure of consideration as result of vendors' failure to construct the improvements.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

9. Contracts ⚷98
Limitation of actions ⚷40(2)

It is not incumbent upon one who has been defrauded to go into court and seek relief, but he may abide his time and when enforcement is sought excuse himself from performance by proof of fraud, and neither a limitation statute nor doctrine of laches will operate to bar defense.

10. Fraud ⚷31

Party defrauded may obtain cancellation or rescission, affirmative relief by action to recover compensation for injury sustained by the fraud, or defensive relief whereby the fraud is set up to defeat action brought to enforce an apparent obligation.

11. Bills and notes ⚷115
Limitation of actions ⚷40(2)

Right of makers to defend action on note on ground of fraud could not be barred by laches or by limitation.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Charles W. Stiles against Henry G. Bodkin and others. From a judgment cancelling certain promissory notes and a trust deed, plaintiff appeals, and from an order denying plaintiff's motion for new trial, plaintiff attempts to appeal.

Judgment affirmed. Attempted appeal from the order dismissed.

Frank L. Perry, of Redondo Beach, for appellant.

Charles S. Gass and Henry G. Bodkin, in pro. per., both of Los Angeles, for respondents.

MARKS, Justice.

[1] This is an appeal from a judgment cancelling promissory notes and a deed of trust on property of Henry G. Bodkin and

Ruth Bodkin to whom we will refer as the defendants. Plaintiff has attempted to appeal from an order denying his motion for new trial. Such an order is not appealable. Sec. 963, Code Civ.Proc.

[2] The appeal is on the judgment roll. In the absence of the evidence we must presume, "in support of the judgment, that every necessary element of the case, which is not refuted by the judgment roll, was adequately proved". E. E. McCalla Co. v. Sleeper, 105 Cal.App. 562, 288 P. 146, 148.

Some time prior to June, 1928, defendants entered into a contract with Title Insurance & Trust Company, trustee for Miramar Estates under a subdivision trust, whereby defendants agreed to purchase the real property in question for $9,500. Concurrently defendants and Title Insurance & Trust Company and the board of syndicate managers of Miramar Estates entered into a separate contract binding the seller and Miramar Estates to pave certain streets and construct sidewalks and other improvements in the tract in the vicinity of the property and in the streets on which it abutted. On June 29, 1928, after half of the purchase price had been paid, the property was deeded to defendants who executed a promissory note for $4,750 secured by a deed of trust on the property. At that time the improvements had not been installed but both the Title Insurance & Trust Company and Miramar Estates promised they would be installed in accordance with the contract. The note was made payable to Julia E. Murton, an agent for Title Insurance & Trust Company and Miramar Estates at the request of the former. She immediately endorsed the note and delivered it and the trust deed to Title Insurance & Trust Company which thereafter delivered the instruments to Arthur A. Weber, who was attorney for and a member of the board of syndicate managers of Miramar Estates. He took with full knowledge of the contract to construct the improvements and the subsequent promise to construct them. At the time he had notice that the improvements had not been installed and that they could not be installed because of the financial condition of Miramar Estates. Defendants had no notice or knowledge of this financial condition.

Title Insurance & Trust Company and Miramar Estates continued to represent to defendants that the improvements would be installed within a reasonable time. Defendants believed and relied on those representations and took no action to cancel the note and deed of trust.

The promissory note was payable in two equal instalments, the first on March 29, 1929, and the second on March 29, 1930.

On April 4, 1930, after both instalments of the promissory note were due, Arthur A. Weber delivered it and the deed of trust to Mrs. M. W. Stiles as collateral security for the payment of a promissory note executed by Miramar Sales Corporation to George L. Stiles, her son, who had been sales manager for Miramar Estates. This note had been assigned by George L. Stiles to his mother. Mrs. Stiles had knowledge of the contract and promises to construct the improvements and knew they formed part of the consideration for the promissory note and deed of trust; that the improvements had not been installed; that the subdivision had been "practically abandoned".

When the note became due defendants refused to pay it on the ground that the improvements had not been installed, and demanded that they be installed or that the note and deed of trust be cancelled. The trial court found "that it is true that Mrs. M. W. Stiles then and there through her agents, falsely represented to said Henry G. Bodkin and Ruth W. Bodkin that she was a holder in due course of said note for $4,750, and that she had parted with value for said note prior to its maturity, without knowledge of the fact that said Title Insurance and Trust Company, a corporation, and said board of syndicate managers of Miramar Estates Trust S–7170 had agreed and promised to install said street work, but had in fact failed to do so; that it is true that at said time said Henry G. Bodkin and Ruth W. Bodkin believed said statements and relied thereon, and because of their reliance thereon were induced to and did execute the promissory note sought to be foreclosed by the present action".

Relying on and believing these representations defendants paid $2,375 on account of the principal of the promissory note, and on March 28, 1934, executed another note for the unpaid balance of $2,375. This note became due on March 28, 1935. On November 29, 1935, Mrs. Stiles assigned this note to plaintiff who had full knowledge of all of the facts we have detailed and that no consideration had been given for the note except that it was a renewal of one-half of the note for $4,750.

The trial court further found that if the contract for installation of the improvements had been performed and the subdivision had not been abandoned, the lot purchased by defendants would have been of the value of $9,500, but because the improvements had not been installed "the value of said lot at the time of the execution of the said promissory notes and each of them, and at the time of the purchase of said property, and at the present time, is no greater than $1,500"; that the consideration for the $2,375 note entirely failed; that defendants owed nothing by reason thereof.

The judgment decreed the cancellation of the deed of trust, the promissory note for $2,375 and the note for $4,750.

[3] From the foregoing findings we must conclude that plaintiff and his predecessors in interest were not purchasers in due course and were not innocent holders for value, but took subject to all equities in favor of defendants. Bernstein v. Pacific States Savings & Loan Co., 19 Cal. App.2d 679, 66 P.2d 699.

Plaintiff argues that by the surrender of the original contract providing for the installation of the improvements, the acceptance of the deed and the execution of the deed of trust, the provisions of the contract were merged in the deed and deed of trust and defendants thereby are precluded from relying on the terms of the contract.

[4] There is no finding that the contract was ever surrendered by defendants. In the absence of a bill of exceptions or a reporter's transcript we are required to assume that the omission of the trial court to find on the question of the surrender of this contract "was due to the fact that no evidence was produced which would justify such findings". Ouzoonian v. Vaughan, 194 Cal. 139, 228 P. 8, 11.

[5] In the case of Mills v. Richmond Co., Inc., 56 Cal.App. 774, 206 P. 486, 487, it was urged that the covenants to install street improvements in a contract were merged in the deed conveying the property to the purchaser. In disposing of this contention, the court said: "It contends that a deed made in execution of a contract for the sale of land merges the provisions of the contract therein. As to the quantity of land described or the identical body of land to be conveyed, it may be conceded that respondent's point is good. Riley v. North Star Mining Co., 152 Cal. 549, 556, 93 P. 194. But there is no such dispute involved in this case. As to the matter of a clear title, the payment of taxes, the grading of streets, the placing of sidewalks, and curbs, one would not expect to see anything on those subjects in a deed. If such matters existed between the parties they were collateral to the deed and may be inquired into. Blahnik v. Small Farms Improvement Co., 181 Cal. 379, 383, 184 P. 661." See, also, Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356; National City Finance Co. v. Lewis, 216 Cal. 254, 14 P.2d 298.

Plaintiff claims that defendants waived the right to claim failure of consideration for the note and deed of trust because they gave the new note to Mrs. Stiles who was a stranger to the original contract to install the improvements. As we have already seen, Mrs. Stiles was not an innocent holder for value, but took the note and deed of trust subject to the equities resting in defendants. The trial court found that she secured the new note by misrepresentation of the facts and the false claim that she purchased the note and deed of trust before maturity, without notice and for value; that defendants believed and relied upon these misrepresentations and gave the note as a result of them. This amounted to a finding of fraud on the part of Mrs. Stiles in obtaining the new note.

[6-8] Waiver implies a knowledge of an existing right or benefit and an actual intent to abandon it (Craig v. White, 187 Cal. 489, 202 P. 648), or circumstances evidencing such an intent. Jones v. Maria, 48 Cal.App. 171, 191 P. 943. Where a party has no knowledge of the facts upon which the claim of waiver is based his conduct ordinarily does not waive his right. 25 Cal.Jur. 926–928. Here, Mrs. Stiles concealed the true facts from defendants and misrepresented facts to them. Under such circumstances we cannot as a matter of law hold that defendants waived any rights in executing the new note.

[9-11] Plaintiff suggests that defendants' rights are barred by laches and the statute of limitations. A similar contention was held to be without merit in J. B. Colt Co. v. Freitas, 76 Cal.App. 278, 244 P. 916, 919, where the court said: "Where fraud is relied upon as a defense merely, 'neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for so long as

the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud.' [In re] Estate of Cover, 188 Cal. 133, 140, 204 P. 583, 587. 'Where no affirmative relief is sought, it is not necessary for him to have exercised an existing right to rescind.' 12 Cal.Jur. 786; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761. 'There are three methods by which in cases like the present a party defrauded may obtain relief: (1) Cancellation or rescission,' etc.; '* * * (2) Affirmative relief by an action to recover * * * compensation for the injury sustained by the fraud; * * * (3) Defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability.' Toby v. Oregon Pacific R. R. Co., 98 Cal. 490, 498, 33 P. 550, 553; Field v. Austin, 131 Cal. 379, 382, 63 P. 692."

The judgment is affirmed. The attempted appeal from the order denying the motion for new trial is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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43 Cal.App.2d 802

PEOPLE v. KAYE et al.

Cr. 2064.

District Court of Appeal, First District, Division 1, California.

March 31, 1941.

Rehearing Denied April 15, 1941.

1. Criminal law 🔑409

In trial for murder and robbery, corpus delicti *held* sufficiently proved to permit introduction in evidence of defendants' extrajudicial admissions.

2. Criminal law 🔑409

The corpus delicti must be proved by evidence outside of defendant's declarations and admissions.

3. Criminal law 🔑409, 517(4)

To authorize reception and jury's consideration of evidence of defendant's extrajudicial confessions or admissions, the prosecution need not establish corpus delicti by proof as clear and convincing as is required to establish defendant's guilt, but slight or prima facie proof is sufficient.

4. Criminal law 🔑563

The corpus delicti may be proved by circumstances shown in evidence or inferences from facts shown, and direct or positive evidence is not essential.

5. Criminal law 🔑563

To establish corpus delicti, it is not necessary that evidence thereof in itself connect defendant with perpetration of offense charged.

6. Criminal law 🔑535(2)

Proof of corpus delicti may consist of testimony of defendant voluntarily becoming witness in case and testifying to facts tending to prove corpus delicti.

7. Criminal law 🔑680(2)

While it is ordinarily proper practice to establish corpus delicti as early in trial as practicable, order of proof is discretionary with trial court, and where corpus delicti is finally established, variation in order of proof cannot be said to result in any prejudice to defendant's rights.

8. Criminal law 🔑535(2)

To warrant conviction of crime, corpus delicti must be proved to moral certainty and beyond reasonable doubt, but it need not be so proven before introduction of other evidence corroborating proof thereof or strengthening reasonable inferences therefrom.

9. Homicide 🔑228(1)

In murder trial, evidence showing prima facie that deceased met death by means of another's unlawful act is sufficient to prove corpus delicti.

10. Criminal law 🔑422(1)

In trial of several defendants for same crimes, extrajudicial statement of each defendant to the police can be considered only as against such defendant.

11. Criminal law 🔑422(1)

In trial of several defendants for same crimes, extrajudicial statements to police by defendant refusing to take stand as prosecution witness were admissible only against himself.

12. Criminal law 🔑1134(2)
On appeal from conviction of several defendants for same crimes, extrajudicial statements to police by defendant refusing to take stand as prosecution's witness and not appealing should not be considered.

13. Criminal law 🔑369(1, 3)
In trial of five persons for murder and robbery, testimony that witness was assaulted by three men, of whom he identified two as defendants, two days before alleged crime and near place at which defendants met their victims, and that gold watch, pawned on following day by another of defendants, was taken from witness by his assailants, was admissible as against identified assailants and such other defendant.

14. Criminal law 🔑1159(2)
To reverse convictions of crimes as not sustained by sufficient evidence, evidence must be such that appellate court can hold that there is not, on any hypothesis, sufficient substantial evidence to support conclusion reached by jury and trial judge.

15. Robbery 🔑24(1)
Evidence *held* sufficient to sustain conviction of robbery.

16. Homicide 🔑234(5)
In trial for murder and robbery of decedent, evidence *held* sufficient to justify inference by jury that blow which caused decedent's death was struck by one defendant in codefendants' presence as part of defendants' preconceived plan to rob decedent, so as to warrant conviction of all defendants.

17. Homicide 🔑18(5)
Intent to kill is unnecessary to justify conviction for murder of one killed in commission of robbery by defendants.

18. Criminal law 🔑747
In trial for murder and robbery, jury could properly consider inconsistencies and direct contradictions between respective defendants' extrajudicial statements to police and their testimony on witness stand and inconsistencies and contradictions in their testimony.

19. Criminal law 🔑745
In trial of criminal case, jury was entitled to indulge in reasonable inferences based on evidence.

20. Homicide 🔑234(1)
Robbery 🔑24(1)
In prosecution of several persons for murder and robbery on theory of conspiracy to rob decedent, evidence *held* sufficient to sustain conviction of defendant not present when offenses were committed.

21. Indictment and information 🔑124(5)
Persons alleged to have jointly committed murder and robbery of one person and robbery of another were properly charged with all such crimes in same indictment.

22. Criminal law 🔑620(2)
Persons properly charged in same indictment with crimes of murder and robbery of one person and robbery of another, alleged to have been jointly committed by all of such persons, were properly tried jointly. Pen.Code, §§ 954, 1098.

◆

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Shirley Kaye, Laura Bonzani, Nicholas Cirimele, and Patrick Pettingill were convicted of first degree murder and second degree robbery of decedent, and defendants Kaye, Cirimele, and Pettingill were convicted of second degree robbery of another person and they appeal.

Affirmed.

A. J. Hennessy, of San Francisco, and C. F. Eschwig, of Tulelake, for appellant Bonzani.

Gerald Kenny, Public Defender, and Jas. A. Toner, Asst. Public Defender, both of San Francisco, for appellants Kaye and Pettingill.

Nathan C. Coghlan, of San Francisco, for appellant Cirimeli.

Earl Warren, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

The four appellants, Laura Bonzani, Shirley Kaye, Nicholas Cirimele, and Patrick Pettingill (alias Pat Kelly), together with one William McCord, were jointly charged by indictment with three offenses: (1) the murder of Donald Maycock; (2) the robbery of Donald Maycock; and (3) the robbery of Joseph Sankus. Over the objections of defendant Bonzani the five defendants were jointly tried. The four appellants were all convicted of the murder and the robbery of Maycock, and Kaye, Cirimele and Pettingill were convicted of the robbery of Sankus. Bonzani was acquitted on this charge. What happened to defendant McCord does not appear, and is not important, inasmuch as he has not appealed. The jury, in each instance, found the murder to have been in the first degree, and fixed life imprisonment as the penalty. The two robberies were found to be in the second degree. The four appellants appeal from the judgments pronounced in accord with the verdicts, and from the order denying their motions for a new trial.

All appellants contend that the evidence was insufficient, as a matter of law, to warrant the convictions of any of them; that there was not sufficient evidence, independent of the extrajudicial statements of the defendants, to establish the corpus delicti of any of the offenses charged; that the evidence shows that defendant Pettingill struck Maycock in self-defense; that evidence of another offense was improperly admitted. Appellant Kaye contends that the evidence was insufficient to warrant her conviction of either the murder or robbery of Maycock, she admittedly not being present when those offenses were committed. It is further contended in her behalf that there is no evidence that she participated in the robbery of Sankus. Appellant Bonzani urges that the evidence as to her is insufficient to warrant her conviction of either the murder or robbery of Maycock, in that, although she was present, there was no evidence that she was a member of the conspiracy to rob Maycock. She also urges that it was error to deny her motion for a separate trial.

It was the theory of the prosecution, as disclosed by the opening statement of the district attorney, that the five defendants entered into a conspiracy to rob men who were under the influence of liquor; that the plan was that Kaye and Bonzani should visit bars and taverns unescorted and permit themselves to be "picked up" by men who had money and were under the influence of liquor; that after finding such prospects they were to telephone the male defendants, who would take the victims to a lonely spot and slug and rob them; that the crimes here involved were committed as part of that conspiracy.

Each of the defendants made a statement to the police, and each defendant, with the exception of McCord, took the stand in his or her own defense. After reading the record, although it must be conceded that in some respects the evidence is not as satisfactory as to some phases of the case as might be desired, we are convinced that the appellants were fairly tried, and that the evidence supports the judgments.

[1] The first question presented is whether the prosecution established the corpus delicti sufficiently to have authorized the court to have admitted in evidence the extrajudicial statements of the defendants.

Joseph Sankus testified that he and Maycock had been honorably discharged from the Army on August 25, 1938; that they met at the College Inn (also referred to as College Den) about noon of August 26th and spent the balance of the day and evening drinking beer there and at two nearby taverns; that some time in the evening they were sitting at the bar in the College Inn and sending tips to the orchestra with requests to play special numbers, when his attention was called by Maycock to two unescorted girls who were sitting in a booth and smiling at the two men; that he and Maycock entered the booth, talked to the girls and bought them some drinks; that the younger of the two girls suggested they go to another place and dance; that this girl left the table to telephone a friend to take them to the dance; that she returned in about five or ten minutes and told them her friend had arrived; that the party proceeded outside where Sankus and Maycock were introduced to three young men; that one of these men had a roadster; that the seven then got in the car, Sankus and the youngest girl sitting in front with the driver and the other four sitting in the rumble seat.

Sankus was unable to identify the defendants with any degree of certainty. He stated that the two women defendants "look like the women, but I couldn't say for sure"; that "the youngest girl [Shirley Kaye] looks familiar, but I couldn't say for sure." His identification of defendant McCord as the driver of the car was somewhat stronger but was not positive by any means. He could not identify at all any of the other defendants. He testified that it was quite dark in the College Inn and also at 723 Vallejo street, where they proceeded after leaving the College Inn. He also stated that he was not drunk and knew what was going on around him. He did identify a fancy steering wheel exhibited to him in the courtroom as being the steering wheel of the automobile in which they rode that night, and further stated that the automobile had "V-8" hub caps; that it was a light-colored car, a roadster, had no top, and had a rumble seat.

Sankus further testified that after leaving the College Den in the automobile they proceeded to a gasoline station where he bought some gasoline; that they then drove to a tavern known as the 723 Club on Vallejo street in San Francisco; that the place was very crowded; that Maycock and the older girl got mixed up in the crowd; that he couldn't get near the bar; that he ordered drinks and asked the younger girl to get them; that she brought him a drink which was either a Tom Collins or a highball; that he started to drink that drink but that he has no recollection of finishing it; that the next thing he remembers is waking up on a sidewalk about a block and a half from the bar; that the inside of his right cheek was cut; that, "It seemed like I was socked in the jaw"; that where he found himself was on a steep hill in a blind dark street; that he then went through his pockets and found but 20 cents; that he had $10 or $15 when he left the College Den, but as to the exact amount he couldn't say for sure; that he was positive that it was more than 20 cents; that he had more than $5 when he arrived at the 723 Club.

Mrs. Anita Slater testified that she and her husband were driving along Alemany Boulevard between 2 and 2:30 a. m. on August 27, 1938, when she saw a man staggering along the shoulder of the road; that his face was covered with blood, that they stopped and observed that the man had no hat or shoes; that they placed the man in the car and took him to a nearby service station where an ambulance was summoned and the man was taken away.

Elmer Lohr testified that he was a hospital steward employed by the city; that he accompanied the ambulance to Alemany Boulevard and Bayshore and there picked up the injured man; that the man had no shoes on, nor did he have a hat; that he accompanied the man to the Mission Emergency Hospital; that there were no tears in the man's suit; that the man told him his name was Donald Maycock; that Maycock was bleeding from the nose, mouth and right ear; that he searched the clothing of Maycock, and that he found no property other than a handkerchief.

Dr. Paul Ashton testified that he examined the man in question upon his arrival at the Mission Emergency Hospital; that he had no shoes; that he was conscious and told the doctor he was an Army man; that he was bleeding from the nose and mouth, and from the right ear; that he had a bruise behind the left ear; that he had a black eye—the left one; that there was intercranial bleeding; that he had a basal fracture of the skull and was suffering from acute alcoholism; that, in the great percentage of such cases, such a fracture is fatal; that it was his opinion that the man was dying; that he had no other external evidence of injury.

Dr. Ralph Everett Reiner corroborated Dr. Ashton as to the physical condition of the injured man, and, in addition, stated that when he saw him he was turning blue, which indicated that there was a severe brain injury and that the man was dying; that the man had no natural teeth; that the upper dental plate was present but the lower one was missing; that Maycock died at 7:30 a. m. on August 27, 1938.

Dr. Sherman Leland testified that he performed an autopsy upon the body of Maycock; that the cause of death was shock and hemorrhage following fracture of the skull. He corroborated the other doctors as to the general physical condition of the deceased, and testified that Maycock's lower dental plate was missing when he examined him. He further testified that the brain of Maycock was removed and sent to the pathologist connected with the coroner's office.

Dr. Jesse L. Carr, the pathologist, testified that he and his assistant examined the brain of Maycock; that such examination revealed a severe brain hemorrhage, and a hemorrhage in the brain stem; that the hemorrhage in the brain stem was called a "boxer's hemorrhage"; that such hemorrhage is caused by the fact that at the bottom of the skull there is a large hole through which the brain stem projects down into the spinal canal; that when the muscles are relaxed and a person receives a sudden blow on the face the stem is pinched over the edges of this hole; that the stem hemorrhage found in the brain of Maycock could have resulted from a blow on the chin, jaw or face; that, from his experience, such a hemorrhage could not have been caused from any other type of injury; that he had never seen it occur except from a blow to the face or back of the head; that a person can receive a blow on the jaw or face of sufficient force to cause a "boxer's hemorrhage" without leaving any mark or abrasion on the jaw or face; that the stem hemorrhage which he found in Maycock's brain could not have been caused by anything other than a punch in the face or a blow that would cause a sudden movement of the head; that there was another skull fracture and brain contusion suffered by Maycock which was caused by his head striking some heavy immobile object.

Defendants McCord, Pettingill and Shirley Kaye were arrested on August 29th. McCord's automobile was outside the house where the defendants were arrested, and the steering wheel was the one identified by Sankus in court. The automobile was a Chevrolet, but had Ford V-8 hub caps. McCord took the police to a spot off Alemany Boulevard nearby where Maycock was later found by Mrs. Slater and her husband. At this spot the police found a five-cent piece, a ten-cent piece, a lower dental plate broken in two, and a combination nail file and clippers. Nearby were certain dark spots which Dr. Carr testified contained human blood. Approximately fifty feet from this spot was found a grey felt hat which had on it certain spots which were found to contain blood.

Sankus testified that Maycock had false teeth; that he had frequently observed Maycock remove his teeth at night; that the broken dental plate found by the police looked like the dental plate belonging to Maycock, but he couldn't be sure about it. He also testified that the combination nail file and clipper was of the type issued to all enlisted men in the Army; that Maycock had such a file, but he could not identify the particular one as belonging to Maycock. Concerning the hat, he testified that during the afternoon of August 26th he had visited a cleaning establishment with Maycock to get the latter's hat which was being cleaned; that the hat was then not ready but he had observed it on a hat block; that later in the afternoon Maycock secured the hat; that the hat found by the police looked like Maycock's hat.

An employee of the hat cleaning establishment testified that the hat in question had been cleaned in his establishment.

Harold Steiner testified that at about 1 a. m., August 27, 1938, he drove into a gas station on Bayshore Boulevard; that he had previously known McCord and Kaye; that McCord drove in and started putting water in the radiator; that he spoke to McCord; that Pettingill was sitting behind the steering wheel; that a girl, other than Shirley Kaye, was in the front seat with two men he did not know; that on that occasion he talked with both McCord and Pettingill.

It is this evidence that appellants claim was insufficient to establish the corpus delicti of any of the three offenses of which they were charged. It must be remembered that, so far as this contention is concerned, we are not at this point interested in whether the evidence is sufficient to establish the guilt of the defendants, but simply as to whether the corpus delicti was sufficiently proved to permit the introduction into evidence of the extrajudicial admissions of the defendants. We think the evidence is clearly sufficient for this purpose.

[2-7] The rule as to the quantum of proof necessary to establish the corpus delicti was stated in People v. Hudson, 139 Cal.App. 543, 544, 34 P.2d 741, 742, as follows:

"It is well settled, as appellant contends, that the corpus delicti must be proved by evidence outside of the declarations and admissions of the defendant; but it is equally well settled that, to authorize the reception and consideration by the jury of evidence of extrajudicial confessions or admissions of a defendant, the prosecution is not required to establish the corpus delicti by proof as clear and convincing as is required to establish the fact of guilt. Slight or prima facie proof is all that is necessary. [Citing cases.]

"It may be proved by circumstances shown in evidence or by inferences drawn from facts shown. People v. Vicunia, 105 Cal.App. 145, 286 P. 1061; People v. Ford, 85 Cal.App. 258, 258 P. 1111. Direct or positive evidence is not essential (People v. Wilkins, 158 Cal. 530, 111 P. 612), nor is it necessary that such evidence in itself connect the defendant with the perpetration of the offense (People v. Jones, 123 Cal. 65, 55 P. 698). The decisions hold also that such proof may consist of the testimony of the defendant himself when he voluntarily becomes a witness in the case and testifies to facts which tend to prove the corpus delicti. People v. Kelly, 70 Cal.App. 519, 234 P. 110. Furthermore, as said in People v. Clark, 70 Cal.App. 531, 233 P. 980, and in the other cases hereinafter cited, while ordinarily it is the proper practice to establish the corpus delicti as early in the proceedings of the trial as may be practicable, the order of proof is discretionary with the court, and, where the corpus delicti is finally established, a mere variation in the order of proof cannot be said to result in any prejudice to the defendant's rights. [Citing cases.]"

[8, 9] In People v. Ives, 17 Cal.2d 459, 110 P.2d 408, 411, the rule is stated as follows: "The corpus delicti may be proven by circumstantial evidence, and the reasonable inferences drawn therefrom. To warrant a conviction it must be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom. If a prima facie case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient. [Citing cases.]"

Tested by these standards, there can be no doubt that the corpus delicti of each of the three crimes charged was sufficiently established. Certainly, there was at least "slight" or "prima facie" evidence that the three crimes were committed.

[10] Each of the appellants made a statement to the police and each of them took the stand in his or her defense. Of course, the extrajudicial statement of each defendant can be considered only as against that defendant.

Appellant Cirimele, in his extrajudicial statement, stated that he had known Shirley Kaye, Pat Pettingill and William McCord for some time prior to the night in question; that he first met Laura Bonzani on that night; that at about 9 p. m. on August 26th, he met Pettingill and McCord in the 723 Club; that in about an hour the three men drove to the College Den in McCord's automobile; that on their first visit there they did not meet anyone; that they drove away and returned; that Pettingill went into the College Den and returned with Kaye and Bonzani and with the two men; that they first got some gasoline and then went to the 723 Club and had some drinks; that later in the evening Shirley Kaye took one of the soldiers (Sankus) for a walk, and that Pettingill and he walked behind them; that when they got several blocks from the 723 Club, Pettingill knocked the soldier down and he (Cirimele) searched him and took his money; that they then returned to the 723 Club; that later he, Bonzani and the other soldier (Maycock), McCord and Pettingill got into McCord's car and took a ride; that this ride had been arranged beforehand by either Pettingill or McCord; that they stopped at a beer parlor and the soldier bought them a drink; that they stopped at a gas station to get some oil; that they then drove to Alemany Boulevard near the Bayshore and pulled off the highway a short distance; that Pettingill was arguing with the soldier; that they got out of the car and Pettingill hit the soldier; that he (Cirimele) searched the soldier while he was lying on the ground; that he doesn't remember if any of the others participated in the searching; that he took three or four dollars from the prostrate body; that they then returned to the 723 Club and spent the money.

On the witness stand he testified as to meeting Pettingill and McCord at the 723 Club and later picking up the two women and the two soldiers at the College Den. He denied that he had participated in the robbery of Sankus. He stated that he had been drinking heavily; that he got sick and took a walk; that later he took a ride; that Bonzani and one of the soldiers sat in front; that he sat in back; that they drove out to Alemany Boulevard and stopped; that Bonzani and the soldier got out of the car; that Pettingill got out; that an argument was going on; that he saw the soldier put up his hands as if about to hit Pettingill; that McCord was with him in the rumble seat; that McCord had "passed out"; that he (Cirimele) never got out of the car at that spot and that he did not rob the soldier.

In the extrajudicial statement of Laura Bonzani she stated that she had known Shirley Kaye and "the rest of them, about one and one-half months"; that she lived with Shirley Kaye; that on August 26th she left her home with Shirley Kaye at about 8 or 8:30 p. m.; that her exhusband drove them to the College Inn; that during the evening they noticed the two soldiers spending quite a bit of money; that they were "picked up" by the two soldiers; that at about 11 p. m. Shirley phoned the 723 Club and shortly thereafter they all drove to the 723 Club in McCord's automobile; that later she left that club with the three male defendants and with the soldier, later identified as Maycock, in McCord's automobile; that she had said to the soldier, "Let's go"; that they stopped and had a drink at a cafe, and a little later stopped and got some oil at a gas station; that they then drove to Bayshore and Alemany Boulevard; that they drove off the road; that she got out, as did Pettingill and the soldier; that "the first thing I knew Pat Kelly [Pettingill] hit him and he went down"; that McCord and Cirimele then got out of the machine and the three men searched the prostrate soldier; that they then drove a few blocks and stopped; that Pettingill offered her two one-dollar bills as her portion; that she "went to take it and he said, 'We didn't get much out of him', and I said, 'Well, I don't want any' "; that the other two defendants took some of the money; that they then drove her to Gough and Market streets and let her out of the car; that when the car was stopped at the place where the soldier was hit the lights were turned off; that she couldn't say whether the soldier put up any resistance; that before she left the 723 Club, Shirley Kaye told her about the other soldier being knocked down by Pettingill. She, as well as the other appellants, denied removing Maycock's shoes to see if any money was hidden there.

As a witness, Laura Bonzani corroborated her above statements except in the following important respects. She testified that she met Cirimele, Pettingill and McCord for the first time on August 26th when she rode with them, Shirley and the two soldiers to the 723 Club; that later in the evening she told the soldier that she had an appointment and he offered to escort her to Market street; that then one of the "boys" offered to ride her to the appointment; that the soldier and Pettingill got into an argument at the gasoline station over who was to pay for the oil purchased; that they stopped off Alemany Boulevard in order to let her off, and that she walked a short distance in back of the car; that when she got back she discovered there had been a fight; that Pat (Pettingill) told her the soldier got fresh and tried to follow her and that he, Pettingill, had tried to stop him; that they then drove her to Gough and Market where she got out of the car. She denied making many of the statements contained in her extrajudicial statement, and particularly denied knowing about the slugging of Sankus, and denied that she invited Maycock to go on the ride, or that she had stated that the three male defendants searched Maycock and offered to divide the money with her.

Patrick Pettingill, in his extrajudicial statement, stated that he was also known as Pat Kelly; that the statement of William McCord had been read to him up to the point where the party had left the 723 Club; that the statement as read to him was correct; that he had no changes to make in that statement; that after they left the 723 Club the soldier wanted a drink so they stopped at a cafe and had a drink; that they then stopped at a gasoline station and that he and the soldier got into an argument as to who should pay for the oil; that they both wanted to pay for it; that the soldier finally paid; that they got back in the car and the soldier continued the argument; that the soldier stated he was going to punch the witness and made other threats; that he (Pettingill) stopped the car and they both got out; that the soldier put up his hands and so he (the witness) hit the soldier first, "and he fell down and just layed there and he snored laying there like he was asleep"; that they then left him lying there and went down to the Musicians Club. He denied that he or the other defendants robbed the soldier.

As a witness he testified that he and McCord went to the 723 Club sometime after 7:30 p. m. on August 26th; that a little later they met Cirimele there; that they had a few drinks and then took a ride to the beach, and sometime after 10 p. m. returned to the 723 Club; that Shirley Kaye's sister told him and McCord that Shirley was down at the College Den and wanted them to pick her up; that he couldn't find Shirley at the College Den; that they returned to the 723 Club and then returned to the College Den; that this time McCord went in and returned with the two girls and the two men; that that was the first time he had met Laura Bonzani; that they stopped at a gas station and Sankus bought some gasoline; that the whole party proceeded to the 723 Club; that they all had some drinks; that Laura Bonzani told him she had a date and he offered to drive her down town; that they got into the car and the soldier Maycock wanted him to drive out to Colma; that he agreed to do so. The balance of his story, as told on the witness stand, is substantially similar to his extrajudicial statement, except that he stated that the reason he drove out Alemany Boulevard was to get an overcoat at his home, and that the reason he stopped is that Laura stated she wanted to stop; that he turned off the lights to assure Laura of privacy. He also stated that the soldier started to follow Laura Bonzani and that he (Pettingill) protested; that the soldier swore at him and hit him; that he struck back and the soldier fell. He also stated that after leaving Laura out of the car on Market street the rest of the party proceeded back to the 723 Club and then went to the Musicians Club. He denied robbing either Sankus or Maycock.

Shirley Kaye, in her extrajudicial statement, stated that she had known McCord and Pettingill for about two and one-half years; that on the evening of August 26th she phoned from the College Den to the 723 Club and talked to McCord and asked him to come over and get her; that she met a girl at the College Den; that the two soldiers came over to the booth where she was sitting; that after she phoned to McCord he called for her, and the party rode over to the 723 Club; that the soldiers were "buying everybody in the place drinks and were dancing quite a bit"; that she left the 723 Club at about quarter to two and went to the Musicians Club; that she didn't know whether the soldiers were still there when she left; that the soldiers spent about $10 while they were with her and her party. In this statement she did not mention the names of Laura Bonzani or of Cirimele.

On the witness stand she stated that Laura Bonzani lived in the same building with her; that she had known her for a month and a half; that she and Laura Bonzani visited together that evening and planned to go out together; that they left the house together and a friend of Laura Bonzani's rode them down to the College Inn; that they remained there for a short period and that the two soldiers came to their booth and bought some drinks; that the soldiers suggested they go some place to dance and she suggested the 723 Club; that she phoned her sister at that club, but she wasn't there so she told whoever answered the phone to send someone with a car over to pick her up at the College Inn; that shortly thereafter McCord came over; that she introduced him to Bonzani, whom he had never met before, and to the soldiers; that they, together with Cirimele and Pettingill, rode over to the 723 Club in McCord's car; that they all were drinking and dancing; that Sankus had at least six straight whiskies; that she remained at the club until about ten minutes to two and did not leave during that time; that at that time she, McCord, Pettingill and Cirimele went to the Musicians Club and stayed there a few hours and had quite a few drinks. She denied taking a walk with Sankus. She testified that she handed Sankus no drinks during the evening, and did not give him any knock-out drops. She denied making all portions of her extrajudicial statement inconsistent with her testimony on the witness stand.

[11, 12] Defendant McCord made several extrajudicial statements to the police, the last one implicating all of the defendants in a preconceived plan to have the girls pick up some drunks and then the male defendants would "roll" them for their pocketbooks. McCord, however, refused to take the stand as a prosecution witness, so that his statements were only admissible against himself, and, since he is not appealing, should not be here considered.

[13] The court admitted into evidence as against appellants Pettingill, Cirimele and Kaye, over their objections, the testimony of one Chong Hin, a Chinaman. He testified that in the early morning hours of August 25th (two days before the events here involved occurred) he visited the 723 Club; that he started to leave that place and walked to the corner when he was assaulted by three men and thrown in a car. He positively identified Pettingill and Cirimele as his assailants, but could not identify the third man. He testified that Pettingill hit him so hard he broke the witness' gold teeth; that they knocked him unconscious and drove him to Pier 43; that a gold watch and $7 were taken from him. He identified a particular watch as the one taken from his person. The evidence also showed that the watch was pawned the next day by Shirley Kaye under the name of Mrs. J. Kirkpatrick, the address being given as 809 Noe street. Appellant Kaye admitted pawning the watch, stated that her former name was Kirkpatrick and that she formerly lived on Noe street. She stated she had found the watch on the floor at the 723 Club. This evidence was clearly admissible as against these three appellants.

[14] All of the appellants urge that the evidence is insufficient, as a matter of law, to sustain their respective convictions. Before the convictions may be reversed on this ground the evidence must be in such a state that this court can hold that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by the jury and the trial judge. This fundamental rule is stated as follows in People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389, 393: "For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."

[15] The evidence is clearly sufficient to establish that Sankus was robbed. The extrajudicial statement of Cirimele establishes his connection with that offense. The circumstances surrounding that offense, and the facts herein recited, raise the inference that this robbery was part of a preconceived plan on the part of all defendants to rob men under the influence of liquor. The testimony of the Chinaman establishes that appellants Kaye, Pettingill and Cirimele had participated in another crime of similar nature.

[16-19] The evidence establishes that Maycock met his death from a blow in the face inflicted by Pettingill, in the presence of Bonzani, Cirimele and McCord, and that he was thereafter robbed. Although there is no direct evidence that this blow was not struck in self-defense, as testified to by the appellants, the surrounding circumstances, and the facts herein recited, justified the jury in inferring that such blow was struck as part of a preconceived plan to rob. Clearly, there was no intent to kill, but that, of course, is not necessary when the killing occurs in the commission of a robbery. The inconsistencies and direct contradictions between the extrajudicial statements of the respective appellants and their testimony on the witness stand, and the inconsistencies and contradictions in their testimony, were matters that the jury could properly consider. The jury was also entitled to indulge in reasonable inferences based on the evidence.

[20] Shirley Kaye urges that the evidence was insufficient to convict her of the murder and robbery of Maycock. Admittedly, she was not present when Maycock was slugged by Pettingill, but was then still at the 723 Club. However, when the circumstances of the "pick up" at the College Den are considered, her participation in the Sankus' robbery, and her past connection with Cirimele and Pettingill in the robbery of the Chinaman, it is our opinion that the jury was reasonably entitled to infer that the two girls started out to "pick up" the two soldiers for the ultimate purpose of robbery to be committed by their male associates. The evidence supports the inference that she did not accompany the group that robbed and slugged Maycock in order to account for the absence of Sankus with whom she had been all evening, and who had already been slugged and robbed. Under such circumstances, the evidence was sufficient to sustain her conviction of the two offenses under discussion.

[21, 22] Appellant Bonzani urges that her motion for a separate trial should have been granted. This contention seems to be predicated on the contention that there was no evidence before the grand jury to indicate that she had been involved in the robbery of Sankus. While it is true that the jury acquitted her of that charge, had she been convicted the evidence would have been sufficient to sustain the conviction for the same reasons that it is sufficient to sustain the conviction of Shirley Kaye on the charges involving the murder and robbery of Maycock. The defendants were all properly charged in the same indictment with the three crimes alleged to have been jointly committed by all defendants. Having been properly charged their joint trial was proper. Secs. 954 and 1098, Penal Code. The doctrine of People v. Davis, 42 Cal.App.2d 70, 108 P.2d 85, has no application to this case. In that case, by separate indictments, different defendants were charged with separate and distinct crimes alleged to have been committed against different persons at different times. In the instant case, there was but one indictment charging all of the same defendants with the same offenses alleged to have been committed against the same persons at the same times.

The judgments and order appealed from are affirmed.

We concur: KNIGHT, J.; WARD, J.

43 Cal.App.2d 678

HOSPELHORN v. NEWHOFF et al.

Civ. 12137.

District Court of Appeal, Second District, Division 1, California.

March 26, 1941.

Hearing Denied May 22, 1941.

1. Limitation of actions 🔑58(5)

Where a Maryland court entered an order imposing an assessment against stockholders of a Maryland bank, and order was affirmed on appeal, under Maryland law stockholders' liability was "created" by the order, and hence an action commenced by receiver of bank more than three years thereafter to enforce stockholders' liability was barred by three-year statute of limitations. Code Civ.Proc. § 359.

See Words and Phrases, Permanent Edition, for all other definitions of "Created".

2. Appeal and error 🔑768

Where facts establishing that action was barred by three-year statute of limitations were admitted by statements in brief for plaintiff on appeal from judgment for defendants after demurrer to complaint was sustained without leave to amend, District Court of Appeal would affirm judgment rather than remand case and require defendants to set up such facts as an affirmative defense. Code Civ.Proc. § 359.

3. Appeal and error 🔑768

Where facts establishing that action was barred by three-year statute of limitations were admitted by statements in brief for plaintiff on appeal from judgment for defendants after demurrer to complaint was sustained without leave to amend, whether complaint stated a cause of action upon its face was a "moot question". Code Civ.Proc. § 359.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

On rehearing.

Prior opinion reversed and judgment of the trial court affirmed.

For prior opinion, see 107 P.2d 956.

Catlin & Catlin and William E. Woodroof, all of Los Angeles, for appellant.

Kornblum & Austrian, of Los Angeles, for respondents.

DORAN, Justice.

Respondents upon rehearing have urged that appellant's brief contains an admission of certain facts, not otherwise appearing upon the face of the record, which show appellant's cause of action herein to be barred by the limitation of time provided by section 359 of the Code of Civil Procedure.

In the original opinion herein (Hospelhorn v. Newhoff, Cal.App.2d 107 P.2d 956, 958) it was said: "Undisputed statements contained in the briefs indicate that the necessity of enforcing the stockholders' liability here in question was adjudicated prior to the date alleged in the complaint and more than three years before the commencement of the instant action. The precise question regarding the same liability sought here to be enforced against respondents was recently before the District Court of Appeal for the Fourth Appellate District in the case of Hospelhorn v. Wanda V. Van Dusen, Cal.App., 104 P.2d 888, 892, wherein it was held that the action was barred by the provisions of section 359, Code of Civil Procedure. However, in the Van Dusen case, supra, such a bar was raised as an affirmative defense and not by demurrer as here, and the question was properly before the court for decision."

The statements referred to reveal that on February 5, 1935, appellant, as receiver of the Baltimore Trust Company, was ordered by the Maryland circuit court to demand and collect from the stockholders of that trust company the sum of ten dollars per share, which sum was assessed by the order of the court as the stockholders' liability to creditors imposed by law. Leave, however, was granted to any stockholder to appear and show cause on or before February 25, 1935, why payment should not be made as ordered. Subsequently, and upon the denial by many stockholders of the right of the court to impose the assessment, certain questions of law were raised and heard preliminarily by the court, and thereafter the judge of the said court filed his opinion in relation to the answers to the questions stated and filed his order thereon on March 26, 1935, which latter order in effect made final the order of February 5, 1935, above mentioned. The court's order imposing the assessment against the stockholders was later affirmed upon appeal, and after the affirmance of its order, and on November 13, 1935, the circuit court again made an order, substantially the same as that made previously, assessing the stockholders ten dollars per share upon their liability to the creditors of the trust company. It is this last order on which appellant bases his claim in the instant action. The orders of February 5th and March 26, 1935, do not appear ever to have been vacated or the execution thereof to have been stayed, and no necessity appears for the order of November 13, 1935, which, in so far as can be determined, constitutes no more than a repetition of the previous orders. It appears from the foregoing admitted facts, therefore, that appellant could have commenced the instant action any time after March 26, 1935, at least.

[1] It also appears that in accordance with the rule laid down in the Maryland case of Robinson v. Hospelhorn, 169 Md. 117, 179 A. 515, 184 A. 903, 103 A.L.R. 740, previously discussed in the original opinion herein, the stockholders' liability was created in the instant case by the order of March 26, 1935, at the latest, and that the instant action was commenced more than three years after the liability was created and is therefore barred by the provisions of section 359 of the Code of Civil Procedure. See Hospelhorn v. Van Dusen, supra.

[2, 3] The facts establishing the creation of the stockholders' liability at a date prior to November 13, 1935, and more than three years prior to the commencement of the instant action, having been admitted by appellant through statements in his brief it appears that the ends of justice would be served by disposing of the instant case upon these admitted facts rather than by remanding the case and requiring the respondent to set up such facts as an affirmative defense, leaving the question to be determined by trial or motion for summary judgment. Moreover, in the light of the facts admitted, whether the complaint herein states a cause of action upon its face presents a moot question.

The judgment of the trial court dismissing appellant's action to collect the stockholders' liability in question should be and therefore is affirmed.

We concur: YORK, P. J.; WHITE, J.

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43 Cal.App.2d 693

COOPER v. SOUTHERN PAC. CO

Civ. 12768.

District Court of Appeal, Second District, Division 2, California.

March 26, 1941.

Hearing Denied May 22, 1941.

1. Appeal and error 🔑989

Where verdict is attacked as being unsupported by evidence, power of appellate court ends with determination regarding whether there is any substantial evidence which will support jury's conclusion.

2. Appeal and error 🔑996

Where two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

3. Appeal and error 🔑996, 1002

To establish defense of contributory negligence as against verdict of jury, evidence must be such that appellate court can say that there is no substantial conflict on facts and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of plaintiff proximately contributing to his own injury.

4. Evidence 🔑586(3)

In action for personal injuries and property damage sustained in collision between automobile and train, negative testimony of one who was in position to hear and observe whether warning bell was sounded is sufficient to sustain verdict as to the nongiving of signals by operators of train.

5. Railroads 🔑348(4)

In action for personal injuries and property damage sustained in collision between automobile and train, evidence sustained implied findings of jury that operators of train were negligent in not giving warning signals and in proceeding without lights on locomotive tender which was the foremost car.

6. Railroads 🔑312(2, 3)

Where a party operates his automobile upon a public street at lawful rate of speed and while maintaining proper lookout approaches a spur track which is both unlighted and unguarded and not indicated by sign or signal, it is negligence on part of train operators to proceed upon the track without proper lights or appropriate signals.

7. Railroads ⚷327(7)

There is no absolute requirement that a driver of a vehicle must actually stop before crossing a railroad track, and whether a driver should stop as well as look and listen for trains depends upon the circumstances of the particular case.

8. Railroads ⚷350(18)

Whether driver should stop as well as look and listen for trains before crossing railroad track is ordinarily a question for the jury.

9. Railroads ⚷327(7)

Where one's vision of track in direction from which an approaching train may be expected is unobstructed for a reasonable distance and his hearing is not impaired by extraneous noise or conditions, it is not necessarily requisite that he actually stop before crossing railroad tracks.

10. Railroads ⚷350(18)

In action for personal injuries and property damage sustained in collision between automobile and train, where evidence disclosed that as motorist approached crossing his view was unobstructed, that there was no warning signal, that nothing indicated that spur track was in frequent use, and that train was proceeding without proper lights or appropriate signals, whether motorist was negligent in failing to stop before attempting to cross track was for the jury. Vehicle Code, §§ 618, 632, 649, St.1935, pp. 201, 205, 212.

11. Railroads ⚷324(2)

A spur track which was flush with or below surface of road was not a "vehicle" or "person" within statute requiring headlights producing ample light to reveal any vehicle or person within approximately 175 feet. Vehicle Code, § 649, St.1935, p. 212.

See Words and Phrases, Permanent Edition, for all other definitions of "Person" and "Vehicle".

12. Railroads ⚷348(8)

In action for personal injury and property damage sustained in collision between automobile and train, evidence was sufficient to warrant finding of jury that motorist performed duty to look and listen before crossing track. Vehicle Code, §§ 618, 632, 649, St. 1935, pp. 201, 205, 212.

13. Railroads ⚷350(6, 13)

In action for personal injury and property damage sustained in collision between automobile and train, where evidence was sufficient to support jury's implied finding that operators of train were negligent and that motorist was free from contributory negligence, the court was warranted in denying motion for directed verdict.

14. Trial ⚷296(3)

In action for personal injury and property damage sustained in collision between automobile and train, instructions regarding ordinary care were not objectionable in view of other instructions.

15. Trial ⚷296(3)

In action for personal injury and property damage sustained in collision between automobile and train, allegedly erroneous instructions regarding ordinary care were required to be read in conjunction with other instructions relating to ordinary care and the conduct of reasonably prudent persons similarly situated.

16. Negligence ⚷65

There is no fixed or exact standard, other than the general one of ordinary care, by which it can be determined whether or not a person has acted as a reasonably prudent person under the circumstances of a particular case.

17. Railroads ⚷324(1)

In action for personal injuries and property damage sustained in collision between automobile and train, the fact that the behavior of other persons might have avoided the accident was not determinative of issue regarding negligence of plaintiff motorist.

18. Railroads ⚷324(1)

The fact that motorist injured in collision with train might have failed to adopt every means of safety available did not necessarily render him negligent.

19. Railroads ⚷346(3, 5)

The fact that collision between automobile and train occurred, or that by adopting some other course of action mishap might have been avoided, was not determinative of question of negligence.

20. Railroads ⚷351(16)

In action for personal injuries and property damage sustained in collision between automobile and train, instruction regarding duty to stop, look, and listen was proper.

21. Trial ⚷296(3)

In action for personal injury and property damage sustained in collision between automobile and train crossing spur track, instruction regarding railroad's statutory duty to ring bell was not objectionable as informing jury that they might find railroad guilty of negligence for failing to ring bell without regard to question of proximate cause or of motorist's contributory negligence, in view of other instructions. Civ. Code, § 486.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Walter D. Cooper against Southern Pacific Company and others, for personal injuries and property damage. From an adverse judgment, defendants appeal.

Affirmed.

Frank Karr and W. I. Gilbert, both of Los Angeles, for appellants.

Parker & Stanbury and John S. Taylor, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendants appeal from a judgment after verdict in favor of plaintiff for $11,062 by reason of personal injuries and property damage resulting from a collision between plaintiff's automobile and a locomotive tender of a train of defendant company. Defendants Fowler and Carter were company employees and train operatives, and at the proper times defendants' motions for directed verdict and for a new trial were denied.

[1-3] The principal contentions made here are that the verdict is entirely unsupported by the evidence, and that as a matter of law defendants were free from negligence and that plaintiff was guilty of contributory negligence. Such contentions require the application of the familiar principle: "* * * that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. * * * To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury." Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184.

Bearing in mind the principles announced in the cited decision, we now briefly review the facts established. On the 7th day of January, 1939, between 3:30 and 3:45 o'clock a. m., plaintiff was driving his automobile in a northerly direction on Alameda street, in the city of Los Angeles, en route to his place of employment. Alameda street is an arterial boulevard which, near the scene of the accident, is divided into two roadways, separated by the train tracks. The westerly roadway upon which plaintiff was traveling is 50 feet in width. At the point of the accident, a spur track on which plaintiff was attempting to drive, crosses that portion of the street on the west side of the tracks. It extends from the west curb line of Alameda westerly to the train track. The spur track was flush with or slightly depressed below the surface of the street. One of the company's trains consisting of a tender, locomotive and two box cars was being operated on the spur track by defendants Fowler and Carter. The train was backing on the spur track toward the main train track at a speed of from six to eight miles per hour. The tender was the foremost car and preceded the locomotive whose front end was headed northwesterly or away from the street. As plaintiff approached the spur track, he traveled at a speed of from 25 to 30 miles per hour. When about 75 feet from the spur, plaintiff first observed the track in the beam of his own headlights. He took his foot from the accelerator, looked up the spur track but saw no train. Almost at the same instant, he observed something black and just before the impact he discerned it was the train moving into the street on the spur track. He was in the act of applying his brakes just as the collision occurred. The foremost corner of the tender struck the left side of plaintiff's automobile. As a result the automobile was almost demolished and plaintiff received injuries which will cause him to be crippled for life.

No sign was posted on Alameda street to indicate the presence of the spur track as a warning to north-bound traffic although a crossing sign stood on the west side of Alameda north of the spur, visible to south-bound traffic but it was not visible to a motorist driving northerly along the street, as was plaintiff as he approached the spur. A lamp for lighting the street was suspended over the west curb of Alameda about 45 feet southerly of the intersection of the spur track and the curb line. Although there is some evidence that the street lamp was lighted at the time of the collision, plaintiff testified that it was not. William Turner, janitor in a neighboring bottle works, testified to the same effect. His testimony was that the street lamp had not been lighted during the entire month of January, 1939, and was not lighted on the morning of the accident. Likewise, police officer Sherman Reed, who arrived on the scene before plaintiff had been removed, after making an examination of the lighting conditions, testified that the nearest illuminating street lamp was at 50th street. While its distance from the point of the collision was not accurately established, it was definitely proved to be more than 300 feet to the northward at 50th street.

Defendants' contention is that the train was brought to a stop before reaching the point of collision nine feet from the east curb line of the westerly roadway of Alameda and that plaintiff drove his car into the train, but since the jury chose to believe the testimony of plaintiff that the train was moving until the time of the actual collision, their finding is justified as to that issue. The physical facts, as demonstrated by the photographs received in evidence, give substantial support to plaintiff's testimony. Those photographs demonstrate that the front of the automobile was only slightly impaired while its left side was practically demolished. Moreover, the step on the advancing end of the tender was bent directly backward and not in the direction in which plaintiff was traveling. From such facts, the jury might very properly have determined that the train was still moving at the time of the impact. The evidence concerning the absence of lights on the train was likewise conflicting. Defendants Fowler and Carter testified that the headlight on the advancing end of the tender was aflame as that car rolled toward the path of plaintiff and that a red lantern was suspended from a bracket on the same end. Other witnesses, who came after the collision were positive that, at the times of their arrivals, the headlight and lantern were both lighted. Contrary to such testimony, however, plaintiff testified that although he looked, he saw no light on the advancing tender or upon any part of the train. In support of plaintiff, it must be observed that defendants admitted that the same train, just one hour earlier, proceeded upon the spur track with no light upon the advancing end of the train.

[4-6] While defendants' witnesses testified that the bell of the locomotive was ringing, plaintiff declared that, while with his unimpaired hearing he listened, he heard no bell. He admitted that he did hear a chugging, squeaking sound from the train but saw it only a split second before the impact. Defendants' contention that such negative testimony is insufficient, in view of the positive testimony to the contrary, to support the finding that no warning was given, cannot be sustained, in view of the law that the negative testimony of one who was in a position to hear and observe whether the warning bell was sounded is sufficient to sustain a verdict as to the nongiving of such signals. Downing v. Southern Pac. Co., 15 Cal.App.2d 246, 59 P.2d 578; Lahey v. Southern Pac. Co., 16 Cal.App.2d 652, 61 P.2d 461. In view of the substantial evidence received in proof of defendants' negligence, in spite of substantial conflicting evidence, it remains that the implied findings of the jury as to defendants' negligence are amply supported by the evidence. Where a party operates his automobile upon a public street at a lawful rate of speed and while maintaining a proper lookout, approaches a spur track, which is both unlighted and unguarded and not indicated by sign or signal, it is negligence on the part of the train operatives to proceed upon such track without proper lights or appropriate signals.

[7-10] Defendants maintain that plaintiff was guilty of contributory negligence as a matter of law in failing to stop, look and listen before attempting to cross the track. There is no absolute requirement in the law that a driver of a vehicle must actually stop before crossing a railroad track. Whether a driver should stop as well as look and listen for trains, depends upon the circumstances of the particular case and is ordinarily a question for the jury. Hoffman v. Southern Pac. Ry., 101 Cal.App. 218, 281 P. 681; Robbins v. Southern Pac. Co., 102 Cal.App. 744, 283 P. 850. "* * * where one's vision of the track in the di-

rection from which an approaching train may be expected is unobstructed for a reasonable distance, and his hearing is not impaired by extraneous noise or conditions, it is not necessarily requisite for one to actually stop before crossing a railroad track. Where one's view of the track and ability to hear an approaching train would not be improved by actually stopping at the crossing, it is not imperative that he should do so." Hoffman v. Southern Pac. Co., 215 Cal. 454, 459, 11 P.2d 387, 389. Whether under the circumstances, a motorist is negligent in failing to stop his vehicle before crossing the track must be determined by the jury. The foregoing principles apply here where the map in evidence discloses that as plaintiff approached the crossing his view of Alameda was unobstructed; there was no warning sign and nothing indicated that the spur was in frequent use. The jury having been fully instructed relative to the stop, look and listen rule, by its verdict must have concluded that plaintiff was not negligent in failing to stop before attempting to cross the track.

[11, 12] Defendants predicate their contention that plaintiff failed in his duty to look, upon their claim that his lights were so defective as to preclude the maintenance of a proper look-out. They argue that by sections 618, 632 and 649 of the Vehicle Code, 1937, St.1935, pp. 201, 205, 212, the headlights of an automobile are required to be of sufficient power to illuminate an object in the path of travel from 175 to 200 feet in advance, and that, therefore, plaintiff was negligent in not seeing the spur track before he was within 75 feet of it. For two reasons this argument fails. First: referring to the cited sections of the Vehicle Code, section 618 prescribes the conditions under which lights were required. It does not regulate the brilliancy of such lights. Section 632 deals solely with the acetylene lights and is not applicable to the present situation for there is no evidence that plaintiff's automobile was equipped with acetylene lamps. Section 649 requires the department to determine whether headlights, submitted for test, produced ample light to reveal "any vehicle or person" within approximately 175 feet. But plaintiff's ability to see a vehicle or person within 175 feet of plaintiff's automobile was not material. The only object to be seen by plaintiff was a spur track which was flush with or below the surface of the road. Certainly it cannot be classified as a "vehicle or person"; therefore the requirement of section 649 cannot be applied. Second: there is absolutely no evidence concerning the distance within which plaintiff's headlights would have revealed a vehicle, person or any other object. The only evidence on the subject of the illumination caused by plaintiff's headlights was that plaintiff did not observe the tracks until he was seventy-five feet from them. There is, therefore, no evidentiary basis for the claim of plaintiff's non-compliance with the requirements of the Vehicle Code with respect to plaintiff's headlights. That plaintiff did in fact maintain a look-out for trains the jury might well have believed. Upon seeing the tracks, he looked in the direction from which trains were to be expected. Seeing nothing, he looked again, when something black hove into view only an instant before the collision.

[13] The contention that plaintiff failed in his duty to listen before crossing the track must likewise fail. Plaintiff testified "Absolutely, I listened". This testimony, when considered with the testimony that although there was nothing wrong with his hearing, he heard neither bells nor noise of the train, convinced the jury that he was not remiss in his duty to listen. Since the evidence is abundant to support the verdict, the jury's implied findings that defendants were negligent and that plaintiff was free from contributory negligence, the court was warranted in denying the motion for a directed verdict.

The remaining assignments of error are concerned with the giving of certain instructions which defendants asserted were erroneous. By plaintiff's instruction No. 14 the jury was informed that: "* * * the mere fact that some other driver in the position of the plaintiff, Mr. Cooper, might have avoided the accident by the exercise of ordinary care is not enough to prove that the plaintiff was negligent. What constitutes ordinary care under a given set of circumstances is not a fixed and standardized matter to be determined by any arbitrary rule. Different individuals, all exercising ordinary care, might behave differently under the same circumstances. Some might see what others would not and do what others would omit to do. Therefore, if an individual, exercising ordinary care under the circumstances, is nevertheless involved in an accident, the law does not brand his conduct as negligent merely because some other person, similarly situated, might have avoided it." In plaintiff's instruction No. 9, the jury was instructed "that the question of what constitutes ordinary care in a given situation is not one to which a fixed and stereotyped answer may be given. That is to say, circumstances may be such that two individuals, each exercising ordinary care, might behave differently, one becoming involved in an accident and the other not. If you find that under all of the circumstances in this case, different motorists situated as was the plaintiff, Mr. Cooper, all exercising ordinary care, might have differed as to their observation and behavior, some being involved in a collision with the train, and others not, then I instruct you that you may not adopt a course of conduct which would have avoided the accident as a conclusive standard by which to determine the question of negligence. In other words, the mere fact that some other and different course of conduct on the part of the plaintiff might have avoided the accident is not enough to charge him with negligence if you find that he did, in fact, drive with ordinary care under all the circumstances notwithstanding the happening of the accident." The vice in these instructions is claimed to be: (1) that they erroneously define the standard of care applicable to persons crossing a railroad track and that they conflict with other instructions on the same subject; (2) that they erroneously enlarge upon the accepted definitions of "ordinary care"; and (3) that they erroneously state that the happening of an accident that could have been avoided by the exercise of ordinary care is not proof of negligence.

[14] Defendants' first claim of error is based on the erroneous assumption that the law fixes an absolute duty on the part of a person about to cross a railroad track to stop, look and listen. However, as above indicated, whether plaintiff in the exercise of ordinary care was required to stop before crossing the track was a question of fact which was properly submitted to the jury. When the questioned instructions are considered as a whole it will be seen that by them the jury was told in effect that there is no fixed standard, or arbitrary rule by which to determine what constitutes ordinary care and that one who is exercising ordinary care is not negligent merely because other persons might have behaved differently; that a finding of negligence may not be predicated upon the happening of the accident alone, or upon the fact that by adopting some other course of action the mishap might have been avoided. In numerous other instructions the jury was informed that it was plaintiff's duty in the exercise of ordinary care to look and listen before crossing the tracks and to stop *if necessary* and that under certain circumstances it was incumbent on plaintiff to stop and go forward on foot *if necessary* in order to see or hear. It cannot be said that the instructions complained of are in conflict with those relating to the duty to stop, look and listen. Whether or not plaintiff was required to stop was properly submitted to the jury. Instructions 9 and 14 were supplementary instructions aimed at guiding the jury in determining the necessity for stopping and in determining whether or not plaintiff had fully performed his duty to look and listen.

[15-19] The assertion that instructions 9 and 14 erroneously enlarge upon the accepted definition of "ordinary care" cannot be sustained. Defendants cite no authority in support of their position. The questioned instructions must be read in conjunction with other instructions given by the court relating to ordinary care and the conduct of a reasonably prudent person similarly situated. When so considered the instructions, though not cleverly phrased, are not objectionable. There is no fixed or exact standard, other than the general one of ordinary care, by which it can be determined whether or not a person has acted as a reasonably prudent person under the circumstances of a particular case. Scott v. San Bernardino Valley Traction Co., 152 Cal. 604, 93 P. 677; Swigert v. Pacific E. Ry. Co., 7 Cal.App.2d 661, 47 P.2d 353. The fact that the behavior of other persons might have avoided the accident is not determinative of the issue as to plaintiff's negligence. Harrington v. Los Angeles Railway Co., 140 Cal. 514, 521, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85. In the Harrington case, several bicyclists approached a street car crossing and all except plaintiff managed to escape injury. It was there held that the fact that the others escaped injury was in no way determinative of the question as to whether plaintiff used reasonable care. Neither the fact that the accident happened nor the fact that by adopting some other course of action the mishap might have been avoided is determinative of the question of negligence. Because plaintiff might have failed to adopt every means of safety available, he did not necessarily render himself neg-

ligent. Liverpool, etc., Ins. Co. v. Southern Pacific Co., 125 Cal. 434, 58 P. 55; Mast v. Claxton, 107 Cal.App. 59, 290 P. 48; 45 Cor.Jur., p. 598.

[20] Instruction No. 12 is next assigned as error. It reads as follows: "You are instructed that if you find that under all of the circumstances of this case, having in mind the nature of the crossing, whatever you find it, from the evidence, to have been, a person of ordinary prudence in the position of the plaintiff would have believed, in the exercise of ordinary care, that he could proceed across the tracks in safety without stopping his car, and without making any further or different observations than you may find from the evidence the plaintiff made, if any, then I instruct you that the plaintiff, Mr. Cooper, was not required to stop his car before entering upon the tracks." Relying upon their claim that there is no evidence that plaintiff either looked or listened, defendants assert that the instruction erroneously informs the jury that plaintiff was not required to stop even though he did not look or listen. This contention must likewise be rejected, however, in view of our conclusion that there was ample evidence to warrant the jury in concluding that plaintiff did look and listen before attempting to cross the track. The instruction properly states the law relating to the stop, look and listen rule. Hoffman v. Southern Pacific Co., supra.

[21] The final contention raised by defendants is that the court erred in giving plaintiff's instruction No. 2, which reads as follows:

"You are instructed that section 486 of the California Civil Code provides as follows: 'A bell, or (sic) at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road or highway; or a steam whistle, air siren, or an air whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of one hundred dollars for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the district attorney of the proper county, for the use of the state. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train or cars, when the provisions of this section are not complied with'.

"You are therefore instructed that it was the duty of the defendant, Southern Pacific Company, in traversing the intersection of its tracks with Alameda street and for a distance of at least eighty rods before reaching Alameda street, to ring a bell as required by the said statute."

It is claimed that the effect of this instruction was to inform the jury that they might find the defendant company to be guilty of negligence for failing to ring the bell without regard to the question of proximate cause or of plaintiff's contributory negligence.

In support of their argument, defendants rely upon the case of Smellie v. Southern Pacific Co., 128 Cal.App. 567, 18 P.2d 97, 19 P.2d 982, in which the instruction criticized was an attempt to convey to the jury the substance of section 486, Civil Code and which declared the absolute liability of defendant without regard to proximate cause or contributory negligence. The distinguishing features of the two cases are readily apparent. In the Smellie case the jury was told unequivocally that a failure to comply with the provisions of the section in question rendered the railroad company liable for all damages caused by its locomotive. In the instant case, after reading the provisions of the statute in full, the jury was instructed that it was the *duty* of the defendant company to comply with the provisions of the statute. In the Smellie case no other instructions relating to the failure to comply with the provisions of section 486 were given. In the instant case several other instructions were given on this subject: One instruction declared that plaintiff had no right to rely upon defendants to give any signals; four other instructions stated essentially that defendants were under no obligation to ring any bell or give any signal whatever after their train had entered the crossing. Furthermore, an instruction was given at the defendants' request which was in the language of section 486 but quoted only that portion of such section ending with the words "under a penalty of one hundred dollars for every neglect, to be paid by the corporation operating the railroad", and concluded with the instruction that defendants were not required to blow a whistle and that "no negligence on the part of the defendants could be predicated upon the failure to blow the whistle in the event you shall further find that the bell was rung as above outlined and was of the weight prescribed by the statute". The jury was elsewhere instructed in general terms relative to negligence, proximate cause and contributory negligence. Furthermore the instruction criticized was invited by defendant's causing the court to read to the jury the greater portion of section 486.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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43 Cal.App.2d 743

JAYNE et al. (OCCIDENTAL INDEMNITY CO., Intervener) v. MORCK et al.

Civ. 11432.

District Court of Appeal, First District, Division 1, California.

March 27, 1941.

Hearing Denied May 22, 1941.

1. Evidence 🔑220(1)

Failure to make claim when parties' rights are being adjusted may be considered in subsequent proceeding as indicating that legitimate claim did not exist and that subsequent legal action may be unfounded.

2. Evidence 🔑220(1)

In death action, evidence that one defendant, who sustained injuries in accident involved and testified as to his freedom from negligence, but asserted no claim for damages, failed to file cross-complaints or counterclaims in previous suits against him by several people for injuries arising out of such accident, was inadmissible.

3. Evidence 🔑220(1)

In death action, failure of one defendant, injured in accident involved, to allege damages, was not admission of his negligence, as such allegation would have been simply averment of legal conclusion.

4. Witnesses 🔑395

An exception to rule that, when witness is impeached by proof of his prior statements contradictory of his present testimony, proof of his prior statements consistent with such testimony is inadmissible, is sometimes recognized where it is definitely charged that testimony is of recent fabrication and offered as result of improper motive or undue influence.

5. Witnesses 🔑395

To render proof of witness' prior statements consistent with his present testimony admissible to rebut charge of recent fabrication of such testimony, such statements should be on point in dispute.

6. Witnesses 🔑395

Ordinarily, determination of question whether witness' prior statements, offered in evidence to prove truthfulness of his present testimony and rebut charge of recent fabrication thereof, are on point in dispute, is within trial judge's discretion.

7. Witnesses 🔑395

In action for wrongful death resulting from automobile collision, where automobile driver was impeached by proof of inconsistent statements as to distance between automobiles when he first saw them, proof of prior statement by driver concerning positions of automobiles on proper or improper sides of road at time of impact was inadmissible.

8. Trial 🔑18

A trial court has power to enforce orderly conduct in its immediate presence by those engaged in litigation or taking part therein. Code Civ.Proc. §§ 128, 177, 178.

9. Appeal and error 🔑1060(1)

In death action, conduct of defendants' counsel, charged with having proceeded by "artifice and trick", "artful insinuations", and "smiles and smirks" to depict plaintiffs' attorney and witness as having prepared a well "concocted" story, *held* not to warrant reversal of judgment on jury's verdict for defendants, in absence of showing that trial court failed in performance of its duty on motion for new trial to consider whether such conduct warranted granting of new trial or that there was miscarriage of justice.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Kathleen deWitt Jayne and others against E. C. Morck and others, for wrongful death of plaintiffs' husband and father, in which the Occidental Indemnity Company intervened as a party plaintiff. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Keith & Creede and O'Connor, Neubarth & Moran, all of San Francisco, for appellants.

Hoge, Pelton & Gunther, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

WARD, Justice.

This is an appeal from a judgment in favor of defendants following a jury trial which resulted in a verdict in their favor. The action was brought by the heirs of a decedent for the wrongful death of their husband and father respectively as the result of an automobile collision. The Occidental Indemnity Company, a corporation, having paid an award under the Workmen's Compensation Act, intervened, joins the wife and children on this appeal, and is represented herein by the attorney representing them. As grounds of appeal, appellants urge two errors in the exclusion of evidence, and claim prejudicial error by reason of the conduct of opposing counsel at the trial.

[1-3] It is contended by appellants that the court erred in excluding evidence of the fact that defendant Morck, who sustained severe personal injuries and who testified to his own complete freedom from negligence, failed to file cross-complaint or counterclaim in suits brought against him by several people for injuries arising out of the accident. In support of this contention they cite Miller v. Stevens, 79 Mass. 282, 13 Gray 282, and Fletcher v. Fletcher, 284 Mass. 377, 187 N.E. 772. In the first case plaintiff employed defendant to sell certain goods and furnished him horses and a wagon to use in the employment, at the termination of which plaintiff paid defendant his wages but failed to make any claim against him for damages on account of injury to the horses which he later asserted he sustained. In a subsequent action for such injuries, proof of failure to make the claim on settlement and conclusion of their business was held admissible. Failure to make a claim when the rights of parties are being adjusted may in a subsequent proceeding be considered to indicate that a legitimate claim did not exist and that the subsequent legal action may be unfounded. In the Fletcher case plaintiff brought an action against the administratrix of his brother's estate for money loaned the deceased during his lifetime. It was held that proof of plaintiff's failure in connection with his bankruptcy to list the brother's indebtedness as an asset was admissible against him. The theory underlying the two decisions is that in a legal action upon a claim, failure to assert it at some previous appropriate time may be a circumstance, although slight, proving that the claim in fact did not exist. Nichols v. New Britain, 77 Conn. 695, 60 A. 655. The facts are not parallel with those of the present case. Defendants are not asserting a claim for damages in the present proceeding, accordingly a similar failure in the previous action is consistent with Morck's position in the present case; proof of that fact would be inadmissible. Assuming that defendant Morck was injured in the accident, a claim for damages would simply be the averment of a legal conclusion. Under the circumstances of this case, we cannot subscribe to appellants' theory that a failure to allege damages is an admission of negligence.

[4-7] Defendant and a witness, Mr. White, who was in the other car with the deceased, were the only witnesses to testify to the facts immediately preceding the impact. White testified that he was driving the car of which decedent's employer was the owner. Defendants offered certain evidence tending to show that this witness had made statements on a former trial as to the distance the two cars were apart when he first saw defendant Morck's car, and that such testimony was in conflict with that given upon the present trial. Upon the theory that prior consistent statements although not admissible in proof of the fact are admissible to rebut the charge of recent fabrication, appellants made an offer of proof as follows: " * * * and at that time I said that I desired to produce the police officer back here to show or to testify that immediately after the accident, or when they were in the hospital there, that Mr. White had told the police officer that he was on his right-hand side of the road, lane 3, driving down the highway;

that Mr. Morck was on his side of the highway, lane 2, there, and that all of a sudden, Mr. Morck pulled over into his lane, and the collision occurred in lane 3."

It is not necessary herein to discuss the rule that when a witness is impeached by proof of prior statements contradictory to present testimony, proof of consistent statements is not generally admissible. An exception to this rule is sometimes recognized where it is definitely charged that the testimony is of recent fabrication and offered as the result of improper motive or undue influence. Davis v. Tanner, 88 Cal.App. 67, 262 P. 1106. However, the consistent statements offered to prove the truthfulness of testimony should be upon the point in dispute. Ordinarily this question is within the discretion of the trial judge. In the present case the variance in the statements related to the distance between the cars when the witness first saw the car operated by defendant. The offer of proof related to the position of the cars on the proper or improper side of the road at the time of impact. The testimony offered by plaintiffs to substantiate the testimony given on the trial does not bear sufficiently upon the facts claimed to be fabricated.

[8, 9] Appellants claim that their cause was prejudiced by the conduct of counsel for defendants. It is charged that the attorney proceeded by "artifice and trick", by "artful insinuations", through "smiles and smirks" to paint a picture that the attorney for the plaintiffs and the witness, Mr. White, had prepared a well "concocted" story. We do not have the advantage of observing the alleged "cynical smiles". However, the record shows that at one point the court admonished the jurors that "smiles are not evidence". A trial court has the power to enforce orderly conduct in its immediate presence by those engaged in litigation or taking part therein. Code Civ. Proc., secs. 128, 177, 178. The trial judge on motion for a new trial had an opportunity to consider whether the conduct of attorneys warranted the granting of a new trial. It does not appear that the trial court failed in the performance of its duty, and the record does not disclose that there was a miscarriage of justice.

The judgment is affirmed.

We concur: PETERS, P. J; KNIGHT, J.

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43 Cal.App.2d 794

CONSTANTINE v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11404.

District Court of Appeal, First District, Division 1, California.

March 31, 1941.

Hearing Denied May 26, 1941.

1. Schools and school districts ⚷136

The contract of employment is governing factor in determining question of teacher's tenure.

2. Schools and school districts ⚷133

Under city charter requiring employment in any one capacity for probationary period of three years for school teacher to establish tenure as permanent employee in such position, a teacher, who was employed for two years as principal and for two preceding years as "vice-principal in charge" and for year preceding that as "teacher in charge", failed to acquire tenure as permanent principal.

3. Estoppel ⚷62(4)

Where teacher served two years as principal and for two preceding years as "vice principal in charge" and for year preceding that as "teacher in charge", and each year the resolution of employment stated definitely the capacity in which teacher was employed, school district was not "estopped" from denying that teacher acquired tenure as permanent principal on ground that although she was not employed as principal for probationary period of three years as required by city charter, she performed all of the duties as such for five years, in addition to her regular duties as teacher, and was paid additional compensation therefor.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. Schools and school districts ⚷133

Where teacher failed to serve probationary period of three years as principal as required by city charter to obtain tenure as permanent principal, teacher was in no position to complain that school board resorted to plan of consolidation of schools for sole purpose of defeating her permanency as principal, since she was deprived of no vested right by action of board.

5. Schools and school districts ⚷133

Under provision of school code requiring city and county boards of education to employ a principal for each school under their control, the assigning of a single principal for two consolidated schools met requirements of school code. School Code, § 5.410.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Proceeding in mandamus by Pearl R. Constantine against the Board of Education of the City and County of San Francisco, and others, to establish tenure as permanent principal of the Gough school in San Francisco, to compel reinstatement to such position, and pay her salary from the date on which she alleged she was illegally removed therefrom. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Piccirillo & Wolf, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for respondents.

KNIGHT, Justice.

Plaintiff appeals from a judgment in favor of defendants in a proceeding in mandamus whereby she sought to establish tenure as permanent principal of the Gough school in San Francisco, to compel the Board of Education to "reinstate and restore" her to that position, and pay her the salary as such from the date on which she alleges she was illegally removed therefrom. The findings and judgment were entered in May, 1939; the final brief was filed in October, 1940, and two months later the appeal came on for oral argument.

The facts as they are shown by the evidence are these: For many years prior to the close of the school year 1934-35 the Gough school was a special elementary school devoted exclusively to the teaching of deaf children. A staff of from five to seven teachers was employed to conduct the school. In 1922 plaintiff became a permanent teacher therein, and she continued to be employed as such until 1930. Thereafter, for the five succeeding years she was employed not only as teacher therein, but also as the administrative head thereof. In this connection the record shows that in August, 1930, she was employed as "teacher in charge" with an added salary of $20 a month, and in 1931 and 1932 as "vice principal in charge", with salary fixed as such. In 1933 and 1934 she was employed as "principal" of said school and paid a salary as such; and at the trial it was stipulated on behalf of the board that during said five years plaintiff performed all the duties of principal of said school.

On May 13, 1935, which was about a month prior to the close of the school sessions for the school year 1934-35 Edwin A. Lee, then superintendent of schools, requested plaintiff's resignation as principal of said school. No complaint had been made against her by parents or teachers, but she was told by Mr. Lee that if she did not resign the board would either disband the school, separate and put the classes in different schools, or consolidate the Gough school with another school. Thereupon he handed her a form of resignation to sign, which she declined to do; and on the following day, May 14, 1935, upon the recommendation of Mr. Lee, the board adopted the following resolutions: "That Mrs. Pearl R. Constantine, who has been serving as probationary Principal at the Gough School, be notified that her services as Principal will not be required after the close of the school session on June 14, 1935." "That effective July 1, 1935, the Gough School and the Sherman School be consolidated under the direction of one principal, and be designated as the Sherman-Gough School." "That effective July 1, 1935, the position of principal of the Gough School be abolished." "That effective July 1, 1935, Mrs. Agnes R. Tardelli, Principal of the Sherman School, be appointed as Principal of the Sherman-Gough School. Salary beginning July 1, 1935, to be at the rate of $3,668.25 per annum. No change in salary rate." "That effective July 1, 1935, Mrs. Pearl R. Constantine be assigned to duty as teacher in the Gough Division of the Sherman-Gough School. Salary beginning July 1, 1935, to be at the rate of $2,410.69 per annum, being the 14th rating of the elementary school teachers' salary schedule for 1934-35. This is a reduction in salary" (amounting to approximately $110 a year).

The following year the Sherman-Gough school was operated in conformity with the consolidation plan laid down in said resolutions, and it was being so operated at the time of the trial of the present proceeding, which took place in May, 1936. All of the administrative, executive, and supervisory duties theretofore performed by plaintiff as principal were taken care of by Mrs. Tardelli, as principal of the consolidated schools, whose offices were located in the Sherman school building, seven blocks distant from the Gough school building; and some of the classes of the latter school were required to attend the Sherman school building for study and instruction a portion of each school day. Moreover, Mrs. Tardelli visited the Gough school building on each school day to give personal attention to such matters as required her presence there.

At the outset it should be stated that plaintiff's tenure as teacher is not questioned, nor is it in any manner here involved. The basic issue upon which the decision of the trial court turned, and which is now presented for determination on appeal, is whether as claimed by the board and found by the trial court, plaintiff, at the time of the consolidation of said schools had not acquired tenure as principal or principal-teacher of the Gough school but was serving merely a probationary period as such; for if the trial court's finding on that issue be sound, then clearly it was within the legal authority of the board, as conferred by section 135 of the charter, to consolidate said schools and thus abolish the probationary position then held by plaintiff as principal thereof.

[1, 2] We are of the opinion that the conclusion reached by the trial court on the vital issue above mentioned must be sustained. The provision of the city charter relating to the matter of tenure is as follows: (Section 135.) "All teachers, heads of departments, vice-principals, principals, supervisors and directors shall be classified as permanent employees in their respective positions after they have been successfully employed in such positions in the school department for a probationary period of three years. In the absence of any action to the contrary by the board of education at the end of the third year of such employment, the classification shall be considered as permanent." In this connection it has been held in recent cases that the contract of employment is the governing factor in determining the question of tenure, Wood v. Los Angeles City School District, 6 Cal.App.2d 400, 44 P.2d 644, citing Gould v. Santa Ana High School Dist., 131 Cal.App. 345, 21 P.2d 623, and that the employment of one as a substitute teacher does not qualify such employee to become a permanent teacher notwithstanding she performs the duties of a probationary or permanent teacher. Hogsett v. Beverly Hills School Dist., 11 Cal.App.2d 328, 53 P.2d 1009. In the present case it is to be noted that plaintiff was employed for two years as principal, and that for the two preceding years she was employed in a different capacity. It follows, therefore, that since the charter requires employment in any one capacity for a probationary period of three years, she failed to acquire tenure as principal.

[3] Citing the case of Briney v. Santa Ana High School Dist., 131 Cal.App. 357, 21 P.2d 610, plaintiff seeks to invoke the doctrine of estoppel against the board upon the theory that although she was not employed as principal for three years she performed all of the duties as such for five years, in addition to her regular duties as teacher, and was paid additional compensation therefor. The factual situation of the Briney case was essentially different, however, from the present one. There the contract for the first year failed to classify the plaintiff as a substitute, probationary or permanent employee. The contract for the second year classified her as a probationary employee, and in the third year contract she was classified as a "permanent employee". The court held, therefore, that in those circumstances the board was estopped from denying that she was a permanent employee. Here, as shown, each year the resolution of employment stated definitely the capacity in which plaintiff was employed.

[4] Plaintiff contends that the board resorted to the plan of consolidation of the schools for the sole purpose of defeating her permanency as principal-teacher of the Gough school. If, however, as the trial court held, and as we believe correctly, the plaintiff had not acquired such permanency, she was not deprived of any vested right by any action of the board in consolidating the schools; and that being so, she is not in a position to complain of the motives which may have prompted it in so doing, so long as it acted within the law.

[5] Section 5.410 of the School Code has been cited to the effect that it is the duty of city and county boards of education "to employ a principal for each school un-

der their control". We are of the opinion, however, that the requirements of said section have been fully met by the assignment of a principal for the consolidated schools. In answer to plaintiff's objections to the qualifications of Mrs. Tardelli to act as principal of the consolidated schools, it will suffice to say that the latter's qualifications are not an issue in the case, nor is a decision thereon essential to a disposal of the appeal.

Much of the briefs has been devoted to the discussion of the question of whether the action of the board in consolidating the schools was justified under the provisions of section 5.711 of the School Code, which provides: "Whenever it becomes necessary to decrease the number of permanent employees in a school district on account of the discontinuance of a particular kind of service in such district, the governing board may dismiss so many of such employees as may be necessary at the close of the school year. In making such dismissals, employees shall be dismissed in the inverse of the order in which they were employed." It will be observed, however, that by the terms of said section it is made to apply to "permanent employees". Therefore, in view of the conclusion we have reached that the trial court was justified in holding that plaintiff had not acquired permanency as principal of the Gough school, we do not deem it necessary to inquire into the merits of the contentions made by the respective parties relating to said section.

The judgment is affirmed.

I concur: WARD, J.

PETERS, Presiding Justice (concurring).

I concur in the order affirming the judgment, but I disagree with the reasoning contained in the majority opinion. It is held therein that the appellant did not acquire tenure as a principal in the San Francisco school system. It is admitted that, under section 135 of the charter, a person employed as principal for three successive years secures tenure as principal. But the opinion holds that appellant was only employed as principal for two years, and, therefore, did not become a permanent employee. The facts show that in 1930 appellant was employed as "teacher in charge" of the Gough school, and in 1931 and 1932 she was employed as "vice principal in charge" of that school, and was employed as "principal" only in the years 1933 and 1934. The majority opinion holds that the contract of employment determines whether an employee acquires tenure, and that, under the contracts here involved, she was employed as principal only for two years, and, therefore, did not acquire tenure. That is undoubtedly the usual rule. Obviously, a person who is in fact employed as a vice principal cannot tack the period so served to the period served as principal, and then claim that with the consolidated periods he has tenure as principal. But that is not the entire picture of the present case. Appellant served as teacher in the Gough school for many years. She is admittedly competent. In 1930 she was appointed "teacher in charge". From that time until she was appointed principal in 1933, she was the administrative head of that school. After considerable evidence was introduced demonstrating that during those three years she performed all the duties and functions of principal, that she attended meetings called by the superintendent for principals, that she signed, rendered and received reports as principal, and that during all this period she received the salary provided by resolution of the board for principals of schools of the class of the Gough school, the respondents stipulated that during this period appellant "performed the duties that she would have performed had she been appointed as principal. * * * We will stipulate that she performed the same duties that she would have performed had she been appointed as principal." There was no other administrative officer at the Gough school. Unless appellant was in fact principal of the school from 1930 to 1933 the respondent board was guilty of a direct violation of the law. Section 5.410 of the School Code provides that, "Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to employ a principal for each school under their control."

Under these circumstances, it seems clear to me that appellant was in fact principal from 1930 to 1933. To hold otherwise is to disregard the admitted facts, and to permit the mere form of the transaction to control its substance.

The majority opinion cites Hogsett v. Beverly Hills School Dist., 11 Cal.App.2d 328, 53 P.2d 1009, as supporting the holding that because the contract did not designate appellant as principal for the period in question, that that is determinative of the question of tenure. In that case the teacher desired to tack on one year served as substitute teacher to her probationary period so as to acquire tenure. During the year in question she was not only designated substitute teacher, but she was also paid as such. The duties she performed happened to be the same as those of a permanent or probationary teacher, but they were also the duties of a substitute teacher. Under such circumstances, the court held that the designation in the contract was controlling. But in the present case the duties performed were those of principal, and not of vice principal or teacher in charge. The salary paid was the salary paid to principals, and not to vice principals or teachers in charge. The law required that there be a principal appointed for the Gough school. A school board may not evade the provisions of the tenure act by calling the principal's position by some other name. In my opinion, this case falls squarely within the rule of Briney v. Santa Ana High School Dist., 131 Cal.App. 357, 21 P.2d 610. In that case the school board attempted to evade the tenure statute by the contention that for one of the three years in question the teacher had not been formally designated as a probationary teacher in the contract of employment. The duties she performed during that year were the duties of a probationary teacher. The court held that the board was estopped to deny that during that year she was not a probationary teacher, and granted her tenure. Any other rule would permit boards of education to obviously and easily evade the basic purpose of the tenure law. For these reasons, I am of the opinion that appellant acquired tenure as principal.

But this holding does not entitle appellant to a reversal. Section 135 of the charter empowers the board to "maintain such schools as are authorized by the laws of the state * * * and to change, modify, consolidate or discontinue the same as the public welfare may require * * *". Here the board, by proper resolution, consolidated the Gough school with the Sherman school. This, the board was authorized to do. When the two schools were consolidated the position of full time principal of the Gough school no longer existed. Under such circumstances the board under section 5.711 of the School Code, was authorized to dismiss appellant as principal, even though she was a permanent employee, for the reason that there had been a discontinuance of the position. There are many cases holding that permanent employees properly may be dismissed upon the discontinuance of the service rendered by them. Davis v. Berkeley School Dist., 2 Cal.2d 770, 40 P.2d 835; Fuller v. Berkeley School Dist., 2 Cal.2d 152, 40 P.2d 831; Schwalbach v. Board of Education, 7 Cal.2d 459, 60 P.2d 984; Walsh v. Board of Trustees, 2 Cal.App.2d 180, 37 P.2d 700. These cases not only establish the power of a board of education to discharge a permanent employee upon discontinuance of a service, but also establish the power when the service is not entirely discontinued but only the particular mode of rendering that service is abolished. That is this case. The board has decided to discontinue the position of full time principal of the Gough school, and to consolidate that school with the Sherman school. For this reason the judgment must be affirmed.

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43 Cal.App.2d 685

LADY v. BARRETT et al.

Civ. 12685.

District Court of Appeal, Second District, Division 1, California.

March 26, 1941.

Hearing Denied May 22, 1941.

1. Appeal and error 🔑714(5)

The statement in brief of alleged facts not sustained by the record is reprehensible practice, and such statement will be disregarded by the court.

2. Executors and administrators 🔑451(2)

In action by special administrator for possession of federal bonds and checks in payment of interest on ground that they belonged to plaintiff's intestate, ownership of the bonds was a question of fact for the jury. Code Civ.Proc. § 1963, subds. 1, 4, 8, 33.

3. Trial ⚿177

The fact that immediately after motion for directed verdict was made in behalf of plaintiff a similar motion was made in behalf of defendant did not give trial court right to direct a verdict in favor of plaintiff, where ownership of property involved was a question of fact for jury.

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Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by William Ellis Lady, etc., against Mary E. Barrett and others for possession of certain personal property. From a judgment for plaintiff, the defendants appeal.

Judgment reversed, and cause remanded for a new trial.

Robert R. Ashton and Cameron B. Aikens, both of Los Angeles, for appellants.

William Ellis Lady, of Los Angeles, in pro. per.

PER CURIAM.

This is an appeal from a judgment, based upon a verdict which the court directed the jury to enter in favor of the plaintiff. He, as special administrator of the Estate of Mary Barrett, Sr., had brought the action for possession of certain personal property held by appellant, Mary E. Barrett, executrix of the Estate of Patrick C. Barrett. Joined as defendants were Mary E. Barrett and Alice G. Barrett, individually, and they also appear herein as appellants. However, as a matter of convenience we shall discuss this appeal as though presented solely by a single appellant, the executrix.

The property in question consists of four $5,000 bonds of the United States, which were payable August 1, 1918, and twenty-one checks in the amount of $150 each, representing interest falling due upon the bonds, at quarterly periods, beginning November 1, 1912, and ending August 1, 1918, excepting two checks which normally would have been issued on February 1, 1916, and May 1, 1916. The total value of these securities is $23,150.

All the bonds and checks were found by Mary E. Barrett and her sister Alice among the effects of their father, Patrick C. Barrett, within thirty days after his death at Claremont, California, on November 10, 1938. Each bond is registered and recites that "The United States of America are indebted to Mrs. Mary Barrett, or assigns, in the sum of Five Thousand Dollars." On the reverse side appears a form providing for an assignment. A notation specifies that the execution and acknowledgment of an assignment when not made at the Treasury Department, must be before a United States Judge or other named official of the government. Each check recites that at the date thereof the payee named in the body of the check is the registered owner of bonds of the "3% Loan of 1908–1918", amounting to $20,000, and is payable "to the order of Mrs. Mary Barrett", referred to during the hearing of this case as Mary Barrett, Sr.

[1] Mrs. Barrett died December 12, 1912, and the issue in this trial, held twenty-nine years later, was the ownership of these uncashed securities. Do they belong to the estate of Mary Barrett, Sr., or do they belong to the estate of Patrick Barrett, who was in possession of them at the time he passed away? It will be observed that the checks are negotiable; the bonds, assignable. Because the bonds were never assigned in writing the court apparently concluded that they have always remained the property of the estate of Mary Barrett, Sr. This, in fact, is the argument advanced by respondent in support of the judgment and of the withdrawal of the case from the jury's consideration. That the respondent, however, has little confidence that this action directing a verdict was warranted on the evidence then before the court, appears from the fact that he has felt called upon to state in his brief, as proven facts, circumstances of which the court below was not advised, according to the record, and incidents which were not brought out in evidence. This, of course, is reprehensible practice on the part of counsel, and in our consideration of the appeal we have disregarded these statements, covering six or seven pages of respondent's brief. Appellant contends that the bonds and the interest checks belonged to Patrick under the presumption that what he possessed at the time of death he owned (sec. 1963, sub. 11, Code Civ.Proc.), and declares that any other theory ignores the presumption "That a person is innocent of crime or wrong". Sec. 1963, sub. 1, Code Civ. Proc. The theory of appellant is that the bonds were given to Patrick by his mother, and she contends that a gift or assignment

by parol may be made of a registered bond, citing In re Stockham's Estate, 193 Iowa 823, 186 N.W. 650, 653, 22 A.L.R. 765, in which the court recognized as valid the transfer of United States registered bonds made in writing before an official other than one of those mentioned on the bond, and stated "Many obligations and choses in action, such as notes, bonds, bank certificates, insurance policies and certificates of stock have been held to be the proper subject of a gift without the formality of a written assignment." See, also, Herbert, Ex'r, etc., v. Simson, L.R.A.1915D, 733, note; Talbot v. Talbot, Ann.Cas.1912C, 1235, note; Re Estate of Connell, 38 A.L.R. 1362, note. A contrary view as to presumption of ownership where no written assignment has been made is expressed in Atchley v. Rimmer, 148 Tenn. 303, 255 S.W. 366, 30 A.L.R. 1481, and Gano v. McCarthy's Adm'r 79 Ky. 409, strongly relied upon by respondent in his brief.

When Mrs. Barrett died she was residing at Green River, Wyoming, which had been her home for almost fifty years. She was a widow, and her heirs at law were her daughter, Mary, known as Mayme, and her three sons, James, Patrick and Joseph Edward, known as Ed. James is the sole survivor of these four children. He was born in Green River in the year 1870, and has always resided in Wyoming. He was appointed administrator of his mother's estate in Wyoming May 19, 1938, and approximately a year later respondent, upon James' nomination, qualified as special administrator for the estate in California. Mary had died in 1930. Ed died in 1934, and Patrick passed away, as we have stated, on November 10, 1938, six months after James' appointment. At the time of his death Patrick was staying with his two daughters, Mary E. and Alice G. Barrett, at Claremont, having arrived there from Wyoming a fortnight previously.

It appeared at the trial that Mary (or Mayme) had been appointed administratrix of her mother's estate by the superior court in Wyoming in 1913, a position from which she was removed, through proceedings instituted by James a year or so later, on the ground that she had not been duly and regularly appointed. At that time Tom Whitmore, not one of the family, was appointed to succeed her, and at a later date, in 1923, Mayme was reappointed administratrix of the estate of Mary Barrett, and continued as such until her death in 1930. At no time did she or Mr. Whitmore, as representative of the estate, list the bonds or checks as assets thereof, nor did either of them, so far as the record shows, bring an action to secure possession of these securities, or cash any of the checks which were issued after Mrs. Barrett's death. The two missing quarterly checks for 1916 have not been accounted for in any way, and it does not appear that Mayme Barrett ever attempted to exercise any ownership over the checks or bonds, either as a part owner or as representative of her mother's estate.

Owing to the fact that, with the exception of James, all the members of the family who were living at the time of Mrs. Barrett's death have died, and because of the restrictions imposed by the rules of evidence upon the admission of statements of deceased persons, the appellant's claim of ownership is based largely upon presumptions and inferences which, under section 1957 of the Code of Civil Procedure, are declared to be evidence. Section 1959, Code of Civil Procedure, defines a presumption as "a deduction which the law expressly directs to be made from particular facts". The appellant does not rely upon any conclusive presumption as specified in the Code, but does contend that certain other presumptions weigh strongly in her favor, and it may be noted that while section 1962 of the Code of Civil Procedure specifies various conclusive presumptions, section 1963 provides that all other presumptions may be controverted, using the language, "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence." Among these disputable presumptions that the appellant calls to her aid are the following: "That a person is innocent of crime or wrong; * * * That a person takes ordinary care of his own concerns; * * * That a thing delivered by one to another belonged to the latter; * * * That things which a person possesses are owned by him; * * * That a person is the owner of property from exercising acts of ownership over it, * * * That private transactions have been fair and regular; * * * That the law has been obeyed."

At the trial only three witnesses appeared, James Barrett, as the sole witness for the respondent, and Mary E. Barrett and her sister Alice, as witnesses for the appellant. James testified that after his wife died in 1935 his brother Patrick lived with him, except for short periods of a month or two, until October, 1938, when he came to Claremont; that he paid no rent, was not employed and, so far as James knew, had no property. He stated that his mother could not read or write and maintained friendly relations with all her children; that following his appointment as administrator in 1938 he learned from the Treasury Department of the United States of the existence of the bonds and checks, and later that they were in the possession of his nieces, Mary and Alice; that he made demand upon them for the securities, which demand was refused. He testified on cross-examination that he was on friendly terms with his sister, although there was litigation between them ending in one or two cases going to the Supreme Court of Wyoming, including one which he brought involving other members of the family also; that he had no idea that the bonds were in existence until he heard from the Treasury Department, but that in 1931, after Mayme had died, he was present at the opening of her lockbox in a Wyoming bank, and that he heard read from a list of contents an interest check of the United States government, payable in the sum of $150 to Mrs. Mary Barrett; that at that time he was looking for the bonds. He stated, under cross-examination, that in 1913 he had Mayme removed as administrator because of misconduct and neglect; that "she was not probating anything that belonged to my mother. She was hiding it out". At this juncture counsel for appellant read to the jury excerpts from the decision of the Wyoming Supreme Court, from which it appeared that the ground of removal was not misconduct or neglect, but error on the part of the lower court in appointing Mayme when she had not applied for appointment. James also testified, on cross-examination, that while Patrick was living with him he, Patrick, owned a house in Green River, willed to him by Mayme, which he had rented. Appellant claims that because of contradictions in the testimony of this witness, which may be noted in the foregoing recital, a jury should have been permitted to pass upon the question of his credibility. Alice testified that she had never seen the bonds, meaning the bonds as distinguished from checks, before the death of her father, but she did testify that in the summer of 1918, when she was about fifteen years old, her Aunt Mary (or Mayme) sent her to the post-office at Green River, Wyoming, for the mail; that she returned with the mail and gave it to her aunt, who looked through it and then handed her a letter, which she described as "a long letter, a long envelope", which was addressed to Mrs. Mary Barrett. This envelope, she stated, she gave to her father, that she saw the contents, "It was an interest check from the United States government, three per cent loan, is what I remember on it, to Mrs. Mary Barrett." The amount of the check, this witness testified, was $150.

Mary E. Barrett testified to finding the securities in her father's suitcase in his bedroom at Claremont, and offered to prove, by documentary evidence, as well as by various conversations which she overheard between Patrick and his sister Mayme, that the latter, while she was acting as administratrix of her mother's estate, made statements that Patrick had the bonds, and that they were in his hands. She also undertook to prove, by conversations which she overheard between Patrick and Mayme, that they were agreed that it would be unwise for Patrick to let James know about the existence of these bonds for fear he would start another lawsuit; also, that during her father's lifetime she had many conversations with him concerning the bonds, beginning in the year 1920 and continuing until his death, in which he told his daughter that he did not intend to cash the bonds, relating his experience with a bank which went broke, causing him to lose all his money; that he was not going to have that happen again; that he was going to keep the bonds intact. The proffered items of evidence, affidavits and conversations, were refused admission by the trial judge, who also ruled out an attempt to show that this action is barred by the statute of limitations, section 361 of the Code of Civil Procedure, which in the appellant's answer was set up as a defense. He had stated at the opening of the case, "I am not going to allow the defense of the statute at all", and he adhered to this determination. Appellant contends that error arose here and also in the court's refusing to admit the various conversations of deceased persons showing state of mind, particularly the statements that would tend to explain Patrick's reticence concerning the bonds and his failure to convert them into cash, claiming that these statements fall within the rule referred to in Bridge v. Ruggles, 202 Cal. 326 at page 330, 260 P. 553 at page 555, where it is said, "It is a well settled exception to the hearsay rule that, when the belief, feeling, and mental state of a person at a particular time is material to the issue, evidence of such person's declarations indicative of his then mental state are admissible, and it is immaterial whether or not such declarations were made in the presence of the adverse party or what the character of the litigation may be so long as evidence of such state of mind is material to the issue." Citing Adkins v. Brett, 184 Cal. 252, 255, 256, 193 P. 251, and other cases. See, also, In re Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239, and interesting discussion of the rule by Professors Maguire and McBaine in their respective essays appearing in 38 Harv.L.Rev. 709 and 19 Cal.L.Rev. 231, 367.

[2] We deem it unnecessary to determine the many questions raised in the appellant's brief upon the correctness of rulings concerning the admission of evidence, in view of our conclusion that under the circumstances of this case the evidence was sufficient to warrant its consideration by a jury in determining the ownership of these bonds and checks. This is so particularly as regards the testimony of Alice Barrett relative to the delivery from Mayme to Patrick, by the hand of Alice, of the interest check in 1918. On this point appellant argues, "It was shown that Mayme Barrett delivered one of the checks in question to Patrick C. Barrett, and there is a strong inference that she delivered the others. How else could he have secured possession of them? It was likewise shown that had the property in question been a part of the estate of Mary Barrett, Sr., Mayme Barrett, as an heir of that estate, would have been directly benefited in a pecuniary manner by its addition to the assets of that estate. Thus the fact of her having delivered the check to Patrick C. Barrett was strong evidence that the check belonged to him. By statute section 1963, subdivision 8 of the Code of Civil Procedure of the state of California has provided that it is presumed 'that a thing delivered by one to another belonged to the latter'. From another standpoint the delivery, in itself, is entitled to consideration, in that if the bonds and checks were known by Mayme to be part of the assets of the estate of Mary Barrett, Sr., Mayme would be a wrongdoer and guilty of a crime in delivering the check to Patrick. Under the circumstances the court and jury were required by law to presume that the law has been obeyed (sec. 1963, subd. 33, Cal.Code Civ.Proc.); that Mayme Barrett was innocent of crime or wrong (sec. 1963, subd. 1, Cal.Code Civ.Proc.); and likewise that she was 'taking care of her own concern' in delivering the checks to Patrick. (Sec. 1963, subd. 4, Cal.Code Civ. Proc.) For she certainly would not have been 'taking care of her own concern' if she delivered property to Patrick that belonged partially to her as an heir of her mother. The trial court, in completely ignoring the existence of these presumptions, created reversible error."

[3] Respondent calls our attention to the fact that immediately after a motion for a directed verdict was made in behalf of the plaintiff a similar motion was made in behalf of the defendants in this case, and claims that by reason of that "the court had an absolute right to make the order since the effect thereof was to withdraw from the jury the question of whether plaintiff and respondent was entitled to recover or whether defendants and appellants were entitled to recover". This view, however, is not supported by the authorities. See Parker v. James Granger, Inc., 4 Cal. 2d 668, 679, 52 P.2d 226.

Without encumbering the record with the multitudinous pronouncements by our appellate courts defining the rule under which a directed verdict may be given, we content ourselves with a reference merely to one of the latest and most complete discussions of that subject as it appears in Re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, et seq. Under the rule there set out, we believe that this case should have been submitted to the jury.

Judgment is reversed and the cause remanded for a new trial.

43 Cal.App.2d 747

NEW YORK LIFE INS. CO. v. OCCIDENTAL PETROLEUM CORPORATION et al.

Civ. 2629.

District Court of Appeal, Fourth District, California.

March 27, 1941.

Hearing Denied May 22, 1941.

1. Appeal and error 🔑907(3)

Where appeal was on the judgment roll, District Court of Appeal assumed that all findings of fact were supported by ample evidence.

2. Trial 🔑404(2)

The fact that certain findings of fact were mistakenly placed in the conclusions of law did not detract from their efficacy as findings.

3. Appeal and error 🔑907(3)

In absence of bill of exceptions or transcript of evidence, District Court of Appeal was required to assume that each material finding was supported by substantial evidence.

4. Insurance 🔑212

Where husband had embezzled money of his employer and represented to wife that unless life insurance policies were assigned to the employer the husband would be prosecuted for embezzlement, and wife acquiesced, the statute which establishes as a disputable presumption that acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact was inapplicable, especially where the employer had not authorized the representations and had no knowledge of their having been made. Code Civ.Proc. § 1963, subd. 27.

5. Principal and agent 🔑131, 177(1)

A principal is charged with knowledge of the facts known by its agent and by his acts within the scope of his authority.

6. Appeal and error 🔑907(3)

Where appeal was on the judgment roll and the findings supported judgment, it could not be disturbed on appeal.

7. Insurance 🔑212

Where employee embezzled funds and employee and his wife who was beneficiary of employee's life policies assigned policies to employer and executed contract guaranteeing validity of assignments and covenanting to defend title of assignee and where findings negatived any duress, menace, fraud or undue influence on part of employer, the wife was not entitled to rescind the assignments and contract after the employee's death. Civ.Code, § 1689.

8. Insurance 🔑212

Where employee and wife for purpose of liquidating indebtedness to employer assigned employee's life policies naming wife as beneficiary to employer and promised to pay premiums on the policies, but paid no premiums after 1931, and employer paid premiums until employee's death on April 23, 1937, the wife was "estopped" from rescinding the assignments. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action in interpleader by the New York Life Insurance Company against the Occidental Petroleum Corporation and Leal Garbett. From a judgment awarding proceeds of life policies to the Occidental Petroleum Corporation, Leal Garbett appeals.

Affirmed.

Hearing denied; SHENK and EDMONDS, JJ., not participating.

H. Sidney Laughlin, of Los Angeles, for appellant.

Overton, Lyman & Plumb, Cecil A. Borden, and Kenyon F. Lee, all of Los Angeles, for respondents.

MARKS, Justice.

This is an action in interpleader in which the New York Life Insurance Company sought to have determined which of two adverse claimants, Occidental Petroleum Corporation or Leal Garbett, were entitled to the benefits of two insurance policies on the life of Leonard Garbett. The trial court awarded the money to the Occidental Petroleum Corporation and Mrs. Garbett has appealed from the judgment.

[1,2] The appeal is on the judgment roll. We must assume that all findings of fact were supported by ample evidence. Certain findings of fact were mistakenly placed in the conclusions of law but this does not detract from their efficacy as findings.

The following facts are gleaned from the findings: Leonard and Leal Garbett were husband and wife at all times material here and up to the time of the death of Leonard on August 2, 1937. On May 14, 1919, and on April 24, 1924, the New York Life Insurance Company issued its insurance policies on the life of Leonard Garbett, with Leal Garbett as beneficiary.

On April 30, 1930, and for a number of years prior thereto, Leonard Garbett was secretary and member of the board of directors of the Occidental Petroleum Corporation; on that day he was indebted to that company in a sum in excess of $90,000 which he had "embezzled and misappropriated" from the funds of the company; the embezzlement was discovered on April 30, 1930; on May 2, 1930, Leonard and Leal Garbett, for the purpose of liquidating the indebtedness of Leonard Garbett, assigned the policies to the Occidental Petroleum Corporation.

On May 14, 1930, as part of the same transaction, the Occidental Petroleum Corporation entered into a contract in writing with Leonard and Leal Garbett wherein they acknowledged the indebtedness and jointly and severally promised to pay it with interest at the rate of five and one-half per cent per annum, guaranteed the validity and sufficiency of the assignments of the insurance policies and covenanted that they would warrant and defend the title of the Occidental Petroleum Corporation as assignee thereof and to all proceeds and benefits therefrom. Leonard and Leal Garbett promised to pay all of the premiums on the policies and to keep them in full force and effect for the benefit of the Occidental Petroleum Corporation. They failed to do this after 1931, and, to keep the policies in effect, the Occidental Petroleum Corporation paid all premiums on the policies after that date, together with interest on the indebtedness of Garbett secured by the policies. This was done with the knowledge of Leal Garbett and without any reimbursement by her. She made no claim of any kind to any interest in the policies after May 2, 1930, and gave no notice of her repudiation of her assignment thereof until about May 18, 1937, after the death of her husband.

In response to affirmative allegations in the answer of Leal Garbett setting up that the assignments were secured from her by fraud, undue influence, threats and menace, and under a contract void as against public policy, the trial court found:

"That it is not true that the instruments hereinbefore referred to, to-wit, the assignments of said policies and the agreement of May 14, 1930, or any of them, were executed and delivered, or executed or delivered, by reason of the undue influence and menace, or undue influence or menace, exercised upon defendant Leal Tedford Garbett and the said Leonard Garbett, or either of them, by said Occidental Petroleum Corporation, and/or upon the agreement of Occidental Petroleum Corporation not to prosecute said Leonard Garbett for the crime of embezzlement, as alleged in defendant Leal Tedford Garbett's first amended answer, or otherwise, or at all."

The trial court further found that Leonard Garbett told Leal Garbett that he had been informed by Occidental Petroleum Corporation, and the then Garbett's attorney also told her that he had been informed by the then attorney for the Occidental Petroleum Corporation that if these assignments and others were not made, Leonard Garbett would be prosecuted for his embezzlements but that if they were made, such prosecutions would be suppressed.

The trial court also found "that, notwithstanding said statements to the defendant Leal Tedford Garbett they were not known or authorized to be made by Occidental Petroleum Corporation and it is not a fact that the defendant Occidental Petroleum Corporation insisted and demanded, or insisted or demanded of said Leonard Garbett and the defendant Leal Tedford Garbett, or either of them, the conveyances or assignments, or the execution of the agreement of May 14th, hereinbefore in these findings referred to, or any of them, but to the contrary the said Leonard Garbett voluntarily, without any inducement whatever on the part of the Occidental Petroleum Corporation, volunteered and agreed that he would execute said documents and obtain the execution thereof by the defendant Leal Tedford Garbett for the sole purpose of liquidating the indebtedness which he then and there acknowledged to exist in favor of the Occidental Petroleum Corporation. Nor is it true that the Occidental Petroleum Corporation threatened that it would, unless Leonard Garbett conveyed, transferred and assigned said property and unless the defendant

Leal Tedford Garbett joined therein, or otherwise, take the necessary steps to cause Leonard Garbett to be incarcerated in the penitentiary, or made any other threat. Nor is it true that said Occidental Petroleum Corporation, by and through its attorney Kenyon F. Lee, or otherwise, stated or promised that if the said Leonard Garbett and the defendant Leal Tedford Garbett executed said documents, it would not prosecute, and would suppress the prosecution of said Leonard Garbett for said embezzlement. * * * That it is not true that the prosecution of said Leonard Garbett for embezzlement and/or any other crime was by said Occidental Petroleum Corporation suppressed, though it is true that said Leonard Garbett was never prosecuted for said crime."

The trial court further found that, about the 2nd day of August, 1937, Leal Garbett notified the New York Life Insurance Company and the Occidental Petroleum Corporation of her rescission of the assignment of the policies and the contract of May 14, 1930, but that she had no legal right to rescind them and that her notice of rescission was ineffective.

The trial court further found facts sufficient to support the plea of estoppel and drew the conclusion of law from those facts that Leal Garbett was estopped from rescinding either the assignments or the contract. It also found that her claim was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure. This finding was misplaced in the conclusions of law.

[3] As we have already observed, we must assume that each material finding was supported by substantial evidence in the absence of a bill of exceptions or a transcript of the evidence.

[4] Mrs. Garbett argues that subdivision 27 of section 1963 of the Code of Civil Procedure which establishes as a disputable presumption "that acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact" is controlling here as she acquiesced in the statements of her husband and her attorney that if the assignments were not made her husband would be sent to the penitentiary but if they were made the fact of the crime would be suppressed.

This provision has been applied where one interested party acquiesced in the statement of the other interested party who assumed an adverse position. In re Clark's Estate, 13 Cal.App. 786, 110 P. 828; Estate of Flood, 217 Cal. 763, 21 P.2d 579. In so far as we can discover, it has not been applied in a case like the one we have here where the person claiming the acquiescence, acquiesced, not in the statements of an adverse party, but in the statements of her husband who was jointly interested with her and of their attorney who was their agent, the adverse party having no notice or knowledge that such statements had been made. The presumption could not arise under these circumstances. It would be as logical to argue that the presumption would arise in a case where a party acquiesced in her own statements which were not communicated to the other party.

[5] The trial court found that none of the statements relied upon by Mrs. Garbett had been authorized or made by the Occidental Petroleum Corporation and that it had no knowledge of their having been made to her. This is in effect a finding that they were not made by its attorney, for a principal is charged with knowledge of the facts known by its agent and by his acts within the scope of his authority.

[6] The findings resolve every factual issue presented by Mrs. Garbett against her and are decisive of the appeal. As they support the judgment it cannot be disturbed here.

[7] Section 1689 of the Civil Code provides in effect that a party to a contract may rescind if the consent of that party or of any party jointly contracting with him "was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party * * *". This section, under the findings, which negative any duress, menace, fraud or undue influence on the part of Occidental Petroleum Corporation, effectually disposes of Mrs. Garbett's contention that she could rescind the assignments and the contract of May 14, 1930.

[8] Further, the conclusion of estoppel is amply supported by the findings. Mr. and Mrs. Garbett promised to pay the premiums on the two insurance policies. They paid no premiums after 1931. In order to keep the policies in force Occidental Petroleum Corporation thereafter paid the premiums (one amounted to $465 per an-

num) until the death of Leonard Garbett on April 23, 1937. Knowing that it was paying these premiums, Mrs. Garbett stood by and did nothing until after the death of her husband. Even then she did nothing to reimburse Occidental Petroleum Corporation for the premiums it had paid. These facts bring the case clearly within the following provisions of subdivision 3 of section 1962 of the Code of Civil Procedure:

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." See Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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43 Cal.App.2d 848

GUARDIAN LIFE INS. CO. OF AMERICA v. OCCIDENTAL PETROLEUM CORPORATION et al.

Civ. 2627.

District Court of Appeal, Fourth District, California.

March 27, 1941.

Hearing Denied May 22, 1941.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Affirmed.

Hearing denied; SHENK and EDMONDS, JJ., not participating.

H. Sidney Laughlin, of Los Angeles, for appellant.

Overton, Lyman & Plumb, Cecil A. Borden, and Kenyon F. Lee, all of Los Angeles, for respondent.

MARKS, Justice.

Except for the insurance carrier, the number of policies and their amounts, the facts of this case and the legal questions presented are identical with those in New York Life Insurance Company v. Occidental Petroleum Corporation and Leal Garbett, Cal.App., 111 P.2d 707.

For the reasons there given and upon the authorities there cited, the judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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43 Cal.App.2d 849

SUN LIFE ASSUR. CO. OF CANADA v. OCCIDENTAL PETROLEUM CORPORATION et al.

Civ. 2628.

District Court of Appeal, Fourth District, California.

March 27, 1941.

Hearing Denied May 22, 1941.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Affirmed.

Hearing denied; SHENK and EDMONDS, JJ., not participating.

H. Sidney Laughlin, of Los Angeles, for appellant.

Overton, Lyman & Plumb, Cecil A. Borden, and Kenyon F. Lee, all of Los Angeles, for respondent.

MARKS, Justice.

Except for the insurance carrier and the amounts of the insurance policies involved, the facts of this case and the issues of law involved are identical with those in New York Life Insurance Company v. Occidental Petroleum Corporation and Leal Garbett, Cal.App., 111 P.2d 707.

Upon the authority of that case the judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

43 Cal.App.2d 831

KING v. FINCH et al.

Civ. 2624.

District Court of Appeal, Fourth District, California.

March 31, 1941.

1. Mortgages ⟹417

Where noteholder suing to foreclose trust deed held more than 25 per cent. of notes, gave trustee written notice of his intention to file suit, and offered to indemnify trustee against costs, expenses, and liabilities all in accordance with terms of trust deed, and trustee immediately delivered trust deed to noteholder and wrote him a letter saying that it did not desire to bring suit or ask for the appointment of a receiver, noteholder was entitled to maintain suit, and judgment for noteholder did not "impair the obligation of the contract" but merely enforced the contract as agreed upon.

See Words and Phrases, Permanent Edition, for all other definitions of "Impairing Obligation of Contract".

2. Mortgages ⟹431

Under trust deed authorizing holders of at least 25 per cent. of amount of notes to bring foreclosure suit after complying with certain conditions precedent and providing that any suit should be maintained for the equal benefit of all holders of notes and that such rights may be enforced without the possession of the notes, the trial court, in the exercise of its equitable jurisdiction, had power to enforce the rights of holder of 25 per cent. of notes in his foreclosure suit with suitable provisions protecting the rights of any other noteholders.

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Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by Shirley King against Fred J. Finch and others to foreclose a bond indenture in the form of a trust deed. From a judgment for plaintiff, defendants appeal.

Affirmed.

A. W. Brunton, of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a bond indenture in the form of a trust deed which was given under date of September 5, 1928, for the purpose of securing a loan of $60,000, evidenced by certain notes. All of these notes became due September 5, 1933, and each note recited that it was one of a series of 170 notes secured by this deed of trust.

The notes were sold to various people and none of the notes were paid when due. At the time this action was filed, on September 3, 1937, the plaintiff was the holder of certain of these notes, the principal of which totaled $54,400. He brought this action in his own behalf and for the benefit of all other holders of these notes, making the others defendants by reason of the fact that they had refused to join as plaintiffs. All of the other noteholders defaulted or consented to the judgment with the exception of the defendant Una Hansen. With respect to her, the plaintiff reported to the court that he was unable to locate her and asked the court to protect her interest in any decree that should be entered.

The court found in all respects in favor of the plaintiff, including a finding that the plaintiff was the owner and holder of notes secured by this trust deed which totaled $54,400, and that the remaining $5,600 in notes were owned by four people, one of these being Una Hansen who held notes totaling $1,600. A judgment was entered in which it was ordered that the real property described in the trust deed should be sold by a commissioner at public auction; that the proceeds of the sale, up to the full amount due, should be paid to the plaintiff; that he should immediately pay to the other noteholders their proportionate share of the proceeds; and that if any of these noteholders should refuse to accept their share within 30 days the respective amounts should be deposited by the plaintiff with the clerk of the court for the benefit of such parties. The judgment further provided for the entry of a deficiency judgment under certain circumstances, with a corresponding provision for the payment to the other noteholders of their proportionate share of any proceeds from such a deficiency judgment or for the deposit in court of such share for the benefit of any such parties. From this judgment the defendants Finch, who borrowed the original $60,000 and gave the trust deed as security therefore, have appealed.

Appellants' main contention is that this action could not be brought or maintained by the respondent since he was merely one of the noteholders. In this connection it is argued that the trust deed provides for a sale by the trustee in case of any default, that any action in court that might be brought is limited by the terms of the trust deed to one brought by the trustee, and that to permit the judgment to stand would impair the obligation of the contract which was executed by the appellants. It rather clearly appears from the evidence that the trustee had refused to take any action for the enforcement of the provisions of this trust deed. Under such circumstances general statutory and equitable provisions and rules would probably be effective to sustain the relief here granted. Lincoln v. Superior Court, 2 Cal.2d 127, 39 P.2d 405; Curtin v. Krohn, 4 Cal.App. 131, 87 P. 243; Bayer v. Hoagland, 95 Cal.App. 403, 273 P. 58; Lowe v. Los Angeles Suburban Gas Co., 24 Cal.App. 367, 141 P. 399.

[1] Whether or not these provisions and rules are here applicable, the provisions of this trust deed sufficiently authorize the bringing of this action and sustain the judgment in this respect. While other remedies for default are provided in the trust deed, dependent upon the cooperation of the trustee, the trust deed contains provisions which authorize such an action as this and such provisions were a part of the contract entered into by the appellants. Article VII of the trust deed is headed "Concerning the Noteholders". Section 1 thereof reads, in part, as follows:

"All rights of action on or because of the notes secured hereby, or the interest coupons thereto appertaining, and all rights of action, under this indenture, are hereby expressly declared to be vested exclusively in the Trustee, except only as otherwise provided; and such rights may be enforced by the Trustee without the possession of any of the notes secured or the interest coupons thereto appertaining."

Section 2 thereof provides that no holders of any of these notes shall have the right to institute any suit under or upon the trust deed unless he shall have given to the trustee written notice of his intention to file such suit, unless the holders of at least 25 per cent in amount of the notes secured thereby have afforded the trustee a reasonable opportunity either to exercise his powers or to institute such an action and the trustee has so failed to do, and unless such holders have offered to furnish the trustee adequate security and indemnity against costs, expenses and liabilities in connection with such an action. It is further provided that "at the option of the trustee" such notification, request and offer of indemnity are to be considered conditions precedent to the filing of a suit, and that any suit shall be maintained "for the equal benefit of all holders of such notes and coupons", with one exception not material here.

The evidence discloses, without conflict, that this respondent held more than 25 per cent of these notes, that he gave the trustee written notice of his intention to file this suit, and that he offered to indemnify the trustee in the respects above noted. The written notice closely followed the language of these provisions of the trust deed. Not only do these steps seem to have been provided for the benefit of the trustee, in view of the option given him, but the trustee here immediately delivered the trust deed to the respondent and wrote him a letter saying that it did not desire to bring suit or ask for the appointment of a receiver. The trustee was given "a reasonable opportunity either to proceed itself to exercise the powers heretofore granted, or to institute such action", as provided for in the trust deed, and by refusing to act as requested and turning the instrument over to the respondent the trustee sufficiently disclosed that it did not desire to itself proceed under any of the alternative remedies provided for in the trust deed. Rather than impairing the obligation of the contract the judgment merely enforced that contract in the manner in which the parties themselves had agreed upon.

[2] The only other point raised is that this judgment could not be lawfully entered since one of the bondholders had not been served and had not appeared, and since other bondholders who were served and who had defaulted had not surrendered their bonds into court at the time the judgment was entered. It may first be observed that the other bondholders are not complaining and their rights were fully protected by the judgment. The appellant is affected, if at all, only on the theory that another action might be brought on some of the notes which were not held by the respondent. A number of reasons appear why this could not occur, and no great harm to the appellants could result since any share of the proceeds of the sale of this property, which cannot be delivered to the lawful owner of any note upon the taking up of that note, is to be deposited in court

where a proportionate benefit would be available to the appellants in any suit that might be filed upon any other note. Moreover, we are not directly concerned with this problem here since the terms of the trust deed expressly provide that any of the noteholders holding at least 25 per cent of the amount of the notes shall have the right to do exactly what was here done, that any suit should be maintained for the equal benefit of all holders of these notes, and that "such rights" might be enforced without the possession of the notes. Under such a contract and in the exercise of its equitable jurisdiction, the court had power to enforce the rights of the respondent, with suitable provisions protecting the rights of any other noteholders, and this the court has done.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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43 Cal.App.2d 732

TANNER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 12972.

District Court of Appeal, Second District, Division 2, California.

March 26, 1941.

1. Executors and administrators ⚷451(1)

Under statute authorizing appointment by court of attorney to defend action on claim made by administratrix of estate against the estate and rejected by the court, probate court had no jurisdiction to appoint attorney to defend at estate's expense an action by administratrix seeking to quiet title in herself to all property inventoried in estate, since if administratrix' claims were valid, there was no estate of decedent to be defended. Probate Code, § 703.

2. Costs ⚷103

Where legal services are rendered in protecting or preserving a common fund for the benefit of some who did not participate in the labors to effect its preservation, the expense of such services including counsel fees is a proper charge against the common fund conserved or protected.

3. Executors and administrators ⚷216(2)

Where probate court appointed attorney to defend action brought by administratrix of estate seeking to quiet title to assets of estate in herself, and judgment that property belonged to administratrix individually was reversed and suit dismissed, not on account of error in findings of fact but because no party defendant had been before the court, probate court had no jurisdiction under either statute or general equity jurisdiction to order payment out of funds of estate to attorney thus appointed for services rendered in administratrix' action. Probate Code, § 703.

◆

Proceeding upon the petition of Eva M. Tanner, administratrix for a writ of review to determine jurisdiction of the Superior Court of the State of California in and for the county of Los Angeles to order petitioner to pay Joseph A. Ball certain counsel fees.

Order annulled.

Will H. Winston, of Long Beach, for petitioner.

J. H. O'Connor, County Counsel, of Los Angeles, and Joseph A. Ball, of Long Beach, in pro. per. for respondents.

MOORE, Presiding Justice.

A writ of review was issued to the superior court sitting in probate for the purpose of having this court determine whether or not that court was without jurisdiction to make its order for the payment of certain counsel fees for services rendered by respondent to the estate following his appointment by such judge.

Following the decease of John L. Best, petitioner qualified as administratrix of his estate. She filed her inventory disclosing that the estate consisted of various stocks and bonds but she averred therein that the assets named were not the property of decedent but that they were her very own. She then instituted a separate action at law entitled Eva M. Tanner v. Estate of John L. Best, et al., whereby she sought to quiet title in herself to all of the assets of the estate. A copy of the summons and complaint were served upon the judge of the court who had granted her letters of administration. In turn that judge made an order purporting to appoint respondent, Joseph A. Ball, as attorney for the "estate of John L. Best", deceased, to defend this estate against petitioner's action. Following the trial, judgment was entered in petitioner's favor. From the judgment entered an appeal was taken to this court. We found no error in the findings of fact but reversed the judgment and directed the dismissal of the action against the "Estate of John L. Best" on the ground that there was no defendant before the court. Tanner v. Best, Cal.App., 104 P. 2d 1084. Thereafter, on November 15, 1940, the court which was administering the estate of Best, after a hearing on the order to show cause and objections thereto, made its order December 20, 1940, that the administratrix herein, Eva M. Tanner, pay $500 out of the assets of the Best estate to Joseph A. Ball in full compensation for his services in conserving and preserving intact the assets of said estate.

Petitioner contends in her petition that the superior court acted in excess of its jurisdiction and that the order requiring petitioner to pay him $500 is void. Respondent contends that the judge was authorized to appoint an attorney to defend the interests of the estate to the end that the title to its assets would not be clouded by petitioner's action; that the court's power was not dependent upon statute, but that its power to appoint counsel to defend the estate is the proper exercise of its equity jurisdiction.

[1] Respondent's position cannot be maintained. As pointed out in our former opinion, no one who had an interest in the estate was served with summons except respondent, who filed a disclaimer. No one interested in the estate appeared to contest petitioner's action to quiet title. But petitioner proceeded upon the erroneous theory and the judge conceived that he was authorized by section 703 of the Probate Code to appoint respondent to defend the estate against petitioner's lawsuit. There is nothing in that section which authorizes the probate judge to appoint counsel to defend an action brought against the estate by its administrator when the very basis of that action denies the existence of any estate of decedent. The purpose of that section was to facilitate the defense of claims for money made against the estate. It distinctly provides that if the administrator is a "creditor" of decedent and files his claim with the clerk, the clerk must present it for allowance or rejection to the judge and if the judge rejects the claim and action be instituted thereon, the "summons must be served upon the judge who shall appoint an attorney at the expense of the estate to defend the action". Nowhere does it appear in the record that any sort of claim was ever filed with the clerk or presented to the judge. By consulting the cited section the judge would have observed that his appointment of counsel to defend an action brought against the estate is one which is instituted following his rejection of a claim. If it should ultimately be determined in such a civil action, as it was determined, that the estate had no assets, there was nothing for the attorney to defend. Therefore, with these facts before the attorney, he was abundantly warned beforehand that he was serving the estate at his peril, for if she should prevail, there is no authority whereby the court could take from the assets of Eva M. Tanner individually, to pay for the services of an attorney who undertook to defend the interest of a nonexistent estate.

Respondent contends that the code section does not require the judge to determine the jurisdiction of the court to appoint counsel before doing so. This contention requires us to say that the language of the statute was clear in that there was no authority given for the appointment of counsel in such an action as that which petitioner had instituted. The point made by respondent that the law had not at that time been settled that such a case would be dismissed is beside the point. The statute was the source of the authority exercised by the court and it clearly did not authorize the appointment of an attorney under such circumstances as those presented by petitioner's action to quiet title.

[2] Respondent argues that the services rendered by him preserved for all legatees and heirs and others interested the assets of the estate. There is no judgment that respondent preserved any assets for the estate. The decision of the superior court was for petitioner to recover judgment quieting her title to the assets listed in the inventory of the estate, and upon a review of the case, we found no lack of evidence to justify that finding. It is true that where legal services are rendered in protecting or preserving a common fund for the benefit of some who did not participate in the labors to effect

its preservation, the expense of such services including counsel fees are a proper charge against the common fund so preserved or protected. 7 C.J.S., Attorney and Client, § 193, p. 1098; Hempstead et al. v. Meadville Theological School et al., 286 Pa. 493, 134 A. 103, 49 A.L.R. 1145; Drain v. Wilson, 117 Wash. 34, 200 P. 581; Bean v. Bean, 74 N.H. 404, 68 A. 409, 124 Am.St.Rep. 978; Brand v. Denson, Tex. Civ.App., 81 S.W.2d 111.

These authorities were cited by respondent and are authority for the exercise of its equity powers by a court in compensating counsel who have been appointed by the court, or who have been employed by some of the interested beneficiaries of a fund to protect it or conserve it against an inimical adversary. In all of the cited cases, as a result of the legal services rendered, there was added to the estate or trust fund property which would have been taken but for the legal services, or property had been gained from the hostile possession of others. In all such cases, the payment of counsel fees is dependent upon establishing the right of the common fund to the property which comprised the subject of the litigation. By those cases the general rule is declared that an attorney rendering such service to a common fund may be given compensation because he increases or protects it. The basis of this rule is the principle that one who preserves a common fund works for others as well as for himself. Brand v. Denson, supra.

[3] The order in question is not to be likened to that which requires the payment "out of a common fund" for services successfully rendered on behalf of such fund. Under the showing made by petitioner, the probate court had determined that there are no assets belonging to the estate. We ordered a dismissal of the action not because of any error in the court's finding of fact but solely for lack of jurisdiction of the court to make an order. To require petitioner now to pay the counsel fees would be to take advantage of a technicality whereby her action was dismissed not because of her failure to prove her demands but because of the want of jurisdiction of the court to render judgment against a nonentity. If a judgment in a proper lawsuit, after service of summons upon the interested parties, should determine that her demand for all of the assets should be finally rejected, it will then be in order for the estate to pay for its conservation whether the counsel who renders the services shall have been appointed by the court or employed by one of the heirs of the estate. But it would certainly be inequitable to make such order while the only showing is a finding and decision of the superior court that the assets inventoried to the estate are the property of the petitioner.

For the reasons given, the order of the superior court authorizing the payment of $500 to respondent by "Eva M. Tanner, the Administratrix herein," is hereby annulled.

We concur: WOOD, J.; McCOMB, J.

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43 Cal.App.2d 764

BAUER v. DAVIS.

DAVIS v. BAUER et al.

HALSTEAD v. DAVIS et al.

Civ. 6413.

District Court of Appeal, Third District, California.

March 28, 1941.

Rehearing Denied April 26, 1941.
Hearing Denied May 26, 1941.

1. Negligence 🔑136(9, 10)

The issue of negligence is a "question of fact" for jury, where evidence is conflicting, or where, although the evidence is without conflict, different inferences may reasonably be drawn from it.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

2. Automobiles 🔑245(14, 15)

In action arising out of automobile collision on city street, where evidence was conflicting as to whether defendant was entering street at intersection without stopping at stop sign, or whether she was in act of making U turn, and, if defendant was making U turn, there was evidence that defendant failed to make proper observation to rear for approaching traffic, question as to whether defendant was negligent was properly submitted to jury. Vehicle Code, § 544, St.1935, p. 185.

3. Automobiles ⚷169, 172(6)

A motorist is not required to maintain a constant observation to the rear prior to making a U turn; however, in turning of a vehicle, whether it is to the left, to the right, or in making of a U turn, motorist is required to exercise reasonable care in ascertaining that such movement will not cause contact with any other vehicle or person. Vehicle Code, § 544, St.1935, p. 185.

4. Automobiles ⚷150

Performing requirement of giving appropriate hand signal does not necessarily relieve motorist of duty to also make proper observations to ascertain that her movement will not cause contact with any other vehicle or person. Vehicle Code, § 544, St.1935, p. 185.

5. Automobiles ⚷246(11)

In action arising out of automobile collision on city street, instruction upon duty of defendant to look to rear for approaching traffic before making U turn, which stated that duty was a continuous one and was not necessarily met by looking once and then looking away, did not require defendant to continuously observe automobile approaching from rear.

6. Negligence ⚷136(26, 31)

Contributory negligence and determination as to whether a plaintiff has by his own conduct proximately contributed to his own injuries is ordinarily a question of fact for jury.

7. Negligence ⚷136(26)

Conduct of a plaintiff, even though admittedly careless in some respect, does not necessarily constitute contributory negligence as a matter of law.

8. Automobiles ⚷245(67, 78, 90)

In action arising out of automobile collision on city street, whether act of plaintiff motorist in taking his eyes off road momentarily to wave to friends, or in driving automobile at rate of speed between 35 and 40 miles per hour, constituted contributory negligence which was "proximate cause" of collision, was for the jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

9. Appeal and error ⚷930(1)

It would be presumed in support of a judgment that all favorable evidence and deducible inferences were considered by the jury.

10. Automobiles ⚷246(47)

In action arising out of automobile collision on city street, where evidence was conflicting as to whether defendant was entering street at intersection without stopping at stop sign, or whether she was in act of making U turn, trial court did not err in giving instructions as to law pertaining to stop signs. Vehicle Code, § 577, St.1935, p. 190.

11. Appeal and error ⚷1067

In actions arising out of automobile collision on city street by motorist and occupant of his automobile against driver of other automobile, refusal to instruct that plaintiff driver was agent of occupant, if error, was harmless, where there was substantial evidence in support of finding that plaintiff driver was not guilty of contributory negligence.

◆

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by Clarence Bauer against Mrs. Harry Davis for injuries sustained in an automobile collision, wherein the defendant filed a cross-complaint naming the plaintiff and Lester P. Halstead and another as cross-defendants, and the cross-defendant Halstead filed a cross-complaint against the original defendant and another. From a judgment for plaintiff and for Lester P. Halstead on his cross-complaint, the defendant appeals.

Affirmed.

H. K. Landram, of Merced, and A. Dal Thomson, of San Francisco, for appellant Davis.

C. Ray Robinson, Willard B. Treadwell, and W. Eugene Craven, all of Merced, for respondent Bauer.

L. A. MacNicol, of Merced, for respondent Lester P. Halstead.

F. M. Ostrander, of Merced, for respondent Albert Lencioni.

PER CURIAM.

This action was brought by Clarence Bauer against defendant and appellant Mrs. Harry Davis, to recover damages for injuries suffered as a result of a collision between the car driven by Mrs. Davis and the one in which plaintiff was riding. The defendant answered denying the allegations of negligence and alleged contributory negligence on the part of plaintiff. The defendant also filed a cross-complaint, naming as cross-defendants, the plaintiff Clarence Bauer and cross-defendants Lencioni, Halstead and Nash. Lencioni was the owner of the car in which plaintiff was riding at the time of the collision. Mr. Halstead was driving this car at the time of the accident. Mr. Nash was an automobile dealer with whom Lencioni was negotiating for the purchase of a new car. A motion for non-suit was interposed and granted as to defendant Nash. The propriety of that order is not contested.

The cross-complaint of defendant Mrs. Davis, named Bauer and Halstead as cross-defendants upon the theory that the collision was a direct and proximate result of the negligence of Halstead, and that Halstead was acting as agent of Bauer at the time of the accident. The respective cross-defendants filed answers to this cross-complaint.

In addition to his answer to the cross-complaint, Halstead filed a cross-complaint against the defendant, Mrs. Davis, seeking recovery of damages for his injuries. An answer to this cross-complaint was filed by Mrs. Davis. The case went to trial upon these several pleadings, and the jury found for plaintiff Bauer and against Mrs. Davis upon the complaint, and against her also on her cross-complaint against Bauer, and for Halstead and against Mrs. Davis on his cross-complaint and against her on his cross-complaint against Davis. No reference was made to Lencioni in the verdicts. This appeal is from a judgment in favor of plaintiff Clarence Bauer, and cross-complainant Halstead.

The collision giving rise to this suit for damages occurred at the intersection of Sixteenth and V streets in the City of Merced. Sixteenth street is also known as Highway 99, and traffic entering thereon is controlled by stop signs. V street intersects Sixteenth street east and west.

A short time prior to the accident, Mr. Bauer who was interested in the purchase of the automobile involved in the collision, had stopped in front of a service station where Mr. Halstead was employed. Halstead offered or was requested by Bauer to drive the car. With Halstead driving and Bauer seated as a passenger in the front seat they proceeded north along Sixteenth street. At a point some 50 feet south of the V street intersection, Halstead recognized two of his friends standing in front of a service station located on the corner to his left. He tooted his horn and waved to them. As Halstead looked back to the highway the car driven by appellant was observed to be approximately 10 to 12 feet distant and approaching into the intersection from the right. Halstead testified, "And this other car seemed to just shoot directly right out in front of me and all I had time was just to get set on the brake and clutch, when the accident occurred". Bauer and Halstead estimate the speed of their car as they proceeded along Sixteenth street at 25 to 35 miles per hour. A traffic officer testified, however, that Halstead had stated he was traveling at a speed between 35 and 40 miles per hour.

There is some conflict in the evidence as to whether the appellant Mrs. Davis, was at the time of the accident in the act of making a U turn or whether she had entered Sixteenth street after having proceeded along V street. She testified that she had been proceeding north on Sixteenth street and was on her way home, and that she remembered something she had forgotten and started to make a left-hand turn for the purpose of proceeding back along Sixteenth street. Mrs. Davis also testified that before reaching the Signal Service Station (which was approximately 50 feet from the southerly curb line of the intersection) she put out her hand and looked into the rear view mirror and observed a car "just this side, just toward me from the cleaners". The Merced Cleaning Works is located one-half block south of the intersection. In answer to questions as to whether she had looked back again after having reached the point opposite the Signal Service Station, the appellant replied, "I don't remember".

Mr. Gross, appellant's son-in-law, who was riding in the car at the time of the accident was not called as a witness.

Although it does appear that the appellant was in the act of making a U turn on Sixteenth street at the time of the accident, there is nevertheless some evidence to indicate she may have driven onto Sixteenth street from V street. Mr. Hull, a witness for appellant, and the only person other than the occupants of the cars who actually witnessed the collision, testified on cross-examination that "There were the marks that the car had made coming out of V street, apparently". Mr. Hull had been standing in the doorway of the service station located on the southwestern corner of the intersection and he observed the two cars involved in the collision just a fraction of a second before they collided. He further testified in regard to the position of the cars, as follows:

"Q. And what was the position of the Dodge (Bauer's) sedan, as you first observed it, as nearly as you can recall? A. In relation to the center line of 16th. street?

"Q. Yes. A. It was approximately in the center of that line and the curb, it was in the center of that space.

"Q. And when you say that, do you mean that one side or the other was approximately on the center, or what we might say, straddling the center of the right-hand lane? A. That would be approximately it, yes.

"Q. And what was the position of the other car? A. The other car (appellant's car) was coming—or on V street, or in the intersection, but heading up and down V street, was again in relation to the center line of 16th. street, the front of that car was possibly five or six feet from the center line and beyond the center line of V street, again possibly in the very center of the right-hand lane of V street, facing towards the track.

"Q. Then you would place the Dodge sedan at approximately straddling the center of the right-hand lane? A. Yes.

"Q. And the Chevrolet (Mrs. Davis' car) as you say, five or six feet from the center line of 16th. street? A. Yes, that is the front of the car.

"Q. Approximately in the center of that quadrant of that intersection? A. Yes, sir."

The appellant, Mrs. Davis predicates error on the part of the trial court in denying her motion for nonsuit, in the giving of certain instructions relating to the duty of care required on her part, and a refusal by the court to instruct that Lester P. Halstead was an agent of respondent Bauer at the time of the accident. It is also urged by appellant that the evidence compels the conclusion that the accident was caused solely by negligence upon the part of Lester Halstead, or that there is at least a showing that he was guilty of contributory negligence as a matter of law.

[1] The question of negligence is one of fact for the jury where the evidence is conflicting or where, although the evidence is without conflict, different inferences may reasonably be drawn from it. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212.

[2] Applying this well-settled rule of law, it clearly appears that the question as to whether appellant was negligent was properly submitted to the jury. There was not only a conflict in the evidence as to whether Mrs. Davis had approached the intersection from V street, but different inferences could properly have been drawn even assuming that there was no question as to whether a U turn was being made at the time of the collision. One obvious consideration would be the question as to whether appellant had maintained a proper lookout for traffic approaching from the rear. Where the circumstances present the question, as in the present case, as to whether a defendant has used the care required of a reasonably prudent person, it is one of fact for the jury to decide.

The jury were instructed in the language of section 544 of the Vehicle Code, St.1935, p. 185, as follows: "No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement."

The jury might well have concluded, and there is substantial evidence in support thereof, that appellant violated the foregoing provisions of the Vehicle Code.

[3] Mrs. Davis testified that she didn't remember whether she had looked back after observing a car opposite the Merced Cleaners. It might well be concluded that appellant did not look back at the time she was making the U turn. An observation at this time would have revealed the presence of the car driven by Halstead, and Mrs. Davis would then have ascertained that her U turn movement could not have been made with reasonable safety. It was not necessary, nor does the law require, that a constant observation be maintained to the rear prior to making a U turn. It is necessary, however, in the turning of a vehicle, whether it be to the left, to the right, or in the making of a U turn, that reasonable care be exercised in ascertaining that such movement will not cause contact with any other vehicle or person. Meyers v. Bradford, 54 Cal.App. 157, 201 P. 471.

[4] Performing the requirement of giving the appropriate hand signal does not necessarily relieve a driver of the duty to also make proper observations. As is often the case, the driver of a car preceding another may suddenly give a hand

signal and turn his car quickly to the right or left without observing traffic to the rear. Such action certainly constitutes negligence, and the hand signal cannot be deemed to have been sufficient warning. The circumstances in the present case indicate that appellant either failed to look to the rear at all, or that upon reaching the intersection she proceeded to complete her U turn without concerning herself with the northbound traffic. As indicated, the jury were presented with sufficient evidence and circumstances from which it might well be concluded that appellant was negligent.

[5] The court's instruction as to the duty of care upon appellant "to look" was perfectly proper. The contention that such instruction compelled a duty to constantly and continuously observe the Halstead car is not sound nor reasonable. The court instructed that the duty to exercise reasonable care was "not necessarily met by looking once and then looking away". The language, that the duty to look is "a continuous one", could not reasonably be construed to require appellant to continuously observe the Halstead car.

[6, 7] Contributory negligence and the determination as to whether a plaintiff has by his conduct proximately contributed to his own injuries, like the question of negligence upon the part of a defendant, is ordinarily a question of fact for the jury. Conduct of a plaintiff, even though admittedly careless in some respect, does not necessarily constitute contributory negligence as a matter of law. Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Johnson v. Pickwick Stages System, 108 Cal.App. 279, 291 P. 611.

[8, 9] The question as to whether the conduct on the part of Halstead constituted negligence which proximately contributed to his injuries was properly submitted to the jury. It cannot be held that Halstead's action in removing his eyes from the road and waiving to his friends was, as a matter of law, a contributing, proximate cause of the collision. Halstead testified in regard to looking away from the highway and toward his friends that it was "just a momentary glance". There is nothing in the evidence to indicate that Halstead could have averted the collision even though his eyes had not been taken momentarily from the highway in front of him. In fact, Halstead's testimony in regard to appellant's car shooting directly out in front of him, might well indicate that no amount of due care on his part would have averted the collision. It must be presumed in support of the judgment that all favorable evidence and deducible inferences were considered by the jury. It must also be presumed that the jury considered the evidence relating to the speed of the Halstead car and concluded that such speed did not proximately contribute to the accident.

Appellant cites the case of Benson v. Burk, 36 Cal.App.2d 448, 97 P.2d 858, in support of his contention that Halstead was guilty of contributory negligence as a matter of law. The negligence of the defendant in the Benson case did consist in defendant's act of diverting his attention from the road and waving to a friend. The decision in the Benson case cannot, however, be deemed to be controlling in every situation where it is shown that the driver of a car has taken his eyes from the road to wave to a friend. Moreover, the language of the opinion indicates that the defendant could have averted striking the child if his attention had not been diverted. Such a conclusion follows from the statement that this was not the case of a child suddenly darting from a hidden place, but the running into a child on an open highway.

We conclude that the verdict of the jury is sufficiently supported by the evidence, as we have indicated, and that the negligence of appellant was a proximate cause of the injuries received by respondent Bauer, and cross-complainant Halstead. Appellant's motion for a nonsuit was therefore properly denied.

[10] There is no merit in the contention that the court erred in its instructions as to the law pertaining to stop signs. As indicated, there was evidence introduced from which the jury might have concluded that appellant entered Sixteenth street after having driven through the stop sign located at that intersection. If Mrs. Davis had been proceeding along V street and had driven through the stop sign in violation of section 577 of the Vehicle Code, St.1935, p. 190, the jury would have been warranted in concluding, under the circumstances, that such violation was a proximate cause of the collision.

[11] In conclusion and in answer to appellant's contention that the court erred in refusing to instruct that Halstead was an agent of respondent Bauer, we deem it sufficient to point out that the verdict of the jury constituted a finding that Halstead

was not guilty of contributory negligence. There is substantial evidence in support of that finding, and therefore it is immaterial as to whether Halstead was or was not acting as an agent for respondent Bauer. Bauer would be precluded from recovering damages as against appellant, assuming that Halstead was the agent of Bauer, only in the event that Halstead was guilty of contributory negligence. Lencioni, the owner of the car driven by Halstead, would in any event, be liable to appellant in damages, only upon the conclusion that the negligence of Halstead was the sole and proximate cause of the collision. It was therefore immaterial that Lencioni was not mentioned in the verdict.

We do not deem it necessary to discuss other points raised in appellant's brief.

The judgment in favor of respondent Charles Bauer, and cross-complainant Lester P. Halstead, is affirmed.

RAVIZZA v. BUDD & QUINN, Inc.

Civ. 6534.

District Court of Appeal, Third District, California.

March 31, 1941.

As Amended on Denial of Rehearing April 29, 1941.

1. Sales 🔑479(1)

Under conditional sales contract by which title is not to pass until price is paid, possession being given to buyer and seller having right to take possession upon default in payment, seller upon default generally, in absence of statute, is put to his election either to retake possession and relinquish any right to price or to recover price and relinquish right to retake possession, and if he pursues one remedy, he loses the right to the other.

2. Election of remedies 🔑3(4)

Where party has suffered an actionable wrong, he will not be permitted to pursue inconsistent remedies against different persons.

3. Sales 🔑477(4)

Where assignee of conditional sales contract brought action against conditional buyer on notes representing balance of purchase price of tractor and disc which assignee sought to attach, and prosecuted the action to judgment, the assignee, under doctrine of "election of remedies", was precluded from maintaining action against the conditional seller for conversion of the property which the buyer had traded in to the seller on purchase price of another tractor.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedies".

4. Election of remedies 🔑1

The "election of remedies" doctrine cannot be applied in favor of one who is not a party to the contract and who is a stranger to the transaction.

5. Sales 🔑477(4)

Where assignee of conditional sales contract covering tractor and disc brought action against buyer for purchase price and subsequently brought action against seller for conversion of the property which buyer had traded in on new tractor, the seller was not a "stranger" to the transaction in view of "privity of estate" between assignor and assignee, so as to preclude application of doctrine of "election of remedies" in its favor as defense to assignee's action for conversion.

See Words and Phrases, Permanent Edition, for all other definitions of "Privity of Estate" and "Stranger".

6. Sales 🔑477(4)

Where assignee of conditional sales contract brought action against conditional buyer on notes evidencing purchase price of conditionally sold tractor and disc, alleged fact that buyer was insolvent and judgment against him was worthless did not render inapplicable the doctrine of "election of remedies" which precluded bringing of action against conditional seller for conversion of the property based on fact that seller had accepted it as part payment of purchase price of another tractor, since election was made and "estoppel" arose when complaint was filed against buyer and assignee had duty to investigate buyer's solvency prior to commencement of such action.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

7. Sales ⚷477(4)

Where assignee of conditional sales contract brought action against conditional buyer for balance of purchase price of conditionally sold tractor and disc, assignee thereby transferred to and vested in buyer title to the property and could not thereafter prevail in an action against conditional seller for conversion thereof based on fact that seller had accepted such property as part payment of purchase price of another tractor, since assignee had neither ownership, possession nor right to possession of the property.

◆

Appeal from Superior Court, Madera County, James D. Garibaldi, Judge.

Action by Fred Ravizza against Budd & Quinn, Inc., for damages arising out of conversion of a tractor and disc. From an adverse judgment, the plaintiff appeals. Affirmed.

Nathan G. Gray, of Berkeley, for appellant.

Adams & Griswold, of Merced (Claude H. Adams and Hugh H. Griswold, both of Merced, of counsel), for respondent.

TUTTLE, Justice.

This action was brought to recover damages arising out of a conversion of a tractor and disc. Findings were entered in favor of defendant, and judgment entered that plaintiff take nothing from defendant. The appeal is from the judgment.

The facts are practically undisputed. On January 10, 1935, John Mogliotti purchased a tractor and disc from defendant, under a conditional sales contract which contained the following provisions relating to the remedies which the seller might exercise in the event of a failure or omission of the buyer to keep any or all of the terms and conditions thereof:

"In the event of the happening of any of the above contingencies, seller may, at its option, without demand or notice, exercise any of the following remedies:

"First: It may without notice elect to treat the entire remaining balance of the purchase price and interest, evidenced by said promissory notes due and payable immediately and sue therefor; or

"Second: It may without demand or performance or notice, retake possession of said property and may, at public or private sale, with or without notice, with or without having the property at the place of sale, and upon such terms and in such manner as it may determine, sell the said property (seller being permitted to bid at any public sale) and after deducting all expenses (including reasonable attorney's fees) incurred therein credit the net proceeds of the sale to the unpaid balance due hereunder; any surplus shall be paid to buyer; and buyer agrees to pay to seller any deficiency remaining under this contract or under said promissory notes after such resale is completed and the proceeds applied as herein provided; or

"Third: It may take possession of said property wherever and whenever found, and with or without notice or demand, may elect to treat buyer in default, and in such event, all of the rights, titles and equities of buyer in said property shall immediately cease and determine, and seller shall be released from all obligations to transfer or deliver said property to the buyer, and all sums of money theretofore paid, and all sums then due and unpaid by the buyer to seller hereunder or under said promissory notes shall remain the property of seller and shall be considered compensation for the use, wear and tear and depreciation of said property, and buyer agrees forthwith to pay to seller all of said payments which are then due and unpaid; or

"Fourth: It may avail itself of any of the remedies for the enforcement of a seller's rights under an agreement such as this, as provided by the laws of the State of California."

On February 11, 1936, said contract was purchased by plaintiff through an assignment, and the sum of $1,240.87 was paid to defendant as consideration therefor. As part of the transaction, several promissory notes of Mogliotti were also assigned to plaintiff. These represented a portion of the purchase price. Mogliotti failed to make any further payments under the contract, and on December 13, 1939, plaintiff commenced an action against Mogliotti to recover upon said notes. An attachment was issued and levied upon a tractor, which was afterward released upon a third party claim filed by defendant. It appeared that the original tractor had been traded in by Mogliotti with defendant on the purchase price of another tractor. The sum of $575 was fixed as the value of the first tractor, and that amount was credited upon the purchase price of the second. On June 18, 1940, judgment was entered in that action in favor of plaintiff in the sum of $1,504.22, and $150 as an attorney fee. Prior to the last-mentioned date, and on March 14, 1940, this action was commenced.

The sole question is the sufficiency of the evidence to support the following finding:

"It is true that plaintiff did, prior to the bringing of this action, exercise one of the options which it was entitled to exercise under the terms of said contract, and did fully and irrevocably elect to enforce payment of the purchase money for said personal property, and did fully and irrevocably waive its option to repossess itself of such personal property."

[1] The general rule governing the situation here presented is thus stated in 7 Blashfield Cyclopedia of Automobile Law and Practice, Perm. Ed., § 4631, p. 257: "The general rule in most jurisdictions, in the absence of a controlling statute, is that, under a contract of conditional sale by which title is not to pass to the buyer until the price is paid, possession being given to the buyer and the seller having a right to take possession upon default in payment, the seller upon such default is put to his election, either to retake possession and relinquish any right to the price or to recover the price and relinquish the right to retake possession, and that, if he pursues one remedy, he loses the right to the other."

[2] The foregoing rule is predicated upon the doctrine of election of remedies which is laid down as follows in 20 C.J., p. 17, § 12: "Where a party has grounds to bring separate actions against different persons, and the maintenance of one necessitates the allegation of a fact, or the assumption of a position, inconsistent with, or repugnant to, the maintenance of another, he is bound by his election, and cannot proceed against the other. In other words, where a party has suffered an actionable wrong he will not be permitted to pursue inconsistent remedies against different persons."

In 9 R.C.L., p. 957, § 1, it is stated: "The basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other—the same principle being applicable also to a choice of defenses. The doctrine of election of remedies is, therefore, generally regarded as being an application of the law of estoppel, upon the theory that a party cannot, in the assertion or prosecution of his rights, occupy inconsistent positions."

The rule laid down by Blashfield is followed in California. In George J. Birkel Co. v. Nast, 20 Cal.App. 651, 129 P. 945, the court reviews the authorities in this state on all phases of the question. We quote from the opinion:

"The provision of the contract, to the effect that the title to the piano should remain in plaintiff until payment of the full purchase price thereof, was inserted for the purpose of securing such payment, and therefore was for the benefit alone of the vendor. Being for its sole benefit, it had the right to waive the same. Shepard v. Mills, 173 Ill. 223, 50 N.E. 709. Plaintiff could not retake the piano and also sue for the price thereof. Muncy v. Brain, 158 Cal. 300, 110 P. 945. Therefore, when it brought this action for the purchase money, it waived its right to retake possession, and elected to enforce payment. Having exercised its option to sue, it was debarred from all right to recover the property under a claim that title had not passed to defendant. Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 P. 435; Parke, etc., Co. v. [White River] Lumber Co., 101 Cal. 37, 35 P. 442. The legal effect of such election was, immediately upon the filing of the complaint, to transfer to and vest in defendant title to the piano as completely as though defendant had made full payment therefor. Elsom v. Moore, 11 Cal.App. 377, 105 P. 271; Shepard v. Mills, supra [173 Ill. 223, 50 N.E. 709]."

[3] The instant case is even stronger for here the seller not only elected to pursue one of the remedies set forth in the contract,—an action on the notes,—but he secured judgment therein after he had commenced the action for conversion. Furthermore, he attempted to attach the property sold. Such facts clearly indicate an election upon the part of plaintiff to treat the property as belonging to the buyer, as such remedy could only be pursued upon the ground and basis that title had passed and was vested in the buyer. On the other hand, this action in con-

version must be predicated upon the ground that plaintiff had a general or special ownership in the property. Rosenthal v. McMann, 93 Cal. 505, 29 P. 121. Such remedies being alternative and inconsistent, the doctrine mentioned is applicable, and after exercising his election by bringing the first action on the notes, which represented the balance of the purchase price, seeking to attach the property and prosecuting said action to judgment, plaintiff was estopped from thereafter maintaining the action in conversion. We therefore conclude that there was sufficient evidence to sustain the finding in question.

It is contended by appellant that there were no alternative remedies available to plaintiff for the reason that when the first action was filed, the buyer did not have possession of the property. Therefore, he argues, the case does not come under the rule stated in the California cases which all involve a choice between an action for the purchase price and one to repossess the property. We believe that this action is just as inconsistent as one brought to recover possession. That has been pointed out above. It is also clearly an alternative remedy.

[4, 5] It is next contended that the doctrine of election of remedies cannot be applied in favor of a third party, that is, anyone who is not a party to the contract, and who is a stranger to the transaction. That is no doubt the rule (20 C. J., p. 17, 18, § 12), but here, defendant was an original party to the contract. It is true it had assigned it, but there is privity in estate between an assignor and assignee. 50 C. J. 406, § 2, B, 1. Defendant, therefore, was not a stranger to the transaction. In the case of Roullard v. Rosenberg Bros. & Co., 193 Cal. 360, 224 P. 449 (cited by appellant), respondent was denied the right to invoke the doctrine upon the ground that the record showed that he was a stranger to the transaction.

[6] It is contended by appellant that as the record shows the buyer, Mogliotti, to have been insolvent, their judgment was worthless. They urge that as the remedy by suit on the notes was unavailing, the doctrine of election of remedies does not apply. We can find no authority for such a contention. The election was made, and the estoppel arose when the complaint was filed, and whether or not anything was realized through execution under the judgment does not affect the situation. It was the duty of plaintiff to investigate whether or not the buyer was solvent or insolvent, prior to the commencement of the action, and as said in Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 P. 435, 436, "it cannot shield itself from the result of this want of care".

[7] The court found that there was no conversion of the property. This necessarily followed because plaintiff, by his election to sue for the balance of the purchase price, thereby transferred to and vested in the buyer, title to the property. See Birkel case, supra. He therefore could not prevail in an action for conversion. He had neither ownership, possession or right to the possession. 65 C. J. 80, § 131.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

PEOPLE v. DAIL et al.

Cr. 3181.

District Court of Appeal, Second District, Division 2, California.

March 29, 1941.

Hearing Granted April 26, 1941.

1. Criminal law 🔑508(9)

Testimony of an accomplice is not to be judged by the same standard as testimony of any other witness, but is to be acted upon with great caution and is subject to grave suspicion.

2. Criminal law 🔑508(9)

The fact that a witness is an accomplice or coindictee bears against the credibility of his testimony.

3. Criminal law 🔑780(3)

In prosecution for conspiracy and for assault, wherein one defendant withdrew former plea and pleaded guilty to first count of indictment, and thereafter remaining counts were dismissed against such defendant and he testified for the state, instructing to the effect that credibility of accomplice's testimony was to be judged by the same standard as that of other witnesses, and that fact that accomplice had entered plea of guilty or that charges against him had been dismissed was not sufficient of itself to discredit testimony of such witness, was error. Pen.Code, § 1099.

4. Criminal law ⚷1186(4)

Where reviewing court could not determine from the record that if erroneous instructions on accomplice testimony had not been given and jury had disbelieved testimony of accomplice coindictee witnesses, jury would nevertheless have returned verdicts of guilty, constitutional provision governing harmless error was inapplicable, and judgments of conviction must be reversed. Pen. Code, § 1099; Const. art. 6, § 4½.

◆

Appeals from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Harry W. Dail and Dexter L. Lewis were convicted of conspiracy to commit assault with deadly weapon, and extortion, and David Joseph Belanger and Dewey Copelan were convicted of simple assault, and they appeal from the judgments of conviction and from orders denying motions for new trial.

Reversed, and new trials ordered.

Otto Christensen, of Los Angeles, for appellants Harry W. Dail and Dexter L. Lewis.

Paul Blackwood, Frank Sturgis, and Frank Desimone, all of Los Angeles, for appellants Dewey Copelan and David J. Belanger.

Earl Warren, Atty. Gen., Frank Richards and Eugene M. Elson, Deputy Attys. Gen., and Buron Fitts, Dist. Atty., and John Barnes, Deputy Dist. Atty., both of Los Angeles, for respondent.

McCOMB, Justice.

These are appeals by (1) defendants Harry W. Dail and Dexter L. Lewis from judgments of guilty of conspiracy to violate sections 245 and 518 of the Penal Code; and (2) defendants David Joseph Belanger and Dewey Copelan from two judgments of guilty of simple assault after trial before a jury.

There are also appeals from the orders denying their respective motions for a new trial.

So far as material to the question which we are called upon to decide, the facts are:

Defendants Dail and Lewis, together with two other men named McKnight and Burruss, were indicted on seven separate counts. One count charged them with conspiracy to violate sections 245 and 518 of the Penal Code, five counts charged them with assault by means of force likely to produce great bodily injury, and one count charged them with extortion.

The evidence upon which the People rely to sustain the conviction was highly conflicting and was predicated principally upon the testimony of the witnesses McKnight and Burruss, who were accomplices, co-conspirators and co-indictees of the convicted defendants. At the commencement of the trial upon motion of the district attorney, pursuant to section 1099 of the Penal Code, the indictment was dismissed as to defendant Burruss. During the course of the trial it came to the attention of defendants' counsel that defendant McKnight intended to request permission to withdraw his plea of not guilty to count I of the indictment for the purpose of entering a new and different plea, to wit, that of guilty to count I of the indictment; whereupon defendants' counsel requested that this proceeding be taken out of the presence of the jury. This request was denied, and the proceedings which occurred at the time were as follows:

"The Court: Let me make this statement: Suppose, for the purpose of the discussion, that the jury is excused. Mr. McKnight entered a plea of guilty and the jury comes back. I will have to tell them that we are now confronted with only nine defendants, the matter having been disposed of as to the 10th defendant. Perhaps I won't tell them what happened, but it will leave a question mark in their minds—

"Mr. Christensen: That is all right.

"The Court:—for speculation, and undoubtedly, I presume, but I don't know—

"Mr. Barnes: I certainly am not going to leave it in a position where it can be inferred that we did not have the gentleman as a conspirator. There is only one possible inference from the fact.

"Mr. Christensen: Well, there may be an inference from the fact that you have dismissed and contemplate using him as a witness and maybe you do contemplate using him as a witness.

"Mr. Barnes: In the event that that situation took place with that certain witness, it will unquestionably appear that he has entered a plea of guilty.

"The Court: It will have to appear, because he will have to be questioned as to his rights, and so forth.

"Mr. Christensen: Well, I don't know that counsel could even question upon that proposition, because it is not evidence in this case. He may testify as to facts and things that may be within his knowledge, and on that we may cross-examine. We would have the right, of course, to show interest, whether it was on impeachment, or otherwise. It is a matter of our own election.

"Mr. Barnes: We don't have to await the assault of the defendant in order to develop that fact.

"Mr. Christensen: I don't think you have any right to develop the fact of what somebody else will do and permit that to be an implication against the other individuals. I don't think there is any such legal right * * *

"The Court: I quite agree with you that the court has a large, wide discretion, but at the same time the jury must be taken into consideration, and now it is our duty, as a court, and you gentlemen as officers of the court, to let the jury know as much as possible about what is going on, what I mean is about what the case is. Now it is not your duty to confound a jury or to leave a question mark in their mind. It is your duty to present the facts so that they may come to a logical conclusion as to the charges contained in the indictment. Now if this is taken in their absence, if this is done in their absence, and there is a stipulation as to what happened, did the People dismiss as against this man? Or what happened in the case? We are not apprising the jury of everything that they should know.

"Mr. Christensen: They are not entitled to that, if the court please, any more than they are entitled to offer in evidence the admissions or confessions of another individual as against a particular defendant. It is just a confession on the other fellow's part; it is evidence only against him and not evidence against anyone else * * *

"Mr. DiVecchio: If the plea was not taken in the presence of the jury I think it would become the duty of the court to tell them * * *

"Mr. Christensen: On the announcement and statement of the district attorney to the effect that he proposes to make a motion to dismiss a number of counts against the defendant McKnight and take his plea as to one count thereof, we move the court that such a motion and application upon the part of the district attorney be determined and disposed of by the court in the absence of the trial jury in this case * * *

"The Court: As I understand it there is a motion, gentlemen, that the proceedings as to the defendant McKnight be conducted outside of the presence of the jury * * *

"Mr. Christensen: * * * let the record show that counsel for defendant McKnight are also present.

"The Court: The motion is denied."

Thereupon the following occurred in open court in the presence of the jury.

"* * * Mr. Warner: At this time, Your Honor, the defendant Paul McKnight, asks leave of this court to withdraw the plea of not guilty heretofore entered to the first count of this indictment, for the purpose of entering a new and different plea.

"The Court: Is that your desire, Mr. McKnight?

"Defendant McKnight: Yes, sir.

"The Court: Permission will be granted to withdraw the plea of not guilty heretofore entered for the purpose of entering a new and different plea. Have you had advice of counsel in this matter, Mr. McKnight?

"Defendant McKnight: I have, Your Honor.

"The Court: You have discussed the matter thoroughly with your counsel?

"Defendant McKnight: Yes, sir.

"The Court: Has anybody made any promises to you of any nature as to what the punishment might be if you should take this action?

"Defendant McKnight: No, sir.

"The Court: You understand that nobody is authorized to make any such promises?

"Defendant McKnight: Yes, sir.

"The Court: And if any promises of any kind have been made, they are not binding upon this or any other court?

"Defendant McKnight: Yes, sir.

"The Court: And you are doing this freely and voluntarily, of your own will, after having had the advice of counsel, is that correct?

"Defendant McKnight: It is.

"The Court: You may rearraign the defendant on the first count of the indictment, Mr. Barnes.

"Mr. Barnes: Will you waive the complete reading of the first count, Mr. Warner?

"Mr. Warner: So stipulated.

"The Court: Mr. McKnight, you waive the reading personally of the first count of the indictment?

"Defendant McKnight: Yes, sir.

"Mr. Barnes: Mr. McKnight, the court has granted you permission to withdraw your plea of not guilty heretofore entered to count I of this indictment. To this count, how do you now plead, guilty or not guilty?

"Defendant McKnight: Guilty.

"Mr. Barnes: Now, Your Honor, in view of the defendant's plea, we move at this time, in the interests of justice, and pursuant to section 1099 of the Penal Code, to dismiss the remaining six counts in the indictment, that is, counts II to VII, inclusive, being all of the remaining counts, for the purpose of using Mr. McKnight as a witness for the state.

"The Court: The motion of the district attorney under section 1099 of the Penal Code to dismiss counts II to VII, inclusive, in the indictment will be granted * * *"

At the close of the trial the trial judge, after commenting upon the testimony of the accomplice-witnesses McKnight and Burruss, instructed the jury thus:

"And in this connection, ladies and gentlemen, the credibility of all of these witnesses is to be judged by you by the same standard as that of any other witness. The fact that the witness McKnight has entered a plea of guilty to one count of the indictment or that all charges against the witness Burruss have been dismissed by the Court on motion of the District Attorney, standing alone, should not discredit these witnesses or their testimony, unless, in addition thereto, there is something about their testimony or their manner of testifying or their interest in the case, or their bias or prejudice against one or any or all of the defendants which casts suspicion upon it in your minds.

"In the Court's opinion the testimony of the witnesses McKnight and Burruss was given in a calm and dispassionate manner; their answers were well considered, and on the face of their testimony and in their demeanor upon the witness stand, there was no evidence of animosity."

Defendants rely for reversal of the judgments, among others, on this proposition:

It was prejudicial error for the trial judge in the instructions set forth, supra, to instruct the jury that (a) the credibility of the witnesses who were accomplices of defendants was to be judged by the same standard as that of any other witness, and (b) standing alone, the facts that the accomplice-witness McKnight had entered a plea of guilty to one count of the indictment and that the indictment had been dismissed against the accomplice-witness Burruss, should not discredit such witnesses or their testimony.

The foregoing proposition is tenable and is supported by the following established principles of law:

[1] (1) The testimony of an accomplice is not to be judged by the same standard as the testimony of any other witness, but such evidence is to be acted upon with great caution and is subject to grave suspicion (People v. Coffey, 161 Cal. 433, 438, 119 P. 901, 39 L.R.A.,N.S., 704; People v. Haack, 86 Cal.App. 390, 400, 260 P. 913; People v. Swoape, 75 Cal.App. 404, 414, 242 P. 1067; People v. Dinenza, 356 Ill. 118, 190 N.E. 298; Crawford v. United States, 212 U.S. 183, 203, 29 S.Ct. 260, 53 L.Ed. 465, 15 Ann.Cas. 392; People v. Braun, 31 Cal.App.2d 593, 603, 88 P. 2d 728; People v. Walther, 27 Cal.App. 2d 583, 590, 81 P.2d 452).

In Crawford v. United States, supra [212 U.S. 183, 29 S.Ct. 268, 53 L.Ed. 465, 15 Ann.Cas. 392], the Supreme Court of the United States thus states the rule:

"The defendant was peculiarly situated in this case, and great care was necessary to prevent injustice to him. * * * Without his [Lorenz] evidence it would have been difficult, if not impossible, to convict the defendant. * * * But the evidence of a witness, situated as was

Lorenz, *is not to be taken as that of an ordinary witness* of good character in a case, whose testimony is generally and *prima facie* supposed to be correct. On the contrary, the evidence of such a witness *ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.* * * *

"It is hardly possible to imagine a case where greater care was necessary in regard to the exclusion of proper and admissible evidence than in the case before us." (Italics added.)

In People v. Haack, supra, 86 Cal.App. at page 400, 260 P. at page 918, Mr. Justice Plummer states the rule in these words:

"The instruction tells the jury that the uncorroborated testimony of an accomplice will not sustain a verdict, but the jury is immediately advised that, if the testimony of an accomplice carries conviction, and if the jury be convinced of its truth, the jury shall give to it the same effect as would be allowed to a witness who is in no respect implicated in the offense. This is not correct. No matter if the jury be convinced of the truth of the testimony of an accomplice, such testimony cannot be given the same effect as may be given the testimony of one who is not implicated in an offense, unless such testimony be corroborated by evidence tending to connect the defendant with the crime charged, separate and apart from the testimony of an accomplice. In any view that may be taken of this instruction, it leads to a confused state of thought, and does not place before the jury a clear or accurate statement of their province when acting upon the testimony of an accomplice."

In People v. Dinenza, supra, Mr. Justice Herrick, speaking for the Supreme Court of Illinois, says at page 299 of 356 Ill., at page 299 of 190 N.E.:

"The testimony of an accomplice is *not to be passed upon the same as the testimony of any other witness,* but the rule is that his evidence is to be acted upon with great caution and is to be subjected to grave suspicion." (Italics added.)

[2] (2) The fact that a witness is an accomplice or co-indictee in a criminal case bears against the credibility of his testimony. The leading authority on evidence in the United States, Professor Wigmore, thus states the rule: "Accomplices and Co-indictees in a Criminal Case. It bears against a witness' credibility that he is an *accomplice* in the crime charged and testifies *for the prosecution;* and the *pendency of any indictment* against the witness indicates indirectly a similar possibility of his currying favor by testifying for the state; so, too, the existence of a *promise* or just expectation *of pardon* for his share as accomplice in the crime charged." (Wigmore on Evidence, 3d Ed. (1940) 525, sec. 967.) Note the learned author states that this rule is unquestioned (see note 1 to section 967).

[3] Applying the foregoing rules to the facts of the instant case, it is evident that the trial judge erroneously instructed the jury, for the reasons that (1) the jury were told that credibility of an accomplice's testimony was to be judged by the same standard as that of other witnesses, and (2) the fact that an accomplice had entered a plea of guilty or that the charges against an accomplice had been dismissed was not sufficient of itself to discredit the testimony of such witness.

[4] There can be no doubt that the giving of such erroneous instructions was prejudicial to the rights of defendants and that as a result they did not have a fair trial. Since we are unable to determine from the record that, if the questioned instructions had not been given and the jury had disbelieved the testimony of the accomplice co-indictee witnesses McKnight and Burruss, they would nevertheless have returned verdicts of guilty, section 4½ of article VI of the Constitution of the State of California is inapplicable. (See People v. Haack, 86 Cal.App. 390, 401, 260 P. 913.)

For the foregoing reasons, the judgments are and each is reversed, and new trials are ordered.

MOORE, P. J., and WOOD, J., concurred.

43 Cal.App.2d 715

In re DE BARRY'S ESTATE.

COYNE v. BARRY et al.

Civ. 12962.

District Court of Appeal, Second District, Division 2, California.

March 26, 1941.

Rehearing Denied April 18, 1941.

Hearing Denied May 22, 1941.

1. Executors and administrators 🔑216(2)

The probate court must fix the fees for extraordinary services rendered to an estate by an attorney. Probate Code, § 911.

2. Executors and administrators 🔑216(2)

The statute providing that an attorney who has rendered services to an estate may apply to the court for an allowance of fees and providing that on hearing the court shall make an order requiring the executor or administrator to pay compensation to the attorney out of the estate was intended to make the attorney a "party interested" in the estate for purpose of enabling him directly to enforce his claim for legal services. Probate Code, § 911.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Interested".

3. Executors and administrators 🔑216(1)

Any person interested in an estate may apply directly to the probate court for an allowance of moneys due him for services rendered, and is a "party" to the probate proceedings. Probate Code, § 911.

See Words and Phrases, Permanent Edition, for all other definitions of "Party".

4. Courts 🔑472(4)

Jurisdiction to pass on the demands of any person who has rendered services to an estate is vested exclusively in the superior court sitting in probate. Probate Code, § 911.

5. Courts 🔑475(2)

The estate of a deceased person is in custody and control of the probate court and the court has exclusive jurisdiction to determine validity of the amount of all claims that are made against the estate to the end that parties interested may be heard upon the propriety of such expenditures. Probate Code, § 911.

6. Courts 🔑475(2)

The jurisdiction of the probate court to determine the validity of claims against the estate is so exclusive that rival claimants for the same commission must be determined in probate and not by a law court. Probate Code, § 911.

7. Courts 🔑198

The probate court, deriving its powers from the Constitution, has the same power as a law court and may hear and determine all questions of law and fact, and such determination is ancillary to proper judgment. Probate Code, § 911.

8. Executors and administrators 🔑55, 85(4)

Where an officer of the court without authority withholds personal property of the estate, the probate court may require him to restore the property to the estate, and if he be deceased, his estate may not retain any part of the funds withheld. Probate Code, § 911.

9. Executors and administrators 🔑85(4)

The probate court may require any person who has been intrusted with any part of an estate to render a full accounting of the money or property which has come into his possession, though the court may have erroneously authorized the payment of the money to the party unlawfully withholding it. Probate Code, §§ 614, 615.

10. Courts 🔑475(2)

One who has been intrusted with any part of an estate and thereafter unlawfully withholds such money or property from the estate is not a third party claiming title adversely to the estate so as to be entitled to litigate his rights before a law court. Probate Code, §§ 614, 615.

11. Executors and administrators 🔑76

The probate court is guardian of the estates of deceased persons and has control of the person appointed by it to administer the estate, subject to review. Probate Code, §§ 614, 615.

12. Executors and administrators 🔑97

The probate court was not bound by a contract which was made without court authorization by executrix and attorney for estate and which purported to employ attorney for a specified consideration to recover royalties and damages from lessee for failure to drill and produce oil and gas on lands of the estate. Probate Code, §§ 614, 615, 911.

13. Executors and administrators 🔑39

An oil and gas lease for 20 years and for so long thereafter as oil and gas were produced in paying quantities was "realty" and should not have been distributed as "personal property" to executrix.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property" and "Realty".

14. Executors and administrators 🔑85(2)

Where actions to recover damages to oil and gas leasehold were brought by plaintiff as executrix as well as individually, and attorney for estate drew stipulation reciting acceptance of settlement by executrix, but attorney retained one-half of amount of the recovery without such sum ever having come into the hands of the executrix, the attorney became amenable to orders of the probate court with reference to the moneys withheld, though order by which lease was distributed had become final as to the executrix for want of appeal and by compromise was ultimately approved by all legatees and heirs. Probate Code, §§ 614, 615, 911.

15. Attorney and client 🔑143

A contract of employment by which an attorney obtains an advantage is presumptively invalid, since undue influence is presumed and the burden is immediately cast on attorney to prove that transaction with client was fair.

16. Executors and administrators 🔑97

Where attorney for estate did not obtain court order confirming contract of employment by executrix for recovery of royalties and damages to oil and gas leasehold and attorney did not show that charges were reasonable or prove that transaction was fair and equitable and that he took no advantage or that he informed executrix of all matters relative to the transaction, attorney had no enforceable rights against executrix and none as against the estate for services rendered in connection with the action. Probate Code, §§ 614, 615, 911.

17. Executors and administrators 🔑497

$2,500 for extraordinary services rendered by attorney for estate was adequate.

18. Executors and administrators 🔑97

Moneys received for lease belonging to estate were distributable only upon order of the probate court, and attorney's retention of a portion of such moneys pursuant to stipulation entered into without court authorization by executrix and colegatees was improper. Probate Code, §§ 614, 615, 911.

19. Descent and distribution 🔑82

Adult heirs may stipulate concerning their common rights and obligations arising from the estate, but the probate court is guardian of the estate, and without its order moneys of the estate may not be paid upon any agreement.

20. Wills 🔑431

A judgment revoking probate of will in so far as it affected rights of pretermitted grandchildren nullified an improper distribution of assets and left the way open for such grandchildren to recover their shares of the assets from the distributees, and as assignees they were entitled to claim the interests of legatees as well as their own in moneys wrongfully withheld by attorney as fees for services. Probate Code, §§ 614, 615, 911.

21. Executors and administrators 🔑85(2)

Attorney for estate and legatees were "interested parties" and as recipients of assets of the estate without judicial authorization were amenable to orders of the probate court requiring repayment to the estate of moneys improperly distributed and withheld. Probate Code, §§ 614, 615, 911.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested Party".

22. Executors and administrators 🔑85(4)

The probate court has power to determine distribution of an estate and to control conduct of interested parties with reference to their receipts of distributable shares and other payments made by the estate, as well as an inherent power to entertain and exercise summary proceedings in its discretion against attorneys who are guilty of misconduct in handling assets of the estate. Probate Code, §§ 614, 615, 911.

23. Executors and administrators 🔑85(4)

Where attorney for estate appeared at hearing on account of executrix and gave testimony in full supporting his retention of moneys of the estate for extraordinary services, the jurisdiction of the probate court to adjudicate the issue could not be questioned after the court had ruled on objections. Probate Code, §§ 614, 615, 911.

24. Executors and administrators 🔑504(1)

The probate judge must examine accounts presented by executrix, and must reject unjust or illegal claims though no exceptions thereto are filed, and may make findings with reference to matters not mentioned in objections to the account, if such matters are integrally related to value of services recited as basis of fees claimed. Probate Code, §§ 614, 615, 911.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Proceeding in the matter of the estate of Adelaide Bermuda De Barry, deceased, wherein Joseph Scott, on behalf of two legatees, filed a motion, which was later withdrawn, to vacate an order confirming a lease. Genevieve Carlile Roth and others were legatees. Objections were filed to the second and third accounts of Lucille M. Barry, executrix. From a judgment fixing the fees for extraordinary services rendered by D. Joseph Coyne as attorney for the estate, Johanna Coyne, as executrix of his estate, appeals.

Affirmed.

Chapman & Chapman and John S. Frazer, all of Los Angeles, for appellant.

Laurence B. Martin, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This appeal is taken by Johanna Coyne, the executrix of the estate of attorney D. Joseph Coyne, from an order of the superior court sitting in probate, whereby it fixed the fees for the extraordinary services rendered by Mr. Coyne as attorney for the estate of Adelaide De Barry in the sum of $2,500. As a part of the same order, the attorney was required to restore to the estate the sum of $15,000 which he had received as attorney for the executrix and withheld as fees for extraordinary services. The order provided that if the attorney should fail within 30 days to restore the $15,000 to the estate that then and in that event the estate should recover from him the full sum of $17,500 "unlawfully deducted and withheld from the funds of the estate and converted to his own uses".

While the caption indicates that respondent is the executrix who was in office at and prior to the time the attorney acquired and retained the moneys, the fact is that following the entry of the order in question, by agreement with her coheirs, the executrix resigned and Marcus L. Roberts qualified as administrator with will annexed of the estate of decedent and he is now so acting.

The questions involved are: (1) whether the superior court sitting in probate and hereinafter referred to as the probate court, upon hearing an account of the executrix and the objections thereto, may fix the fees for the extraordinary services of an attorney and at the same time require the attorney to restore to the estate moneys theretofore acquired by him without an order of the court; (2) whether the revocation of the probate of decedent's will, following a contest after probate by her infant heirs, nullifies, as to those heirs, all of the agreements of the executrix and her attorney as well as orders of the court made at the request of such attorney for his own advantage; (3) whether upon the hearing of such account and objections thereto the court may make findings with reference to matters not mentioned in the objections of the attorney but which are integrally related to the value of such extraordinary services.

It is established that at some time prior to July, 1932, the will of the decedent, Adelaide B. De Barry, was admitted to probate by the superior court of Los Angeles county; that the will named Lucille M. Barry as its executrix; that the executrix employed one D. Joseph Coyne as attorney to present the will for probate and to perform the statutory services required of an attorney of an estate. Some 17 years prior to the passing by Mrs. De Barry, she had executed an oil and gas lease upon certain of her lands to one Taylor. This lease was to continue for a period of 20 years from date provided that the lessee may retain possession and continue to operate any well or wells producing oil so long after the termination of this lease as such oil or kindred substances are produced in paying quantities. By mesne assignments, the lease ultimately passed into the ownership of the Texas Company, which was the owner of the lease until its expiration.

On July 6, 1932, about five years prior to the expiration of the lease, and while Coyne was attorney for the estate, he caused Lucille Barry to sign a letter as executrix and individually which purported to employ him to recover royalties unpaid and damages arising out of the failure of the Texas Company to drill and produce oil and gas on the lands of the estate under the Taylor lease and to make such adjustments and settlement as might thereafter be approved by her. Also, by the same instrument, he was to file suit in order to determine the rights and obligations of both parties under the lease with reference to the future drilling on the property in deeper zones. As a consideration for his services and for advancing costs to prosecute the actions mentioned, the writing provided that Coyne was to be paid 50 per cent of the moneys received by "settlement or adjustment made". Subsequently Coyne filed two suits against the Texas Company to recover damages for drainage of oil from the land and for declaratory relief. Both actions were brought in the name of Lucille Barry individually and as executrix.

On October 25, 1933, Coyne petitioned the court for approval of a new lease on the same property to one Slaney, brother-in-law of Coyne, to take effect upon the expiration of the Taylor lease in April, 1937. Under this new document, the lessee was to pay the sum of $500 as a consideration for this lease and 1/7th of the gross proceeds received by the lessee or his assigns "from the sale of oil and gas produced, saved and sold from the leased premises". The order authorizing the lease to Slaney was prepared and presented by attorney Coyne at the hearing on November 7, 1933. Prior to that order, however, Coyne had for a long time known that the Texas Company desired an extension of its lease beyond the date of its termination.

Thereafter attorney Joseph Scott on behalf of two of the legatees, on the grounds of the inadvertence and excusable neglect of his clients and of the illegality of the order, and of the fraud of Miss Barry, moved the court to (1) vacate the order confirming the Slaney lease, (2) to vacate the order distributing the Taylor lease to Lucille Barry, and (3) to remove her as executrix. Scott's opposition and motion to vacate the order confirming the Slaney lease came on for hearing before the probate department on February 6, 1934. On that day the Texas Company offered to renew its lease and stated that it was ready to pay 1/6th royalty and $30,000 in cash in consideration for the lease and in settlement of the litigation which Coyne had instituted. The court suggested the inadequacy of the offer. Further hearing on the motion and opposition was continued until the 13th day of February.

In the interim attorney Scott procured an offer from the Texas Company for the payment of $60,000 for the Slaney lease and in settlement of all controversial matters, including the drainage suits.

On the 10th day of February, 1934, Lucille Barry and the two legatees who had moved to vacate the order confirming the Slaney lease, with three other legatees, signed a stipulation providing for the settlement of the controversy created by orders Coyne had procured and for the division and distribution of $50,000 of the sum to be received from the Texas Company and for the payment to Scott of his fees by the company. It is in words and figures as follows:

"It Is Hereby Stipulated, by and between the undersigned, heirs of the above entitled estate, and the only parties in interest therein, as follows:

"The purpose of this stipulation being to compose and adjust, settle and dispose of the various matters now subject to controversy, and as authority and direction to the Executrix of the above entitled estate, in the administration of the above entitled estate.

"1. That the said Executrix is authorized and directed to accept in full settlement and discharge of the law suits now pending wherein the Estate is plaintiff and the Texas Company is defendant, Superior Court No. 362-898 and 362-899, the sum of $15,000 and dismiss the said actions with prejudice.

"2. That the said Executrix is authorized to cause the lease approved November 7th, 1933, by the above entitled court and in which lease Wm. J. Slaney is named as lessee, to be assigned to the Texas Company, in consideration of the payment of the amount of $35,000.00 to the said above estate.

"3. That the lease now upon the real property of the said estate, held by the Texas Company, is to continue in full force and effect until its termination, subject to such modifications as to future operations as may be agreed to by the heirs and said Texas Company, in agreements executed contemporaneously herewith.

"4. That the royalties heretofore paid into the estate by the said Texas Company, on the wells now producing about 3500 feet, and hereafter to the date of the expiration of the said present existing lease are to be distributed to Lucille Barry as personal property under the last will of said deceased.

"5. That the royalties to come from the future operations and development of said real property, by the Texas Company, both under the existing lease and the new lease known as the Slaney Lease, in payment of oil from the deep zones below 6000 feet, are to be distributed to the heirs, share and share alike.

"6. That the proceeds of the settlement and adjustment of the suit for drainage damages against The Texas Company, Action No. 362-899, to-wit: the sum of $15,000.00 is to be paid over to said Lucille Barry, and distributed to her as her property under the will of said deceased.

"7. That the proceeds of the bonus received from the said Slaney lease, to-wit: the sum of $35,000.00 is to be paid out and distributed as follows: To D. Joseph Coyne, for legal and other services in connection with the securing of said lease and the said bonus, the sum of $10,000.00 and the balance of $25,000.00 is to be distributed, share and share alike to the undersigned heirs.

"8. That the said Executrix is authorized and empowered to have paid out and distributed the said sums covered by the aforesaid paragraphs 6 and 7 to the said parties respectively, without the necessity of applying to the Court for an order of distribution thereof, *but however, subject to reporting the same in the next account and report filed in said estate proceedings.*

"9. Consent is hereby given that Joseph Scott, attorney for certain heirs of said estate, may charge and receive from the Texas Company, such compensation as he may, for his services to the said estate, and as a charge upon the said Texas Company in the adjustment of the matters of controversy with said Texas Company.

"10. That certain suit filed by Irene McClung against Lucille Barry, No. 119-908, is to be dismissed with prejudice.

"11. That certain proceedings filed in the above estate, to remove the Executrix of said estate, to be dismissed with prejudice. That certain proceeding in said estate, Motion under Section 128, C.C.P. to be dismissed with prejudice.

"That certain proceeding in said Estate, Motion for relief under Section 473, C.C.P. to be dismissed with prejudice.

"12. That the said Executrix is empowered and authorized to make such stipulations and or agreements, as may be required or deemed necessary to close the said above mentioned matters with The Texas Company, to carry into immediate effect the purpose and intent of the adjustment and settlements hereby approved. This stipulation need not be filed.

"February 10, 1934.

"(Signed) Mrs. Irene McClung
Mrs. Mildred Barry Barrow
Lucille Barry
Mary M. Barry
Margaret Barry Richardson
Libbie Barry Rawson."

Attached to the stipulation was a memorandum signed by the two attorneys which provided for the division of $60,000. It is in words and figures as follows:

"Re: Barry Estate February 10, 1934.
Memorandum of understanding as to distribution of money received from the Texas Company.

$60,000 to be paid as follows: $45,000 as bonus for the lease and $15,000 in settlement of the drainage suits, which amounts are to be distributed as follows: $15,000 received from drainage suits to be paid to Lucille Barry. The remaining $45,000 is to be distributed as follows: $10,000 to D. Joseph Coyne as attorney's fees; $10,000 to Joseph Scott, as attorney's fees; $25,000 to be divided one-sixth to each of the devisees named in the will.

"(Signed) D. Joseph Coyne
"Joseph Scott."

The money was received by Coyne from the Texas Company and by him promptly disbursed as provided in the stipulation. At that time none of the infants who later established their rights as heirs of decedent had appeared in the proceeding.

It must be remembered that the above "stipulation" provides that the "executrix" is authorized and directed to accept in full settlement and discharge of the law suits now pending $15,000; that the "executrix" is authorized to pay Lucille Barry $15,000 and to pay Coyne $10,000. The usurpation of the court's jurisdiction was emphasized by paragraph 8 which provides that the executrix might distribute the sums to the parties without the necessity of applying to the court for an order for distribution.

On February 13, 1934, the stipulation was discussed informally in chambers with the judge of the probate court who suggested the inclusion of the italicized clause in paragraph 8. But the document was not presented in open court as the subject of any petition for an order. Following the execution of the stipulation and the informal conference thereon with the probate judge, attorney Scott dismissed his motion to set aside the order authorizing the Slaney lease. The stipulation was never made a part of the files in the proceeding until the following September 26th when it was attached to the second account and report of the executrix which was filed by Coyne. The original of the stipulation was not filed until it was received in evidence as contestants Exhibit No. 1 at the trial of the objections to the second and third accounts of the executrix, following which the judgment appealed from was rendered. One other fact is necessary to a complete picture of the background of the judgment.

On the 17th of August, 1934, six months after the stipulation had been executed, seven minor grandchildren of the decedent filed a contest of the will. Thereafter, on September 26, 1934, the "second report and account" was presented showing the payment by Coyne to himself of $10,000 for his extraordinary services. That account was not heard by the court and no order was made with reference to it until the third account had been filed. Both accounts and objections thereto were heard on December 15, 1939. Before the final hearing of the two accounts, the legatees had, on May 25, 1939, stipulated for the judgment revoking the probate of the will in so far as it affected the grandchildren and for certain benefits to be derived by the minor heirs. By the terms of that settlement Lucille should resign as executrix and all of the heirs ratified the second account with the exception of the items for "attorney's fees obtained without an order or approval of the court". Also, the legatees assigned to the infant heirs all rights to any money held by Coyne as attorney fees that may be disallowed by the court.

The third account was filed by Marcus L. Roberts who succeeded Coyne as attorney for the executrix. It prayed for a determination of the amount due Coyne as attorney fees. At the same time, pursuant to the agreement of May 25, the executrix resigned and Roberts was appointed as administrator with will annexed. Following the hearing, on the 19th of December, 1939, the court settled and approved the third account. Likewise the second account was approved with the exception of the moneys which had been retained by attorney Coyne. Thereafter the court made and filed findings of fact and conclusions of law and rendered a judgment as indicated in the first paragraph hereof with this addition that in the event Coyne fail or refuse so to reimburse the estate the sum of $15,000, then Coyne shall not be entitled to any fees whatsoever for his extraordinary services and in that event he should pay to the estate the full sum of $17,500.

[1-8] That the probate court must fix the fees for extraordinary services of an attorney rendered to an estate, there can be no doubt. Section 911 of the Probate Code provides that any attorney who has rendered services to the estate, upon notice to the personal representative and to the persons interested in the estate, may apply to the court for an allowance upon his fees "and on the hearing the court shall make an order requiring the executor or administrator to pay such attorney out of the estate such compensation, on account of services rendered up to that time, as the court shall deem proper, and such payment shall be made forthwith". The purpose and effect of the quoted section was to make the attorney a "party interested in the estate" for the purpose of enabling him directly to enforce his claim for legal services. In re Estate of Hite, 155 Cal. 448, 101 P. 448, 449. Prior to the enactment of that section in 1905, the attorney was not an interested party. 11 Cal.Jur., sec. 1065. However, now any person "interested in an estate" may apply directly to the probate court for an allowance of the moneys due him for services rendered; he is a party to the probate proceedings. In re Estate of McDougald, 143 Cal. 476, 479, 77 P. 443, 444; Eastwood v. Stewart, 64 Cal.App. 614, 617, 222 P. 369. Jurisdiction to pass upon the demands of any person who has rendered such services is vested exclusively in the superior court sitting in probate. Eastwood v. Stewart, supra. The estate of a deceased person is in the custody and control of the probate court and it is within its exclusive province to determine the validity of the amount of all claims that are made against the estate to the end that parties interested may be heard upon the propriety of such expenditures. Gurnee v. Maloney, 38 Cal. 85, 99 Am.Dec. 352. So exclusive is this jurisdiction of the probate court that rival claimants for the same commission must be determined in probate and not by a law court. In re Estate of Hughes, 3 Cal.App. 2d 551, 40 P.2d 295. Inasmuch as the probate court derives its powers from the Constitution, it has the same power as a law court and may hear and determine all ques-

tions of law and fact, and such determination is ancillary to proper judgment. In re Estate of Dobbins, 36 Cal.App.2d 536, 539, 97 P.2d 1051; In re Estate of Clary, 203 Cal. 335, 264 P. 242. Where an officer of the court without authority withholds personal property of the estate the probate court may require him to restore the property to the estate (Bauer v. Bauer, 201 Cal. 267, 256 P. 820) and if he be deceased his estate is not permitted to retain any part of the funds withheld. In re Estate of Kafitz, 51 Cal.App. 325, 196 P. 790.

[9-11] In support of the power of the probate court to enforce its jurisdiction over persons interested in the estate, that court may require any person who has been entrusted with any part of an estate to render a full accounting of the money or property which has come into his possession (Probate Code, sec. 615), and if he refuse to do so, he may be summarily dealt with and committed to the county jail until he submits to the order of the court. Probate Code, sec. 614. The last-mentioned Code sections were applied in Re Estate of Troy, 92 Cal.App. 352, 268 P. 426, where the attorneys withheld moneys received from the sale of estate property. Such an order may be made even though the court may have erroneously authorized the payment of the money to the party unlawfully withholding it. Heydenfeldt v. Superior Court, 117 Cal. 348, 49 P. 210. Such a party so holding property is not a third party claiming title adversely to the estate so as to entitle him to litigate his rights before a law court. Id. The probate court is the guardian of the estate of deceased persons and has control of the person appointed by it to administer the estate, subject to review. In re Estate of Clary, supra.

[12, 13] The suggestion that the probate court was bound by the contract made by Coyne with Lucille Barry is disposed of by the foregoing. Coyne was not a stranger to the estate. He instituted the proceedings as attorney for the executrix. He served in that capacity until his resignation at the time of the trial of the contest over his right to withhold the moneys claimed by him. Appellant contends that Coyne had the right to retain the money paid to him as fees by Lucille Barry individually out of proceeds received in settlement of the two suits brought by her to recover damages to the leasehold which had been distributed by proper order of the court. While she was entitled to have distributed to her the personal property of decedent immediately following the probate of the will, it is not true that the lease, which Coyne caused the court to distribute to Lucille, was personal property. The first account and petition for partial distribution prepared by Coyne discloses that the Taylor lease gave the lessee the right to enter upon the property to prospect, sink wells, and remove oil, gas and other hydro-carbon substances for a period of 20 years *and so long thereafter as said substances are produced in paying quantities, etc.* By virtue of those terms the Taylor lease was realty and should not have been distributed as personal property to Lucille Barry. Dabney v. Edwards, 5 Cal.2d 1, at page 11, 53 P.2d 962, 103 A.L.R. 822. But inasmuch as the order by which this lease was distributed to her was never appealed from, it became final so far as Lucille Barry was concerned and ultimately by compromise it was approved by all legatees and heirs. Because of the finality of this order distributing the Taylor lease to Lucille Barry, appellant contends that the transactions with reference to that lease were not within the cognizance of the probate court, and that the $15,000 disbursed as damages for drainage was the property of Lucille Barry individually. Conceding the finality of that order, it will be remembered that $7,500 of the money paid in settlement of the drainage suits was never paid to her. When Coyne received the check from the Texas Company, he retained two sums (1) $7,500 he claimed to be due him from Lucille Barry for his services in the drainage suits, and (2) $10,000 claimed to be due from the estate. We proceed with our consideration of the first item.

[14] The drainage suits were brought in the name of the executrix as well as in the name of Lucille Barry individually. Thereby the attorney as well as the executrix acknowledged the interest of the estate in the outcome of these actions. Also Miss Barry joined in the stipulation that the "executrix" accept $15,000 in settlement of the two actions. Furthermore, Mr. Coyne himself was the author of that stipulation. Inasmuch as one-half, or $7,500 of the recovery was found to be in his possession at the time of the hearing of Coyne's objections to the accounts of the

executrix, he was amenable to the orders of the probate court with reference to the moneys he withheld.

[15, 16] But other cogent reasons appear why Coyne was not entitled to retain the $7,500. Not only did he have no order confirming his contract of employment but he bargained with a client whose confidence he then enjoyed, and she was the executrix. The contract of employment between an attorney and his client, where an advantage is obtained, is presumptively invalid. Magee v. Brenneman, 188 Cal. 562, 571, 206 P. 37; Brydonjack v. Rieck, 5 Cal.App.2d 219, 42 P.2d 336. Undue influence is presumed and the burden is immediately cast upon the attorney to prove that his transaction with his client was fair. Coyne did not make such proof. Neither did he show that the charges which he made were reasonable. He neither made proof that the transaction between himself and the executrix was fair and equitable and that no advantage was taken by him but also he failed to establish that his client was fully informed of all matters relative to the transaction or that she fully comprehended her rights or her duties to the estate so that she could act understandingly and deal with the attorney at arm's length. Brydonjack v. Rieck, supra; In re Estate of Witt, 198 Cal. 407, 245 P. 197; Moore v. Hoar, 27 Cal.App.2d 269, 81 P.2d 226. So failing, he had no enforcible rights as against Lucille Barry and none as against the estate on account of the drainage suits. The probate court had not authorized his employment on a fifty-fifty basis or directed the payment of $7,500 to him.

[17] The second item withheld by Coyne was $10,000 which he claimed for extraordinary services in negotiating the Slaney lease. He had already prepared or approved a lease to Slaney and had caused the court to confirm it three months before Scott appeared upon the scene in opposition thereto. For those services he had not suggested the charge of any fee but he had proposed that an over-riding royalty of 1/42nd of the recovery be paid to him by the Texas Company as part of the consideration for the transfer of the Slaney lease. When Scott presented his motion to vacate the order confirming that lease, he advised the court then of a substantial offer by the Texas Company for a renewal of its lease. With that much for a beginning, with the judge objecting to $30,000 as an insufficient sum for a settlement of the drainage suits, and with Scott's friendly contact with the Texas Company already established, it is not readily conceivable that Coyne added a considerable force in inducing the increase of the offer to $60,000. That is to say, the evidence justified the court's appraisal of the value of all of the extraordinary service rendered by Coyne.

[18] But, however valuable his services might have been, he was in no position to withhold $10,000 or any money of the estate for fees without a court order so to do. Prob.Code, sec. 911. The stipulation which, appellant claims, authorized his retention of the money shows definitely in paragraphs 1, 2, 7, 8 and 10 that Coyne knew the Slaney lease was an asset of the estate. Of course, moneys received for it belonged to the estate distributable only upon order of the court. Instead of seeking an order authorizing payment of fees and the distribution of the $35,000, the action of the court was obviated by Coyne's having the executrix of the estate join in a stipulation with her colegatees to pay him $10,000 and to divide the remaining $25,000 among the legatees. Such a stipulation was contrary to the cited section and at variance with a long-established practice. The facts disclosed by the record from the time of effecting the distribution of the Taylor lease to the close of the trial of his objections to the second and third accounts are sufficient to warrant the court in finding that Coyne did not pay the $50,000 to the executrix but that $17,500 thereof was appropriated to himself out of those funds without the approval of the court.

[19] The $60,000 delivered to Coyne by the Texas Company was never a trust fund which any person had the right to distribute. Its distribution was subject only to the order of the court. Adult heirs are at liberty to stipulate concerning their common rights and obligations arising from an estate. But the probate court is the guardian of the estate of a deceased person and without its order moneys of the estate may not be paid upon any agreement. 11-b Cal.Jur. 589, sec. 1131; In re Estate of More, 121 Cal. 635, 639, 54 P. 148.

[20] The disbursement of the $60,000 preceded the filing of their contest of the

will by the seven infant heirs. It is unnecessary to follow the vicissitudes of that action. As already noted, a judgment was finally entered revoking the probate of decedent's will in so far as it affected rights of the pretermitted grandchildren. So far as those infant heirs were concerned, that judgment nullified the distribution of the Taylor lease and of the $15,000 to Lucille Barry; the employment of Coyne to institute the drainage actions; the stipulation among the adult heirs to pay Coyne $10,000; the division of the $25,000 among the legatees and the withholding of the $17,500 by Coyne. The nullification of these steps in the proceedings left the way open for the infant heirs to recover their shares of the assets of the estate from its distributees. Thompson v. Samson, 64 Cal. 330, 30 P. 980; Brydonjack v. Rieck, supra; Moore v. Hoar, supra. Likewise, as assignees thereof, they may successfully claim the interests of the legatees as well as their own in those moneys withheld by Coyne under the denomination of attorney's fees.

[21] Despite the foregoing observations and the authorities cited, appellant urges the proposition that the probate court was without jurisdiction to order Coyne to repay to the estate the moneys he had taken from its coffers. In support thereof they cite a number of authorities: Jackson v. Superior Court, 210 Cal. 59, 290 P. 448, 70 A.L.R. 475; Tomsky v. Superior Court, 131 Cal. 620, 63 P. 1020; Estate of Haas, 97 Cal. 232, 31 P. 893, 32 P. 327; In re Estate of King, 199 Cal. 113, 248 P. 519; McCarthy v. McCarthy, 205 Cal. 184, 270 P. 211; McPike v. Superior Court, 220 Cal. 254, 30 P.2d 17; In re Estate of Inghilleri, 27 Cal.App.2d 664, 81 P.2d 568. But all of these cases are readily distinguishable in this: that in each of them the party who finally prevailed was a stranger to the estate and was entitled to a trial before a law court. As to Coyne and the legatees, all of them were "interested parties" and as such they were amenable to the orders of the probate court as recipients of assets of the estate without judicial authorization.

[22] Not only does the probate court have the power to determine the distribution of an estate and to control the conduct of interested parties with reference to their receipts of distributable shares and other payments made by the estate but it is an inherent power of the court to entertain and exercise summary proceedings in its discretion against attorneys who are guilty of misconduct in handling the assets of the estate. Brunings v. Townsend, 139 Cal. 137, 72 P. 919; 6 Cor.Jur. 711–713; 7 C.J.S., Attorney and Client, § 159. Whether the court will exercise its summary powers is a matter within its discretion. Id. Upon this point appellant cites two authorities, Ex parte Casey, 71 Cal. 269, 12 P. 118; Tomsky v. Superior Court, 131 Cal. 620, 63 P. 1020. In the Casey case, the claimant was a total stranger to the estate, necessitating action before a law court. In the Tomsky case the executrix for an estate paid her attorney certain moneys advanced as cost and retainer fees. There was no professional misconduct on the part of the attorney. Without a trial, the lower court could not find him guilty of neglect of duty and order him to refund the money. What he had received was not paid to him as a trust fund or by order of the court for a certain purpose. It had not been embezzled or fraudulently taken.

[23] But it could not be contended that Coyne was the victim of a summary proceeding. Far from it; he created the issues by his own pleading and he submitted his person to the jurisdiction of the court by appearing, pleading, giving his testimony in full and by demanding judgment in his favor. He was thereby given his day in court and had the privilege of presenting all evidence available to him to establish the affirmative of his contentions. At the trial all of the facts surrounding his services and the moneys deducted by him from the funds of the estate were fully developed. He thus nominated the probate court to determine the validity and merit of his objections to the accounts. That court having ruled upon them, appellant is in no position now to question the jurisdiction of the probate court to adjudicate the issue. In re Estate of Marre, 127 Cal. 128, 132, 59 P. 385.

[24] The final contention is that the court was without authority to make findings with reference to matters not mentioned in the objections to the account. Unquestionably this may be done, when such matters are integrally related to the value of the services recited as the basis of the fees claimed. Had he filed no objections at all to the accounts which charged him with the moneys in dispute, it was the duty of the probate judge carefully to examine the account presented and

to reject all unjust or illegal claims whether or not any exceptions thereto were filed. In re Estate and Guardianship of Vucinich, 3 Cal.2d 235, 44 P.2d 567; Bauer v. Bauer, supra.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

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43 Cal.App.2d 753

DUNNER v. HOOVER.

Civ. 12807.

District Court of Appeal, Second District, Division 2, California.
March 28, 1941.

1. Sales 🔑110(2)

Allegations of complaint, including allegation of plaintiff's service on defendant of notice of rescission and cancellation of agreement, stated cause of action for rescission of contract for sale of milk route and equipment to defendant.

2. Specific performance 🔑68

Equity will not decree "specific performance" of contract for sale of personal property except in rare cases where remedy at law is not adequate.

See Words and Phrases, Permanent Edition, for all other definitions of "Specific Performance".

3. Specific performance 🔑68

Buyer was not entitled to "specific performance" of contract for sale of milk route and equipment where seller failed to deliver names of number of customers promised, since buyer could prove value of names of patrons not delivered to him and recover damages and it is presumed that breach of such agreement can be relieved by pecuniary compensation. Civ.Code, § 3387.

4. Specific performance 🔑114(2)

To entitle litigant to "specific performance" of contract, he must first allege an enforceable contract and his passing of an adequate consideration.

5. Specific performance 🔑115

The requirements for complaint for specific performance were applicable to counterclaim asking such relief, and it was required to allege fairness of contract and that it was reasonable. Civ.Code, § 3391.

6. Specific performance 🔑115

An answer which failed to state that plaintiff's obligations could be reasonably performed by him or that terms were reasonable or just, failed to allege that defendant paid or offered to pay purchase price, and failed to set forth any reason for defendant's inability to perform covenants required of him or that his performance was prevented by plaintiff's acts, was insufficient to entitle defendant to specific performance of contract for sale of milk route. Civ.Code § 3391.

7. Specific performance 🔑123

A decree awarding specific performance in favor of defendant of contract for sale of milk route to defendant was erroneous where findings did not specifically declare that defendant's failure to pay purchase price of property was rendered impossible by acts of plaintiff.

8. Specific performance 🔑124

In action to rescind contract for sale of milk route to defendant with counterclaim for specific performance, there was no authority or evidence to warrant referee's allowance of four and one half cent profit on sales not made by defendant, or to hear evidence and make findings respecting number of customers to whom defendant delivered milk, number ordered by plaintiff not to pay defendant, or to consider ex parte evidence of customers as to plaintiff's acts in violation of agreement, and to formulate decision for court as to amount of plaintiff's debt to defendant. Code Civ.Proc. § 639, subds. 1, 2.

9. Reference 🔑6

Where no long account was involved in transaction, there was no authority to direct referee to hear and decide the whole issue. Code Civ.Proc. § 639 subd. 1.

10. Reference 🔑72

Where defendant stood on breach of contract and not on performance thereof, taking of "account" by referee was wholly unauthorized. Code Civ.Proc. § 639 subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Account".

11. Account ⚷3

To take an "accounting" between parties is in order only when both parties confirm contract and demand their shares of profit or of capital investment or both, and it is not proper in case of breach of agreement to convey personal property.

See Words and Phrases, Permanent Edition, for all other definitions of "Accounting".

Appeal from Superior Court, Los Angeles County, Frank C. Collier, Judge.

Action by John Dunner against Myron L. Hoover to enforce the rescission of a contract, wherein defendant filed a counterclaim. From a judgment for defendant, plaintiff appeals.

Reversed.

Lester V. Peterman, of Twenty Nine Palms, for appellant.

A. D. Orme, of Pasadena, for respondent.

MOORE, Presiding Justice.

This action was instituted by plaintiff to enforce the rescission of a contract executed by plaintiff and defendant September 30, 1938. The ground alleged as the basis for rescission was fraud in that defendant never intended to perform any of the terms and conditions of the contract which provided for the sale to defendant by plaintiff of a milk route and certain equipment, including a truck, subject to an indebtedness in the sum of $434.05, certain bottles and cases in use by the Sunnybrook Dairy, a list of a sufficient number of customers of that dairy or others to enable defendant to sell 150 quarts of milk per day; defendant to purchase all milk sold by him from plaintiff at one cent per quart more than the prevailing wholesale market price, which by the terms of the contract was fixed at 5¢, 6½¢ or 7¢ per quart, depending upon the butterfat content of the milk; defendant to assume to pay the debt due on the truck and to pay plaintiff $25 per month until the sum of $300 had been paid, at which time plaintiff should execute a bill of sale for the route and equipment; defendant to build up the business by proper service to his patrons and to account daily to plaintiff for sales made.

Prior to and on September 30, 1938, plaintiff owned and operated a dairy (known as Quality Dairy) and delivered milk, under the trade name of "Quality Dairy" over a route in the city of Pasadena and environs. At the same time one Olmstead was the owner of a milk route on which he sold milk under the trade name of "Sunny Brook Dairy" and of a Ford truck, and of bottles and cases described in the contract. Olmstead had declined to sell to defendant the Sunny Brook route and the personalty he used in delivering the milk but he did sell the route and equipment to plaintiff for $300, and plaintiff thereupon agreed to sell to defendant. Following the execution of the contract and on the same day the parties met with Olmstead at plaintiff's home, at which time they consolidated and divided the territory in which milk had been theretofore sold by plaintiff and Olmstead. They designated Orange Grove avenue the dividing line of the two divisions, defendant choosing for his territory the area south of Orange Grove avenue. However, defendant did not by his acceptance of such territory release plaintiff from his obligation to deliver him a sufficient number of names of patrons who would purchase 150 "points" i. e., quarts of milk, daily. The customers on the list of names delivered to defendant purchased only 85 quarts. The events that followed appear in outline in the complaint.

[1] The complaint alleges that at the time of the agreement plaintiff owned the personal property described in the quoted contract including a list of the names of customers and patrons, who resided in Pasadena and neighboring cities, who purchased from plaintiff under the trade names of Quality Dairy and Sunny Brook Dairy; that defendant falsely promised to perform all the covenants and conditions of the contract; that by reason of plaintiff's reliance upon such promises he executed the writing, delivered to defendant the list of names of those who purchased milk from plaintiff on defendant's route, together with the route book, cases and caps; defendant's lack of intention to perform; his failure to pay the monthly instalments in November, December, January and February, 1939; that defendant purchased milk for about one month from plaintiff as agreed, then purchased but a small quantity and subsequently none; that the total amount of such purchases was of the agreed value of $394.68 on which defendant paid the sum of $123; that defendant now purchases milk from dealers other than plaintiff and delivers milk to customers on plaintiff's route in bottles with the name

"Quality Dairy" on them, and represents to his customers that the milk he sells to them is "Quality Dairy Milk"; that he is the owner of the Quality Dairy; and that defendant purchases merchandise from merchants in Pasadena and Los Angeles on the credit of plaintiff. The allegations are sufficient to constitute a cause of action in rescission, including the allegation of his service on defendant of notice of rescission and cancellation of the agreement. By his prayer he demands that defendant be enjoined from selling milk under the names of Quality Dairy and Sunnybrook Dairy, and from selling any milk purchased from dealers other than plaintiff and for the recovery of the sum of $271.68 due for milk purchased from plaintiff and for $100 as instalments due on the contract of purchase.

The answer denied the allegations of the complaint and in a separate paragraph alleged he had faithfully complied with all of the terms and conditions of the agreement but that plaintiff had failed to perform his part; had failed to deliver the names of a number of customers as promised; has constantly interfered with defendant by making collections from defendant's customers and has caused defendant to lose a number thereof; that while collecting from defendant's customers, plaintiff has failed to account to defendant either by credit or cash; that defendant has paid plaintiff directly or indirectly by cash or earned credits a sum over and above the amount owing plaintiff under the terms of said agreement. The prayer of the answer was that an accounting be required of plaintiff for all money collected and all credits earned, that the number of customers and names and addresses thereof to which defendant is entitled be determined, that the court adjudge which party is indebted to the other, that the rights of the respective parties to the contract be specifically determined, and that plaintiff be enjoined from interfering with any of defendant's patrons.

The court found that all of the allegations of the complaint are not true except that the contract was executed, and except that plaintiff delivered to defendant a list of names of customers on the route sold but that those were an insufficient number to comply with the contract in that plaintiff failed to deliver the sum of 65 "points", having delivered only 85 points instead of 150 "points" agreed upon; that the "milk bottles and caps bearing the names of Quality Dairy and Sunnybrook Dairy belonged to defendant and not to plaintiff."

From the findings the court decided that the notice of rescission was void; that defendant was entitled to recover the sum of $256.16; that he is entitled to 65 additional "points" of milk. The judgment followed the decision.

The grounds of appeal are: (1) that it was error to order specific performance of a contract for the sale of personalty; (2) that it was error to award specific performance in favor of defendant in the absence of either allegation or finding that defendant had performed all of the conditions and covenants required of him; (3) that it was beyond the scope of the powers of the referee named by the court to determine the extent of the damage suffered by defendant; and (4) that it was error to deny plaintiff's motion to amend his complaint.

[2, 3] 1. It is a rule of ancient origin and of continuous practice that equity will not decree specific performance of a contract for the sale of personal property except in rare cases where the remedy at law is not adequate. 58 C.J. 852. This action does not come within the exceptions. The plaintiff failed to make delivery of the property promised by his agreement in the one particular, to-wit: the names of sufficient customers whose purchases of milk would enable defendant to make sales to them of 150 quarts daily. It was competent for defendant to make proof of the value of the names of patrons of the milk route not delivered to him and recover his damages. Emirzian v. Asato, 23 Cal.App. 251, 137 P. 1072; Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal.App. 431, 297 P. 73. It is presumed that the breach of such an agreement can be relieved by pecuniary compensation. Civ.Code, § 3387.

[4-7] 2. In order to entitle a litigant to the specific performance of a contract, he must first allege an enforceable contract and his passing of an adequate consideration. The requirements for a complaint for specific performance are applicable to the counterclaim. It must allege the fairness of the contract and that it is reasonable. Civ.Code § 3391, Young v. Matthew Turner Co., 168 Cal. 671, 675, 143 P. 1029; Buckmaster v. Bertram, 186 Cal. 673, 200 P. 610. While the allegations of the answer are sufficient to enable the court to award damages, it does not contain allegations which are necessary to a pleading seeking specific performance. "Even if the allega-

tions were to be considered as those of a cross-complaint, still the pleading could not be sustained as it wholly fails, standing alone, to state facts sufficient to constitute an independent cause of action." Bandy v. Westover, 200 Cal. 222, 231, 252 P. 593, 596. Defendant's affirmative allegations do not state that the obligations imposed upon the plaintiff can be reasonably performed by plaintiff or that the terms are reasonable or just. Bandy v. Westover, supra. Having failed to allege that he paid or has offered to pay the purchase price of the property to that extent he has failed to allege a cause of action for specific performance. Cates v. McNeil, 169 Cal. 697, 707, 147 P. 944. Neither does the answer set forth any reasons for defendant's inability to perform the covenants required of him or that his performance was prevented by the acts of the plaintiff. Neither do the findings specifically declare that defendant's failure to pay the purchase price of the property was rendered impossible by the acts of plaintiff.

[8] 3. In spite of the inadequacy of the defendant's pleading to warrant the decree of specific performance, the trial court, after hearing testimony of the two litigants and Mr. Olmstead, referred the controversy to one C. S. Anderson. The referee assumed judicial powers and undertook to compute the extent of the loss of profits on the part of the defendant. In doing this, he considered evidence not only of the parties and of such books as they kept but also he took the testimony of previous customers of plaintiff as well as statements from the customers of defendant, and he derived the conclusion that defendant was entitled to a credit of $376.68 as loss of profits on his inability to sell 65 quarts daily for a period of 129 days, based upon a profit of 4½¢ per quart to defendant. Without discussing his errors in computation, it is sufficient to observe that there is no authority or evidence to warrant his allowance of 4½ cents profit on sales not made, or to hear evidence and make findings with reference to the number of customers to whom defendant delivered milk, the number of customers ordered by plaintiff not to pay defendant, or to consider the ex parte evidence of customers as to the acts of plaintiff in violation of the agreement and to formulate a decision for the court as to the amount of plaintiff's debt to defendant.

[9] A referee appointed under circumstances such as those described has no such power. The first subdivision of section 639, Code of Civil Procedure, authorizes a referee "to hear and decide the whole issue" when the trial of an issue of fact requires the examination of a long account. There was no long account involved in this transaction. There was, therefore, no authority to direct him to hear and decide the whole issue; and the court did not pretend to exercise such authority.

[10, 11] The second subdivision of the same section merely authorizes the court to direct a reference "when the taking of an account is necessary for the information of the court". But since defendant stood upon a breach of the contract and not upon a performance thereof, the taking of an account was wholly unauthorized. To take an accounting between parties is in order only when both parties confirm the contract and demand their shares of profits or of the capital investment, or both. It is not proper in case of the breach of an agreement to convey personal property.

The judgment is reversed.

We concur: WOOD, J.; McCOMB, J.

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43 Cal.App.2d 773

BURBANK v. NATIONAL CASUALTY CO.

Civ. 6434.

District Court of Appeal, Third District, California.

March 28, 1941.

Hearing Denied May 26, 1941.

1. Insurance 🔑665(7)

In action against insurer to recover on a judgment obtained against the insured under an automobile liability policy in action for injuries sustained in automobile accident, wherein plaintiff contended that insured's failure to give notice to insurer within time required by policy was excused because insured was unaware at the time of the accident that accident had actually occurred, evidence sustained finding that insured did not know that the accident occurred.

2. Insurance ⚿539(6)

If insured under automobile liability policy did not realize at time of accident, which caused personal injuries, that accident had actually occurred, insured's failure to give notice to insurer within time required by policy would be excused, and an action could be maintained against the insurer on a judgment recovered in personal injury suit against insured.

3. Insurance ⚿535

Under a policy requiring "immediate notice" to an insurer of accidents insured against, the condition does not apply to every trivial occurrence, even though it may prove afterward to result in serious injury, and if no apparent harm came from the mishap and there was no reasonable ground for believing at the time that bodily injury would follow, there is no duty on insured to notify the insurer.

See Words and Phrases, Permanent Edition, for all other definitions of "Immediate Notice".

4. Appeal and error ⚿1195(1)

A judgment or determination made on a certain state of facts ceases to be of binding force if the facts presented at the retrial are essentially different.

5. Appeal and error ⚿1195(3)

Where, in action against insurer to recover amount of judgment against insured under automobile liability policy in a prior personal injury action, there was new evidence produced bearing on alleged fact that insured did not know of accident when it occurred, and that hence his failure to give notice to insurer within time required by policy would be excused, the new evidence precluded application of the rule that the "law of the case" must be followed.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

6. Appeal and error ⚿931(1)

The District Court of Appeal has the duty to construe a trial court's findings in a manner which will support rather than defeat the judgment.

7. Insurance ⚿665(7)

In action against insurer on judgment obtained in personal injury action against insured under an automobile liability policy, evidence was insufficient to support finding that third person to whom alleged notice of accident was given within time required by policy was an agent of the insurer at the time.

8. Principal and agent ⚿23(2)

Agency may be proved by circumstantial evidence.

9. Appeal and error ⚿1008(1)

The existence of an agency is a fact question for the trial court.

10. Principal and agent ⚿19

The burden of proving the existence of an agency rests on the one affirming its existence.

11. Insurance ⚿539(5)

Where time which elapsed from date of automobile accident until notice was given by insured under automobile liability policy, which required "immediate written notice", exceeded by 20 days the 20-day period allowed by statute, the insured breached the condition of the policy and recovery could not be had against insurer on judgment against insured. St.1935, p. 510, § 551.

12. Insurance ⚿646(9)

Since after lapse of time it virtually becomes impossible for an insurer which has issued an automobile liability policy to learn what facts, favorable to the insurer, could have been ascertained through prompt inquiry, prejudice to the insurer from failure to give notice of accident to insurer within time required by policy and by statute must be presumed. St.1935, p. 510, § 551.

◆

Appeal from Superior Court, Madera County; H. S. Schaffer, Judge.

Action by Julia J. Burbank and another against the National Casualty Company to recover amount of judgment against an insured to whom the defendant had issued an automobile liability policy. On death of plaintiffs Otis J. Burbank, etc., was substituted in their stead. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Hearing denied; GIBSON, C. J., and SHENK, J., dissenting.

Ray W. Hays, of Fresno, for appellant.

Jos. Barcroft and D. P. Barcroft, both of Madera, and C. Ray Robinson, of Merced, for respondent.

PER CURIAM.

The defendant, engaged in the liability insurance business, executed a policy in favor of J. M. McIntyre against liability imposed upon him by law on account of the operation of the automobile described in said policy. While driving the automobile McIntyre injured Julia J. Burbank. Julia J. Burbank and Willie Burbank, wife and husband, filed suit against McIntyre to recover damages for personal injuries.

The Burbanks recovered a judgment against McIntyre, which he failed to pay, and they then brought the suit now under consideration against the appellant to recover the amount of said judgment.

Since the commencement of the action, both of the Burbanks have died. Plaintiff now represents them.

The injuries mentioned above were received by Mrs. Burbank when her car and the car driven by McIntyre collided on November 19, 1931. On the 7th day of December, 1931, a criminal complaint was filed in a justice's court in Madera county, charging John Doe with reckless driving, and a warrant was issued under said complaint. McIntyre was arrested in Coalinga, Fresno county, on December 30, 1931. On the 13th day of January, 1932, he appeared in court and pleaded not guilty. Burbank subsequently filed suit and recovered damages against McIntyre. That judgment is final, and has not been paid. This suit was brought by the Burbanks against defendant insurance carrier. The lower court gave judgment in favor of plaintiffs for $5,000. When appealed to this court (15 Cal.App.2d 483, 59 P.2d 589), the judgment was reversed upon the ground that the insured, McIntyre, had breached the terms of his policy by his failure to give notice of the accident within the time required therein. Prior to the retrial, which was had on July 12, 1939, plaintiffs moved the court for permission to withdraw from the stipulated facts upon which the first trial was based. In that stipulation the parties agreed, in part, upon the following facts:

"That on the 18th day of February, 1932, J. M. McIntyre addressed a letter to the National Casualty Company, San Francisco, advising said company that he had an accident on the 19th day of November, 1931, near Berenda, California; that this was the first notice of said accident given by J. M. McIntyre to the National Casualty Company or any of its representatives. * * *"

Under such facts we held, on the former appeal, that such notice was not given within the time provided in the policy. The motion was granted, although opposed by defendant. Thereupon, the parties entered into a second stipulation of facts, which, together with oral testimony, exhibits, and the deposition of McIntyre, now constitutes the record before us. The second stipulation of facts omitted the following clause contained in the first: "that this was the first notice of said accident given by J. M. McIntyre to the National Casualty Company or any of its representatives". The stipulation includes a letter written by McIntyre to appellant, dated February 18, 1932, informing the latter that he had been in an accident on November 19, 1931. It also concludes with the following words: "Do not know who this should be sent to so have sent a duplicate to issuing agent," (not the Brown mentioned herein).

Upon a retrial by the court, the following findings were made:

"That the said J. M. McIntyre did not have any knowledge or notice of the accident of November 19, 1931, until December 31, 1931. That on December 31, 1931, the said J. M. McIntyre was arrested for reckless driving arising out of the accident of November 19, 1931. That said policy of insurance provided in part as follows: 'Failure to give any notice required to be given by this policy within the time specified shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time, and that notice was given as soon as was reasonably possible.' The court finds that it was not reasonably possible for J. M. McIntyre to have given notice sooner than it was given; and the court finds that said notice was given as soon as was reasonably possible. That at said time, to-wit, between December 31, 1931, and January 5, 1932, and prior and subsequent thereto, the said A. B. Brown was an agent and acting as such for and on behalf of the defendant, and thereafter actively prepared and investigated said cause for and in behalf of said defendant."

Judgment was entered in favor of plaintiff in the sum of $7,235.17. This appeal is taken from such judgment.

It is first contended by appellant that the evidence is insufficient to support the above findings, in that it is shown, without contradiction, that the notice of injury was not given within the time required by the policy, nor is there any proof that it was not reasonably possible for the insured to have given such notice within such time. The portion of the policy involved here reads as follows:

"This insurance is subject to the following conditions and failure on the part of the Insured to comply therewith shall forfeit the right of the Insured or of any judgment creditor of said Insured to recover hereunder.

"1. Notice, Claims and Suits. The Insured shall give to the Company or to its authorized Agent immediate written notice of any accident covered hereby, and shall also give like notice of claims for damages on account of such accidents. Notice of accident or claim given by or on behalf of the Insured to any authorized Agent of the Company with particulars sufficient to identify the Insured shall be deemed to be notice to the Company. Failure to give any notice required to be given by this policy within the time specified shall not invalidate any claim made by the Insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time, and that notice was given as soon as was reasonably possible."

[1-3] It is conceded that the accident occurred November 19, 1931, and that only written notice of the same was mailed to appellant on February 18, 1932. December 30, 1931, McIntyre was arrested on a complaint charging him with reckless driving on November 19, 1931, and on January 13th, he pleaded not guilty to the charge. The evidence upon which the foregoing facts are based is not questioned. Such was the condition of the record upon the former appeal to this court. In the present record there is additional evidence in the testimony of McIntyre, the insured. He testified that he did not realize or know, at the time, that he had been involved in the accident of November 19th, and that the first time he knew of the accident was when he was arrested on December 30th. We are satisfied that the finding in respect to the excuse for failure to give any notice of the accident prior to the last-mentioned date has ample support in the evidence. The rule in this situation is found in Huddy's Encyclopedia of Automobile Law, volumes 13, 14, section 288, at page 358:

"Under a policy requiring immediate notice to the Insurer of accidents insured against, the condition does not apply to every trivial occurrence, even though it may prove afterward to result in serious injury. If no apparent harm came from the mishap and there was no reasonable ground for believing at the time that bodily injury would follow, there is no duty upon the insured to notify the insurer."

[4, 5] It is next contended that the former opinion of this court lays down the law of the case which must be followed here. But "when the judgment or determination is made upon a certain state of facts, it ceases to be of binding force if the facts presented at the retrial are essentially different". 2 Cal.Jur., p. 1044, § 621. As indicated above, there was additional evidence produced at the second trial, bearing upon the question of whether or not the insured knew of the accident when it occurred. This was sufficient to preclude the application of the rule based upon the law of the case.

[6] The findings of the court are indefinite as to the time of the giving of notice by McIntyre. In fact there is no specific finding to the effect that the assured gave any notice prior to the date of the written notice of February 18, 1932. However, there is evidence in the record from which the trial court might find that oral notice was given to Brown within the five days succeeding December 30, 1931. It is our duty to construe the findings in a manner which will support, rather than defeat the judgment. We therefore construe the finding to mean that the assured gave appellant the notice required by the policy between the dates mentioned.

[7] It is our opinion that the evidence fails to support the finding that A. B. Brown was the agent, or was acting in behalf of appellant at the time the purported oral notice was given by McIntyre to him. The evidence not only fails to support the conclusion that Brown was an authorized agent of appellant within the meaning of the provisions of the policy, but it is wholly lacking in proof that Brown was employed to act in any capacity on behalf of appellant during this five-day period of time.

Brown's connection with the transaction is shown to be as follows: A. B. Brown was an independent insurance adjustor (residing at Fresno), and had always acted in this capacity in the investigation of claims for appellant insurance company. He had handled the investigation of a number of claims for appellant prior to his assignment in the present case. It was necessary, however, as is true in regard to all independent adjusters, that Brown receive a specific assignment of investigation as to a particular claim, in order to proceed with authority in behalf of appellant. Brown had received such assignment in the past from both the Los Angeles and San Francisco offices of appellant. A letter addressed to Mr. Brown, and dated February 29, 1932, directing him to proceed with the investigation of the accident of November 19, 1931, was introduced in evidence by the appellant for the purpose of fixing the time of his authorization for this particular case. This letter was sent from the Los Angeles office. The tenor of the letter discloses that this was the first communication between the Los Angeles office and Brown in regard to the McIntyre matter. The letter also assumes, as readily appears from the language used, that Brown was, up to the time of receipt of such letter, ignorant of such matter.

There are two incidents which are relied upon by respondents as proof of the agency of Brown between December 30th and January 5th. One is the testimony of the justice of the peace before whom the criminal charge of reckless driving was brought. It is as follows:

"Q. Is that notation given at the bottom of the letter dated January 14th, 1932, received by you from Raymond Cato to the effect that you were to notify A. B. Brown, 617 Brix Building, is that in your own handwriting? A. Yes, sir.

"Q. And do you recall when you made that notation on that letter? A. I can't say exactly.

"Q. By refreshing your recollection from the date of the letter or any other means there, can you refresh your recollection in that connection and give us the approximate date that the notation was made? A. I would say from my general practice that it was put on there approximately the date that the warrant was received.

"Q. What is your best recollection of the time that notation was placed upon that letter received on January 14th, 1932? A. About the time I received this. That is my best recollection.

"Q. And was that January 14th, 1932? A. Yes.

"Q. Now, do you recall the occasion of your making that notation? In other words, did Mr. Brown come to your office or phone you or write you or what? A. I recall that he telephoned.

"Q. Where from? A. Fresno."

The second is the testimony of Brown with reference to the date when he had communicated with the attorneys for McIntyre. At the first trial said attorneys, Barcroft & Barcroft, agreed, by written stipulation: "that following the 29th day of February, 1932, A. B. Brown, pursuant to instructions from the National Casualty Company and acting for them and in accordance with the reservations of rights agreement proceeded with the investigation of said accident; that said A. B. Brown ascertained that the law firm of Barcroft & Barcroft represented Mrs. Burbank and secured their consent to have the said Mrs. W. Burbank examined by Dr. F. L. R. Burks, of Fresno, which examination was made on or about the 30th day of June, 1932, and by Dr. D. H. Trowbridge, Fresno, which said examination was made on or about June 27, 1932." At the first trial, Brown testified that he had contacted the attorneys for McIntyre the latter part of January, 1932. On this trial, Brown testified that his previous testimony was erroneous, and that the correct month was February, which was subsequent to the time that written notice was given to appellant by the insured. The testimony of Brown at this trial is as follows:

"Now, I will ask you if at that trial you did not give the following answers to the following questions: 'Did you—however, you did, though, according to the stipulation, you contacted Barcroft and Barcroft and arranged for a medical examination of Mrs. Burbank?' That was asked by Mr. Hays, that question, and your answer is 'A. Yes, sir', and the question by Mr. Hays, 'That was somewhere in the latter part of January, 1932'. A. No.

"Q. Now, I will ask you, Mr. Brown, and claiming surprise, whether or not at the time stated previously, at the previous trial of this action, you did not give the following answers to those questions at that time and place—now, just a moment, if you at that time, in answer to that question, did not answer it as follows, or the question, rather, by Mr. Hays 'That was somewhere in the latter part of January, 1932', and the reply, 'Yes, sir'. A. That is not my answer, and if it was it was a mistake.

"Q. Well, now did you at that time give that testimony? A. No.

"Q. I will now ask you if this morning at approximately 10:30 in this courtroom when you were under oath when I asked you whether or not you did give that testimony at that time, if you did not at that time testify that you did so testify? A. This morning I said that, yes.

"Q. This morning you said that at the time this other trial took place that you testified that it was in the latter part of January, 1932, didn't you? A. Yes.

"Q. Now, I will ask you if at that trial you did not give the following answers to the following questions: 'Q. Did you—however you did, though, according to the stipulation, you contacted Barcroft and Barcroft and arranged for a medical examination of Mrs. Burbank?' That was asked by Mr. Hays, that question, and your answer is 'A. Yes, sir', and the question by Mr. Hays, 'That was somewhere in the latter part of January, 1932? A. Yes, sir'.

"Q. Did you give those answers to those questions at that time? A. Yes, sir."

"Q. When did you first receive the assignment in this case? A. On February the 29th.

"Q. And had you heard anything prior to that time, anything about this accident? A. Nothing whatsoever.

"Q. Had you ever seen Mr. McIntyre prior to that time? A. No.

"Q. When did you first see Mr. McIntyre? A. When he came into my office, which I believe was on March the fourth, but there is a matter of record on that date.

"Q. And do you recall whether or not you had communicated with Barcroft and Barcroft at all about this case prior to that time? A. I knew nothing about the case until I received that letter.

"Q. So you did not communicate with them? A. No.

"Q. And you had not then, arranged with them for a medical examination of Mrs. Burbank in the latter part of January? A. No.

"Q. And if it says in January in the transcript, that is an error, isn't it? A. Yes.

"Q. Then, why did you testify that you arranged with Barcroft in January of 1932? A. Well, that undoubtedly was a misunderstanding about the date. I could not have arranged to see him until I knew about the accident, but I did not know about it."

[8-10] While we are aware of the rule that agency may be proved by circumstantial evidence, and that the existence of an agency is a question of fact for the trial court (1 Cal.Jur. p. 696, § 7)—we believe that there is no substantial evidence in the record from which the trial court could conclude that Brown was the agent of appellant at the time when the assured testified he gave the oral notice of the accident, assuming that the requirement of written notice was waived. The two incidents mentioned were several weeks after the time when the oral notice was given. No act of appellant is proven which would show, or tend to prove, that it communicated in any manner with Brown prior to February 18th, 1932, in respect to this accident. "Agency is a fact, the burden of proving which rests upon the party affirming its existence." 2 C.J., p. 923, § 662; 3 C.J.S., Agency, § 315. We are of the opinion that plaintiff has failed to meet the requirements of the rule last stated.

As a result of the foregoing, the record shows that the first notice of the accident was given by the assured on February 18th. McIntyre, the assured, was excused from giving such notice until he discovered he had been in an accident. This was on December 30, 1932. Thus, some forty days elapsed until the notice was given. Section 551 of the Insurance Code, St.1935, p. 510, provides as follows: "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid."

[11, 12] Thus, the time which elapsed, before notice was given, exceeded by twenty days the time allowed by the statute. We are also of the opinion that, irrespective of the section quoted, the notice was not given immediately after the insured learned of the accident. The insured therefore breached the condition of the policy and could not recover. The reason for requiring prompt notice is well expressed in Purefoy v. Pacific Automobile Indemnity Exchange, 5 Cal.2d 81, 53 P.2d 155, 159, where it is said:

"But respondent argues with convincing force herein that the lapse of time which removes the opportunity for prompt investigation, also destroys the possibility of showing prejudice arising from delayed inquiry. Where witnesses are interviewed after lapse of time, during which they either may have forgotten the facts or been approached solely by representatives of the injured party, it virtually becomes impossible to learn what facts, favorable to defendant, could have been ascertained through prompt inquiry. We are impelled to the conclusion that prejudice must be presumed in such situations."

The judgment is reversed.

WEST KEY NUMBER SYSTEM

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43 Cal.App.2d 782

BASYE v. CRAFT'S GOLDEN STATE SHOWS et al.

Civ. 6445.

District Court of Appeal, Third District, California.

March 28, 1941.

Hearing Denied May 26, 1941.

1. Appeal and error 🔑886

An inadvertently erroneous fact finding by trial court in conflict with other findings thereof will be corrected by District Court of Appeal on respondent's motion, supported by trial judge's affidavit, so as to preclude reversal of judgment appealed from because of such conflict. Rules for Supreme Court and District Courts of Appeal, rule 14.

2. Master and servant 🔑316(1)

The relationship of one operating shooting gallery as independent concession in conjunction with carnival shows and owning all apparatus connected with such gallery, as well as means of transporting equipment thereof, to owner of such shows, was that of "independent contractor".

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

3. Theaters and shows 🔑6

A proprietor or operator of place of amusement owes legal duty to exercise due care to protect from injury individuals coming on his premises by his express or implied invitation.

4. Theaters and shows 🔑6

A proprietor or operator of place of amusement must see that his premises are in reasonably safe condition for use of persons coming thereon by his express or implied invitation.

5. Theaters and shows 🔑6

Failure of proprietor or operator of place of amusement to exercise reasonably careful supervision of appliances or methods of operating concessions under his management constitutes breach of his duty to exercise due care to protect from injury persons coming on his premises by his express or implied invitation.

6. Master and servant 🔑320, 321

The proprietor or operator of place of amusement is liable for injuries, received on his premises by invited member of public as result of an independent contractor's or concessionaire's negligence, when such proprietor's or operator's failure to exercise reasonably careful supervision over appliances or methods of operating concessions under his management is shown to have proximately resulted in such injuries.

7. Master and servant 🔑315

The owner, occupier, or possessor of premises on which amusement is being operated, as well as proprietor or operator thereof, owes duty to exercise care for protection of patrons from injury and is responsible for independent concessionaires' negligence resulting in injuries to patrons.

8. Master and servant 🔑320, 321

A possessor of land, held open by him to entry of public for his business purposes, is liable for injuries to persons entering thereon for such purposes as result of his failure to exercise reasonably careful supervision of appliances or methods of independent contractor or concessionaire, employed or permitted by such possessor to carry on upon land an activity directly or indirectly connected with his business use thereof, regardless of whether such persons pay for admission or receive privilege of entry as gratuity from possessor.

9. Master and servant 🔑320, 321

The owner and operator of carnival shows owed public, invited to patronize them, duty to maintain reasonable inspection of shooting gallery, operated by independent concessionaire in conjunction with such shows under agreement with owner, in order to see that appliances and method of operation of such gallery were reasonably safe.

10. Master and servant ⚷320, 321

The failure of owner and operator of carnival shows to maintain reasonable inspection of shooting gallery, operated in conjunction with shows by independent concessionaire, in order to see that appliances and methods of operation of gallery were reasonably safe, rendered such owner liable for injury to show patron struck in eye by deflected fragment of bullet, fired by patron of such gallery, as result of defective condition of beaver board placed between targets and steel backstop to prevent rebound of lead fragments.

11. Landlord and tenant ⚷167(7)

An owner and operator of carnival shows, who failed to maintain reasonable inspection of shooting gallery, operated in conjunction therewith by independent concessionaire, is liable for injury to show patron, struck in eye by deflected fragment of bullet, fired by patron of such gallery, as result of defective condition of beaver-board placed between targets and steel backstop to prevent rebound of lead fragments, though corporation owning park, in which shows were being operated under agreement with such owner, may also be liable for failure to perform its duty to maintain such inspection.

12. Master and servant ⚷320, 321

The liability of one operating shooting gallery in conjunction with carnival shows under agreement with owner of such shows for injury to show patron, struck in eye by deflected fragment of bullet, fired by patron of shooting gallery, does not relieve show owner of liability for such injury because of his negligence in failing to maintain reasonable inspection of shooting gallery to see that its appliances and method of operation were reasonably safe.

13. Landlord and tenant ⚷167(7)

A carnival show owner and operator, going into possession of portion of park owned by corporation under agreement providing for payment of certain percentages of gross receipts of various attractions to such corporation, became lessee of such portion of premises for purpose of operating his concessions and attractions for profit, so as to render him liable for injury to show patron as result of owner's negligence in failing to maintain reasonable inspection of shooting gallery operated in conjunction with shows by independent concessionaire, though such corporation reserved right to operate and control certain concessions on premises.

14. Theaters and shows ⚷6

The fact that corporation, leasing portion of park owned by it for operation of carnival shows, collected general admission fees from members of visiting public, did not affect relationship between owner of such shows and patrons thereof and such owner's consequent liability for injuries to patron.

15. Landlord and tenant ⚷167(7)

One operating shooting gallery in conjunction with carnival shows under agreement with owner thereof, whose contract with corporation for operation of shows in its park gave such owner exclusive control of all shows and concessions, was not lessee of such corporation and independent concessionaire by virtue of implied agreement with corporation, so that corporation was not liable for injury to show patron, struck by deflected fragment of bullet, fired by patron of shooting gallery, as result of defective condition of beaver-board placed between targets and steel backstop to prevent rebound of lead fragments.

16. Landlord and tenant ⚷167(1)

A landlord is ordinarily under no duty to inspect or maintain premises in his lessee's possession, as respects liability for injuries to third persons.

17. Master and servant ⚷330(3)
Theaters and shows ⚷6

In action against owner of carnival shows and one operating shooting gallery in conjunction with such shows for injuries to show patron, struck in eye by deflected fragment of bullet, fired by patron of shooting gallery, as result of defective condition of beaver-board placed between targets and steel backstop to prevent rebound of lead fragments, evidence *held* sufficient to support trial court's finding that plaintiff's injuries were direct and proximate result of negligence of defendant show owner in failing to maintain reasonable inspection of shooting gallery and codefendant's negligence in maintaining beaver-board in perforated and damaged condition.

18. Appeal and error ⚷992

In action against owner of carnival shows and one operating shooting gallery in connection with such shows for injuries to show patron, struck in eye by deflected fragment of bullet fired by shooting gallery patron, it was trial judge's province to determine whether beaver-board, intended to prevent particles of shattered bullets from flying about gallery, was in substantially same perforated and damaged condition when delivered to officer about an hour and a half after accident and when received in evidence as at time of accident.

19. Evidence ⚿194

In action against owner of carnival shows and one operating shooting gallery in connection with such shows for injuries to show patron, struck in eye by deflected fragment of bullet fired by shooting gallery patron, perforated and damaged beaver-board, intended to prevent particles of shattered bullets from flying about gallery, was admissible in evidence, in view of officer's testimony that he procured board from gallery almost immediately after accident and court's observation of its damaged condition, though there was no direct testimony that it was in same condition when delivered to witness as at time of accident.

20. Appeal and error ⚿1052(2)

Error, if any, in permitting witness to testify from memory as to language in certain advertising banners, was cured by subsequent introduction of such banners in evidence.

21. Master and servant ⚿330(3)

In action against carnival shows owner for injuries to patron, struck in eye by deflected fragment of bullet fired by patron of shooting gallery operated by independent concessionaire under agreement with such owner, evidence *held* sufficient to show that defendant owner owed shooting gallery patrons duty to see that equipment of gallery was maintained in such reasonably safe condition as not to endanger them by flying particles of bullets and was guilty of negligence, rendering him liable for such injuries, in failing to perform such duty.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by Willis M. Basye against Craft's Golden State Shows, O. N. Craft, and H. S. Takei for personal injuries. From a judgment for plaintiff against defendants Craft and Takei, they appeal.

Affirmed.

Elber H. Tilson and Irving E. Read, both of Los Angeles, L. A. MacNicol, of Merced (John J. Ford, of Los Angeles, of counsel), and Chester O. Hansen, of Fresno, for appellants.

Masao Igasaki, of Los Angeles, for appellant Harry S. Takei.

C. Ray Robinson, F. M. Ostrander, and Willard B. Treadwell, all of Merced, for respondent.

THOMPSON, Justice.

Plaintiff recovered judgment against defendants O. N. Craft and H. S. Takei and each of them, in the sum of $21,380.90, for personal injuries sustained from a deflected fragment of a bullet fired by another person in a shooting gallery, resulting in the loss of the sight of one eye. Appeals from the judgment were taken by both defendants Craft and Takei. Defendant Takei, however, failed to perfect his appeal by complying with the provisions of either section 650 or section 953a of the Code of Civil Procedure. On motion the purported appeal of Takei was dismissed by this court on May 28, 1940. Respondent's motion for diminution of the record was also granted on the last-mentioned date.

[1] Through inadvertence, paragraph III of the findings of fact with relation to the answer of Craft erroneously read as follows: "That the allegations of Paragraph III thereof are true." The inadvertent error of this finding is apparent. On motion of respondent, supported by affidavit of the trial judge, under the authority granted by rule XIV of the Rules for the Supreme Court and District Courts of Appeal, the foregoing finding is hereby modified and changed to read as follows: "That the allegations of Paragraph III thereof are *untrue*." The correction of the foregoing finding of fact renders nugatory the appellant Craft's contention that the judgment should be reversed on account of the conflict in the findings. The judgment is no longer subject to attack on that account.

The appellant Craft contends no duty of care was imposed upon him by law toward the respondent under the circumstances of this case; that even though such legal duty did exist, there is no evidence of any breach thereof or that such breach was a proximate cause of respondent's injury.

We are concerned only with the question of the liability of the appellant Craft and the issues raised by him.

The accident, resulting in respondent's loss of the sight of one eye, occurred on the evening of August 20, 1938, while he was attending a carnival in the city of Atwater. The carnival was operated on premises located within the city known as "Firemen's Park". On the occasion of the injury, the respondent, a dentist, thirty-five years of age, was accompanied by a friend, Mr. Savateer. They proceeded through the carnival grounds to the dance pavilion, where they were to be met by their wives.

As they approached the short-range shooting gallery operated by Takei it was suggested they should stop to watch a patron who was then shooting at matches. The respondent stood to the left and a foot or two behind the man who was shooting. After a shot or two had been fired, the respondent was struck in the eye by a deflected fragment from one of the bullets. Mr. Savateer, who stood near the respondent, testified as follows: "Well, the doctor, Dr. Basye, grabbed hold of his eye and something stung me on the cheek and I reached up and picked off a little piece of lead that had imbedded itself right on my cheek and the doctor had a handkerchief to his eye and I did not think he was badly hurt, I mean at that time, I did not realize it and I was more or less concerned about myself. About that time a man by the name of Charley Osborn came along and took him away, I believe under the grandstand, under the bandstand and tried to find out what had happened."

The fragment of lead which caused the injury to the doctor's eye rebounded from the steel backstop behind the target in the shooting gallery. Approximately one hour and a half after the accident, Mr. Henderson, a deputy district attorney, upon learning of the injury to respondent, went to the shooting gallery for the purpose of making an investigation. At this time, he procured from the man in charge of the gallery some .22-caliber bullets of the type which were being used, and also secured some pieces of wall-board or beaver-board which had been located between the targets and a steel backstop at the rear of the gallery.

The beaver-board was located in that position as a precaution against the danger from fragments of lead rebounding from the steel backstop to the front portion of the shooting gallery. These pieces of beaver-board were received in evidence at the trial. At that time they were in a badly perforated and disintegrated condition, caused by the firing of numerous bullets through the board. The testimony of Mr. Henderson indicates this board was then in the same condition that it was at the time he made his inspection on the evening of the accident. On cross-examination, in response to the question as to why he had taken the board from the gallery, Mr. Henderson testified: "Because I had learned that an injury had been received by Mr. Basye from a bullet bouncing out from there and *I considered the range and condition it then was in, was a nuisance and there was danger of injury there to life.*"

It is the contention of appellant that the duty of due care owed to respondent was upon Atwater Volunteer Firemen, Inc., and that he, appellant, cannot be held liable for the injuries caused by the negligence of Takei, who was an independent concessionaire.

To determine the question of legal liability for the injury received by the respondent, it is necessary to determine the contractual relationship which existed between Atwater Volunteer Firemen, Inc., O. N. Craft and H. S. Takei.

In May, 1938, Craft's Golden State Shows, as the party of the first part, entered into an agreement with Atwater Volunteer Firemen, Inc., as party of the second part. It was agreed that the party of the first part should bring Craft's Golden State Shows to the city of Atwater for a period of five days and nights, commencing August 17th and ending August 21, 1938, inclusive, to be operated under the auspices of Atwater Volunteer Firemen, Inc. The appellant agreed to furnish twenty attractions to be located at Firemen's Park, in Atwater, which was fulfilled. Firemen's Park was owned by Atwater Volunteer Firemen, Inc. The agreement provided that Craft's Golden State Shows should have "exclusive control of all shows, riding devices *and concessions.* Settlement shall be made at the close of each day's business. Except second party to have beer and soft drinks and eats at location near dance hall."

For the privilege of operating their attractions at Firemen's Park, Mr. Craft agreed to pay a percentage of the gross receipts to Atwater Volunteer Firemen, Inc., as follows: "10% percentage of all shows; 15% percentage of all riding devices, (except the Octopus and Scooter Rides) which shall be 12% percentage. All concessions not classed as paid attractions, first party agrees to pay second party the sum of Five ($5.00) Dollars for each concession that operates during the life of this contract." The short-range shooting gallery which was operated by Takei came within this latter classification from which Atwater Volunteer Firemen, Inc., was paid by appellant the sum of $5 for the operation of the gallery in conjunction with the other attractions.

[2] Mr. Takei first operated his shooting gallery in conjunction with Craft's Golden State Shows in 1936. The evidence discloses the fact that such operation was always carried on in the capacity of an independent concession. Takei owned all of the apparatus connected with the shooting gallery, as well as the means of transporting the equipment. During the period of operation in conjunction with appellant's show, Takei sometimes failed to accompany the attractions to their locations. His relationship to the appellant was that of an independent contractor.

In November, 1937, Takei entered into an agreement with the appellant, which provided that he should operate his concession, consisting of "3 bottle games, 1 short range (shooting gallery), 1 cigarette range and 1 string game", in conjunction with and on the same premises occupied by the appellant's shows in the various cities of the state of California. The agreement provided that appellant was to furnish Takei with a location in the various cities, police protection, electric current for lights, and with necessary licenses. It was further agreed that Takei was to "hold first party harmless against any and all claims arising from any source whatever and to indemnify first party against all loss, damage and/or liability that might result from the erection, maintenance, operation, and dismantling of said sideshow or concession * * *". This written agreement provided for payment by Takei to the appellant Craft of a percentage of the daily net receipts of his enterprise. It appears, however, payments were not made in that manner. The evidence discloses the fact to be that Takei actually paid the appellant $30 per week for the privilege of operating his concession in conjunction with Craft's Golden State Shows.

No employees of the appellant exercised supervision over the manner of conducting or operating this concession. Takei had full control in this regard. The shooting gallery was not inspected by the appellant nor by his employees. Evidence was introduced at the trial, indicating that Mr. Takei sold his shooting gallery and equipment the day prior to respondent's injury. That circumstance, however, has no bearing on the issues presented on this appeal.

Atwater Volunteer Firemen, Inc. advertised the carnival by placing a banner across one of the streets in Atwater upon which there appeared the name of the Firemen's association in connection with this advertisement. The general admission fee to the carnival grounds was collected and retained by Atwater Volunteer Firemen, Inc. The Firemen's association also controlled and operated in the enclosure a '49 Camp, a dance hall and a soft-drink and eating concession. The appellant received no portion of the gate receipts and no share of the receipts from the dance hall or the food or drinks' counter. All of the other concessions and attractions, including some twenty in number, with the exception of the short-range shooting gallery and one or two others, were owned and operated by Craft's Golden State Shows. One or two other independent concessions were operated on contract with the appellant in the same manner as that of Mr. Takei. All of the carnival concessions on the grounds were advertised by the appellant. His banners read: "Craft's Golden State Shows." It does not appear from the evidence that Mr. Takei, or any of the other independent concessionaires, advertised their attractions independently of the Craft's Golden State Shows. Appellant does not contend his attractions were advertised independently. There were no separate banners advertising the short-range shooting gallery as a concession, independently of Craft's Golden State Shows; nor does it appear that the independent concessions were located in such a manner as to designate them as separate and distinct from the other attractions belonging to appellant.

[3-7] The law is well settled that a proprietor, or one who operates a place of amusement, owes a legal duty to exercise due care to protect from injury individuals who come upon his premises by his express or implied invitation. He must see that such premises are in a reasonably safe condition. It constitutes a breach of this duty for him to fail to exercise reasonably careful supervision of the appliances or methods of operating concessions under his

management. The proprietor or operator of such a place of amusement is liable to an invited member of the public for injuries received as the result of negligence on the part of an independent contractor or concessionaire when it is shown that the failure to exercise such supervision proximately results in injuries to a patron. The duty of exercising care, and the responsibility for the negligence of independent concessionaires, are extended by law to the owner, the occupier or the one in possession of the premises on which the amusement is being operated. Szasz v. Joyland Company, 84 Cal.App. 259, 257 P. 871; Johnstone v. Panama Pacific I. E. Co., 187 Cal. 323, 202 P. 34; Harvey v. Machtig, 73 Cal. App. 667, 239 P. 78; Whyte v. Idora Park Co., 29 Cal.App. 342, 155 P. 1018.

In the case of Szasz v. Joyland Company, supra, the amusement grounds were owned and operated by the defendant. A number of the concessions had been leased to independent operators. One of the leased concessions was operated as a shooting gallery. The injury to plaintiff, necessitating the removal of one of his eyes, was received under precisely the same circumstances which existed in the present case. The plaintiff, a young boy, was standing behind the patron who was shooting at targets in the gallery. A fragment from one of the bullets rebounded and struck him in the eye. The owner and controller of the amusement grounds was held to be liable. The court described the accident and gave the reason for concluding that the owner of the grounds was liable for negligence. The opinion, 84 Cal. App. on page 263, 257 P. on page 872, says in that regard: "Of course, the path of the bullet was not discernible to the eye of any witness, but the whole situation was such as reasonably to establish the probable manner in which the accident occurred. * * * A bullet glancing against any one of these rods or bars might readily fly off in such an oblique direction as to strike the rear iron wall at a very acute angle and be deflected thence at a similar angle to one of the iron side walls or to one of the bars or rods in the rack, glancing thence towards the place from which it was fired. The number of courses which such a ricocheting bullet might take through the network of iron rods and bars and against the iron background is infinite. The bullet would probably be broken into fragments which would fly out in different directions. It cannot be held that the evidence does not warrant a finding that the defendant should have anticipated the happening of such an accident and that it was negligent in maintaining the arrangement described. Since it is a justifiable inference that such arrangement was dangerous, and that the danger arising therefrom ought to have been anticipated, mere proof that no such accident ever occurred before does not require a finding in favor of defendant."

In the case of Whyte v. Idora Park Co., supra, a judgment was sustained against the corporation conducting an amusement park, for injuries received by a patron in a concession installed and operated by private parties. The injury was caused by the negligent construction of a slideway which plaintiff was required to use as a means of exit from a building. The defendant in that case reserved the right to object to any employee of the concessionaire "who was not conducting the business in a proper way". [29 Cal.App. 342, 155 P. 1019.] Otherwise employees were under the exclusive control and direction of the concessionaire. The agreement provided that the corporation was to receive a percentage of the gross admission fees received by each particular concession. In holding that the owner of the amusement park was guilty of negligence, the court cites with approval the language used in the case of Thornton v. Maine State Agricultural Society, 97 Me. 108, 53 A. 979, 94 Am.St.Rep. 488, in which it was said: "It is held that an association conducting a fair is liable for injury through a defect in apparatus employed by a concessioner for the amusement of patrons when it receives a portion of the sums paid for the use of the apparatus, has general charge of the grounds, and takes an active part in advertising the amusements."

The court further quotes with approval, 29 Cal.App. at page 345, 155 P. at page 1020, from this last-cited as follows: "'Some of these cases cited are those where the injuries resulted from the negligence of independent contractors, and not lessees. But we can perceive no tenable distinction in a case like this. In either case the offending thing is where it is by the license and permission of the owners of the premises, and upon ground which the owners, by virtue of their invitation to the public, hold out as safe. This is the ground of their liability. By inviting patrons to their fair, they make themselves bound to use reasonable care to see that the fair in all its parts is safe, and is conducted safely, whether the various parts of the fair are conducted and managed by the owners themselves, or, with their permission, by licensees, independent contractors, or lessees. Such is the conclusion which rests upon good sense, and which seems to be clearly established by all the authorities upon the subject.' "

[8] The principle of law announced in the foregoing cases is approved in Restatement of the Law on Torts, section 344, pages 944, 945, as follows:

"A possessor of land who holds it open to the entry of the public for his business purposes is subject to liability to members of the public entering for such purposes for bodily harm caused to them by his failure to exercise a reasonably careful supervision of the appliances or methods of an independent contractor or concessionaire whom he has employed or permitted to carry on upon the land an activity which is directly or indirectly connected with his business use thereof.

"a. A possessor of land is subject to liability, under the rule stated in this Section, only towards those who come upon the land as his patrons, that is, who are invited or permitted to come thereon for the purposes for which it is held open to the public. Thus, a possessor of land who utilizes it as a public fair grounds is subject to liability to all persons invited or permitted to come on the fair grounds to witness the fair. *If the possessor invites or permits another to enter for the purpose for which the land is held open to the public, it is immaterial whether the other pays for his admission or receives the privilege of entry as a gratuity from the possessor.*"

[9-12] It follows from the foregoing authorities that the appellant in this case owed a duty toward the invited public to maintain a reasonable inspection of the shooting gallery to see that its appliances and method of operation were reasonably safe, and his failure to do so rendered him liable for the injury received by the plaintiff, under the circumstances of this case. A reasonable and timely inspection of the appliances of the shooting gallery should have disclosed the defective condition of the perforated beaver-board. That liability on the part of appellant would exist under the facts of this case, even though Atwater Volunteer Firemen, Inc. might also be similarly liable for failure to perform its duty in that regard. The joint liability of the codefendant, Takei, does not relieve the appellant of his negligence.

[13, 14] By virtue of the agreement between appellant and Atwater Volunteer Firemen, Inc., appellant went into possession of a portion of Firemen's Park as a lessee and operator of a place of amusement. The gross receipt percentages paid to Atwater Volunteer Firemen, Inc., constituted rental payments. The fact that the Atwater Firemen reserved the right to operate and control a '49 Camp, a dance hall and an eating establishment is not inconsistent with the conclusion that appellant was a lessee of the remainder of the premises for the purpose of operating his concessions and attractions for profit. The appellant placed himself in the position of a possessor of land who holds it open to the public for the benefit of his business. The evidence shows that these portions of the grounds were advertised as "Craft's Golden State Shows" by means of banners owned and displayed by appellant; nor does the fact that the Atwater Volunteer Firemen, Inc. collected general admission fees from the members of the visiting public affect the relationship as between appellant and those patrons. The appellant received $30 weekly from Takei for the privilege of operating the shooting gallery.

[15] It is the contention of appellant that the proper construction of the written agreements between himself, the Atwater Volunteer Firemen, Inc. and Takei required the court to conclude that Takei was a lessee of the Atwater Volunteer Firemen, Inc., and an independent concessionaire by virtue of an implied agreement with the Firemen's association. With this contention we cannot agree. The written contract between the appellant and the Atwater Volunteer Firemen, Inc., provides in part: "First party (appellant) is to have exclusive control of all shows, riding devices and concessions. Settlement shall be made at the close of each day's business. Except second party (Atwater Firemen) to have beer and soft drinks and eats at location near dance hall." This clause gives the exclusive control of *all* shows, riding devices *and concessions*. The Atwater Volunteer Firemen, Inc., were not given control over Takei's shooting gallery. There is no evidence that the Firemen's association had knowledge of the agreement between the appellant and Takei.

[16] The cases cited by the appellant, which state the general rule of law re-

garding the liability of a landlord for the negligence of his tenant are not applicable. A landlord is ordinarily under no duty to inspect or maintain the premises in possession of his lessee. No case cited by appellant is in conflict with the law as we apply it to the circumstances existing in the present case.

[17] The trial court found that the injuries suffered by respondent were a direct and proximate result of the negligence of appellants O. N. Craft and H. S. Takei. We believe there is substantial evidence to support that finding.

There is evidence that the breach of duty on the part of appellant was a proximate cause of respondent's injuries. Respondent introduced in evidence the badly perforated and disintegrated beaver-board, heretofore referred to, for the purpose of proving the immediate cause of his injury. It was the theory of respondent that the condition of the beaver-board permitted fragments of lead to ricochet or fly back toward the front part of the shooting gallery. In support of this theory as to the immediate cause of the injury, numerous fragments of bullets were found to be lodged in the beaver-board which was introduced in evidence.

[18, 19] The findings of the court imply that the beaver-board, which was intended to prevent particles of shattered bullets from flying about the gallery, was in such a perforated and damaged condition at the time of the accident as to endanger the safety of the patrons of the gallery. It was the province of the trial judge to determine whether the beaver-board, which was offered in evidence, was in substantially the same dangerous condition when it was delivered to the officer, Henderson, about an hour and a half after the accident occurred and when it was received in evidence as it was at the time of the accident. We are of the opinion the court did not err in receiving the beaver-board in evidence. Henderson, who was a witness at the trial, examined the exhibit. He testified that he had heard of the accident almost immediately after it occurred, and that he went to the gallery and procured the beaver-board because he believed the equipment of the gallery rendered it dangerous to patrons. The court also observed the perforated and damaged condition of the board. It was self-evident that the condition of that board could not have been materially changed within the short period of time which elapsed from the time of the accident until it was delivered to the witness. There was no direct statement that it was in the same condition, but it sufficiently appeared that it must have been in substantially the same condition. The receiving of that beaver-board in evidence does not constitute reversible error.

[20] Error, if any, which may have occurred in permitting a witness to testify from memory to the language contained in certain advertising bulletins which were displayed in Firemen's Park was cured by the subsequent introduction in evidence of those identical advertising banners.

[21] We are satisfied the record adequately shows that the appellant owed a duty to the patrons of the shooting gallery to see that the equipment was maintained in such a reasonably safe condition as not to endanger them from flying particles of bullets, and that he was guilty of negligence in that regard which renders him liable for the injury which was sustained by the plaintiff. The findings and judgment are sufficiently supported by the evidence.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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43 Cal.App.2d Supp. 884

BALLIN v. LOS ANGELES COUNTY FAIR et al.

Civ. A. 4812.

Appellate Department, Superior Court, Los Angeles County, California.

March 24, 1941.

1. Gaming ⚷5

Under statute regulating horse racing providing that the commission deducted by any licensee from pari mutuel pools shall not exceed eight per cent. of the gross amount of money handled, and the odd cents of all redistributions to be made on all mutual contributions exceeding a sum equal to the next lowest multiple of 10, "contributions" are the bets or wagers made, and "redistributions" are the sums payable as winnings, and a wager may not be divided into fractions and the odd cents deducted for each fraction separately, but the winnings must be considered as a whole, and the odd cents deduction must be made accordingly and can be taken only once for any wager. Gen.Laws 1937, Act 3421, §§ 3, 8, 12, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Contribution" and "Redistribution".

2. Justices of the peace ⚿150(4)

Where no demurrer was interposed in justice's court on ground that complaint was uncertain with respect to amount for which suit was brought, the point could not be considered on appeal from judgment of dismissal.

3. Action ⚿8

Where plaintiff stated a cause of action to recover money to which he was legally entitled, and the construction of a statute on a matter of interest to many persons was involved, plaintiff could not be refused relief in the justice's court having jurisdiction of actions for such amounts merely because the amount was small under the rule of "de minimis non curat lex", since judgment for plaintiff would in the court's discretion carry costs, and a question of right was involved. Code Civ.Proc. § 1031.

See Words and Phrases, Permanent Edition, for all other definitions of "De Minimis Non Curat Lex".

4. Action ⚿8

The rule of "de minimis non curat lex" will be applied in a case for the recovery of a small amount of money only where an award of a nominal amount will not carry costs and no question of right is involved.

5. Parties ⚿10

Plaintiff suing in the justice's court to recover an amount of money allegedly due on a horse racing wager on ground that defendant had erroneously deducted "breakage" from winnings could not maintain the action as a representative action, and hence could not demand an accounting on behalf of other persons who made wagers and against whom defendant allegedly made the same error in figuring "breakage". Gen. Laws 1937, Act 3421, §§ 3, 8, 12, 14; Code Civ.Proc. § 382.

6. Justices of the peace ⚿58(5)

Where plaintiff's complaint sufficiently stated a cause of action within the jurisdiction of the justice's court, and allegations regarding other causes of action, of which it had no jurisdiction, were insufficient to state causes of action or even to show that by amendment they could be stated, those allegations could not defeat the court's jurisdiction over the cause which was sufficiently stated.

7. Justices of the peace ⚿90

Where allegations regarding plaintiff's claim to sue in behalf of other persons in the justice's court were insufficient for that purpose, they could be ignored as "surplusage", and the complaint could be treated as one for the enforcement of plaintiff's rights only.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

8. Justices of the peace ⚿58(5)

That plaintiff labeled his complaint as one for declaratory relief which could not be obtained in a justice's court did not oust that court of its jurisdiction over the action, where there was no prayer for such relief, and there was no allegation of facts which under statute must exist to entitle a plaintiff to sue for such relief. Code Civ.Proc. § 1060.

◆

Appeal from Justice's Court, San Jose Township, Los Angeles County; Will G. Fields, Judge.

Action by Fred A. Ballin, Jr., etc., against the Los Angeles County Fair, etc., and others to recover a sum of money. From a judgment of dismissal, plaintiff appeals.

Reversed and remanded, with directions.

Howland & Prindle, of Los Angeles, for appellant.

Allard, Whyte & Brownsberger, of Pomona, for respondents.

SHAW, Presiding Judge.

This action was commenced by plaintiff in the Municipal Court of the City of Los Angeles and upon proceedings which are not here questioned, and which we therefore assume to have been proper, was transferred to the justice's court from which this appeal is taken. The justice's court sustained a demurrer to the complaint with leave to amend and, no amendment having been made, a judgment of dismissal was entered, from which the plaintiff appeals.

This appeal requires us to construe section 14 of the act of 1933 regulating horse racing. Stats.1933, p. 2046; Deering's Gen. Laws, 1937 Ed., Act 3421. This act authorizes wagering upon horse races, provided the wagers are made within the enclosure of a licensed race track and by "the pari mutuel or mutual method of wagering" (§§ 3, 8, 14); and section 14 provides that the "commission deducted by any licensee from pari mutuel pools shall not exceed eight per cent [in addition to which 4 per cent is paid to the state for a license. § 12] of the gross amount of money handled, *and the odd cents of all redistributions to be made on all mutual contributions exceeding a sum equal to the next lowest multiple of ten*". The provision in question here is that italicized.

In his complaint plaintiff recounts the story of a visit made by him to a licensed horse racing track operated by the defendant, during which he made a wager on a certain horse under the pari-mutuel system of wagering carried on there by defendant. This proved to be a winning wager, but when the time for payment arrived plaintiff and defendant disagreed as to the amount to which plaintiff was entitled. Plaintiff wagered $2, and the winnings thereof were $0.879 for each dollar or a total of $1.758, before making any deduction for odd cents, sometimes called "breakage". Plaintiff's claim is that he was entitled to $1.70, being these total winnings less $0.058 as the odd cent (or "breakage") deduction, and to the return of his wager, making the total of $3.70, which he demanded. The defendant deducted $0.079 for odd cents (or "breakage") from the winnings of each dollar wagered by plaintiff, leaving $0.80 as the amount due plaintiff on each dollar wagered by him, and tendered him twice this amount, or $1.60, plus his original wager, making the total sum of $3.60.

[1] We conclude that plaintiff is right and defendant is wrong in construing the statute. It authorizes the deduction of the odd cents "of all redistributions to be made on all mutual contributions" only. This language uses words not commonly applied to such a subject matter; but considering it in the light of the remainder of the act and in view of what goes on under the pari-mutuel system of wagering, we can plainly see that "contributions" are the bets or wagers made and "redistributions" are the sums to be paid to the several winners as winnings. There is no warrant in these words for dividing a wager ("contribution") or winnings ("redistribution") into fractions of any size and deducting odd cents for each fraction separately. The amount to be returned on any winning wager must be considered as a whole, and the odd cents deduction must be made accordingly and can be taken only once for any such wager. Substantially the same question has arisen in Massachusetts under the law of that state authorizing pari-mutuel betting, and the Supreme Court of that state has decided it in accordance with the views above expressed. Feeney v. Eastern Racing Ass'n, 1939, 303 Mass. 602, 22 N.E.2d 259. The statute there involved is more plainly worded than ours, but the differences are not such as to impair the value of that case as authority here.

[2-4] There is an uncertainty in the complaint as to the amount for which suit is brought, for while the complaint alleges that plaintiff demanded $3.70 and defendant offered him $3.60, it does not state whether plaintiff accepted this offer. But no demurrer was interposed on this ground and the point cannot be considered now. If plaintiff accepted the offer, this might have been done under such circumstances as to constitute an accord and satisfaction, but that fact does not appear from the complaint, and if any such defense exists it must be raised by answer. Whether plaintiff sues for ten cents or for $3.70, he has stated a cause of action to recover money to which he is legally entitled, and cannot be refused relief, in the inferior court having jurisdiction of actions for such amounts, merely because the amount is small. The rule of de minimis, on which defendant relies, will be applied to such cases only where an award of a nominal amount will not carry costs and no question of right is involved. Kenyon v. Western Union Tel. Co., 1893, 100 Cal. 454, 459, 35 P. 75. Here judgment for plaintiff would, in the discretion of the trial court, carry costs. § 1031, Code of Civil Procedure. Moreover, there is here involved the construction of a statute on a matter which is doubtless of interest to many persons, and for this reason also the maxim referred to should not be applied. Feeney v. Eastern Racing Ass'n, supra, 303 Mass. 602, 22 N.E.2d 259.

[5] In addition to stating his cause of action as above set forth, plaintiff claims by his complaint to represent and sue for numerous other persons who have made wagers at defendant's track and against whom defendant has made the same error in figuring "breakage", and he demands in their behalf an accounting of all these

transactions and seeks to recover for them sums aggregating more than $200,000. We have carefully considered these allegations and find them entirely insufficient to show a case in which the law would authorize the bringing of such a representative suit by plaintiff or entitle him to an accounting. We see no good purpose to be accomplished by a discussion at length of these allegations or the law in regard to them. Plaintiff's demand for an accounting depends entirely on his right to bring a representative action. Our conclusion that he cannot maintain this as a representative action is based on the principles declared in Carey v. Brown, 1881, 58 Cal. 180, 183, 184, construing section 382 of the Code of Civil Procedure, and in cases construing like statutes of other states, among which are these: Brenner v. Title Guar. & Trust Co., 1937, 276 N.Y. 230, 11 N.E.2d 890, 114 A.L.R. 1010, 1013, 1014; Society Milion Athena v. National Bank of Greece, 1939, 281 N.Y. 282, 22 N.E.2d 374, 377; Batman v. Louisville Gas, etc., Co., 1920, 187 Ky. 659, 220 S.W. 318, 320; Lile v. Kefauver 1932, 244 Ky. 486, 51 S.W.2d 473, 475; Garfein v. Stiglitz, 1935, 260 Ky. 430, 86 S.W.2d 155; Thorn v. Geo. A. Hormel & Co., 1940, 206 Minn. 589, 289 N.W. 516, 518.

[6, 7] We have, then, a cause of action sufficiently stated which is within the jurisdiction of the justice's court. The allegations regarding other causes of action, of which it has no jurisdiction, are insufficient to state such causes of action or even to show that by amendment they could be stated. They cannot, therefore, defeat the court's jurisdiction over the cause which is sufficiently stated. Merrill v. Hare, 1934, 139 Cal.App. 462, 34 P.2d 194; Cook v. Winklepleck, 1936, 16 Cal.App.2d Supp. 759, 764, 767, 59 P.2d 463; 21 C.J.S., Courts, § 117, 179. The allegations regarding plaintiff's claim to sue in behalf of others being insufficient for that purpose, they also may be ignored as surplusage and the complaint may be treated as one for the enforcement of plaintiff's rights only. Carey v. Brown, supra, 58 Cal. 180, 182; see also California Trust Co. v. Cohn, 1932, 214 Cal. 619, 628, 7 P.2d 297.

[8] In addition to making his claim for an accounting, the plaintiff also labeled his complaint as one for declaratory relief. Such relief could not be obtained in a justice's court. Section 1060, Code of Civil Procedure. There is, however, no prayer for such relief, and we find no allegation of the facts which, by the terms of section 1060, Code of Civil Procedure, must exist to entitle a plaintiff to sue therefor. This mere label does not oust the justice's court of its jurisdiction over the action. Cook v. Winklepleck, supra, 16 Cal.App.2d Supp. 759, 764, 59 P.2d 463; Standard Brands v. Bryce, 1934, 1 Cal.2d 718, 721, 37 P.2d 446.

The judgment is reversed and the cause is remanded to the justice's court with directions to overrule the demurrer and permit the defendant to answer, appellant to recover his costs of appeal.

We concur: BISHOP, J., FOX, J.

44 Cal.App.2d 107

HEASTON & GLIMPSE, Limited, v. WEST AMERICAN OIL CO.

Civ. 2636.

District Court of Appeal. Fourth District, California.

April 8, 1941.

1. Trusts 🔑101

Where corporate defendant's predecessor in interest assigned to plaintiff for an indebtedness a royalty interest of 3 per cent. of the gross total of oil and gas produced from a particular well, the assignment constituted defendant a "trustee" of the funds derived from the sale of oil and gas, and plaintiff was entitled to rely on the belief that defendant as its trustee was faithfully performing its services under the assignment until the contrary appeared.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

2. Limitation of actions 🔑102(5), 103(4)

Where corporate defendant's predecessor in interest assigned to plaintiff for an indebtedness a royalty interest of 3 per cent. of the gross total of oil and gas produced from a particular well, the assignment and acceptance thereof constituted an express "trust", and the statute of limitations did not begin to run until plaintiff had knowledge of the repudiation of its terms and a violation thereof by defendant as its trustee. Civ.Code, § 1725.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

3. Mines and minerals 🔑79(7)

Where corporate defendant's predecessor in interest assigned to plaintiff for an indebtedness a royalty interest of 3 per cent. of the gross total of oil and gas produced from a particular well, evidence, including showing that assignment was recorded and that defendant and its predecessor had the same president, active manager, and virtually the same stockholders, justified the trial court in drawing the inference that defendant was not alone obligated to perform under the assignment but that defendant took the oil and gas lease with notice of the assignment and could not equitably refuse its performance.

4. Pleading 🔑243

In action for accounting under assignment executed by defendant's predecessor in interest which had had the same name and corporate structure as defendant, the trial court did not err in permitting plaintiff to file an amended complaint alleging the proper date of incorporation of defendant and alleging that defendant was a transferee with notice, where cause of action was not changed in any respect, and no showing was made that any damage resulted from the court's ruling.

5. Pleading 🔑236(1)

The right to amend a pleading rests in the sound discretion of the trial judge, and each particular case must be decided on its own particular facts.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action for an accounting by Heaston & Glimpse, Limited, against the West American Oil Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hanna & Morton, of Los Angeles, for appellant.

Cameron & Perkins, of Long Beach, for respondent.

CONWAY, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff in an equitable action for an accounting. In the year 1929, the West American Oil Company, a corporation, the predecessor in interest of the present West American Oil Company, a corporation, defendant herein, and having the same president and controlled by practically the same officers and stockholders, was engaged in drilling an oil well in Huntington Beach, California. Plaintiff corporation owned and operated a machine shop and was engaged in selling bits and doing machine shop work for oil well drilling operations. The former West American Oil Company was short of the necessary funds to secure bits and pay for services in connection with machine shop work in its proposed drilling operations and the officers of these two corporations talked over a deal which was satisfactory to both and which finally culminated in a written contract between the parties which was evidenced by the acceptance of an offer contained in a letter written to the plaintiff by the former West

American Oil Company. The letter confirmed the oral agreement to assign three per cent of the gross production of the well until such time as the debt was paid in full, at which time the percentage assigned would revert to the assignor.

In conformity with the promise contained in the letter to assign a three per cent interest in the production of the well, the former West American Oil Company, on December 30, 1929, executed and delivered to plaintiff an instrument entitled "Assignment of Oil and Gas Royalty", which assignment was recorded in the office of the county recorder of Orange county December 6, 1930. The assignment set over to respondent a royalty interest of three per cent of the "gross total of oil and gas", and further provided that the assignor might pay the posted market price for oil and gas produced in lieu of delivery in kind. This assignment was acknowledged by H. S. Kohlbush, president, and H. R. Gimbal, secretary of West American Oil Company. It will be noted that it carries a royalty interest of three per cent of the gross total of oil and gas produced from the well, and contains nothing to indicate the right of the oil company to deduct operating expenses. Plaintiff admittedly furnished bits and performed machine shop services and rendered its bill in the sum of $4,713.98. This assignment was pledged by the assignee to various creditors and the well became a producer. The West American Oil Company paid the plaintiff and its assignees various sums which totaled $3,819.65, leaving a balance due under the contract of $894.33. All of these payments were made from the three per cent production of oil only and also after certain operating expenses were deducted, and no payments were ever made for the gas produced.

The evidence shows that in the month of January, 1938, plaintiff discovered for the first time that these royalty payments did not include any percentage of the gas produced from the well, and were based upon a deduction for operating expenses. Plaintiff immediately demanded an accounting, claiming a right to the payment of three per cent of the gas produced free and clear of any operating expenses. The accounting was refused and this action was seasonably commenced. The present defendant, West American Oil Company, was incorporated July 7, 1933, and when incorporated it was named the Equitable Oil Company. On or about February 19, 1934, its name was again changed from the Equitable Oil Company to the West American Oil Company. The former West American Oil Company changed its name to W. A. Oil Company and was dissolved on or about March 22, 1937. The former West American Oil Company transferred the lease upon the property to the Equitable Oil Company, and it in turn transferred the same to the present West American Oil Company, which held and owned said lease and operated the well. The court held that the present West American Oil Company became such owner and assignee of said lease with full knowledge and notice of the existence of plaintiff's royalty interest and agreement. These various changes in corporate names apparently were made for "tax purposes".

The amount of the claim is not in controversy and it is not denied that all payments made under the royalty assignment were based upon production of oil only. It is also admitted that if plaintiff had received its three per cent interest, without operating deductions, of both the oil and gas produced, the debt agreed upon would have been liquidated more than four years prior to the time of the filing of the original complaint. The trial court rendered judgment in favor of the plaintiff in the sum of $894.33 with interest and the defendant has appealed from the judgment.

Appellant and respondent agree that the contractual relationship the parties bore to each other was that of principal and agent. By the terms of the agreement, which the court held to be unmodified, the appellant who was the agent of the respondent was obligated, as a trustee, to pay three per cent of the monthly gross proceeds of the well on both oil and gas until respondent's claim had been paid in full. Appellant contends that the assignment amounted, under the doctrine of potential possession, to a present sale to respondent of a three per cent of the oil and gas produced from the well and accordingly, since admittedly three per cent of the oil and gas would have liquidated the entire bill more than four years prior to the filing of the complaint, the cause of action was therefore barred by a limitation of time. He cites the case of Western Oil & Refining Co. v. Venago Oil Corporation, 218 Cal. 733, 739, 24 P.2d 971, 973, 88 A.L.R. 1271, where the court says:

"The operating lessee who has acquired the right by contract to enter upon land

and prospect for oil and gas has potential possession of all oil and gas which may be produced during the continuance of the lease, and this is so notwithstanding the oil lease may provide for forfeiture in the event the lessee shall fail to drill a well within a designated time, or fail to discover oil. Leases of farm lands commonly provide for forfeiture for nonpayment of rent or other breaches of the lease, yet such provisions have never been thought to render the doctrine of potential possession inapplicable to crops grown while the lease is in full force and effect, and has not been forfeited or terminated. It follows that when, as in the instant case, the operating lessee has assigned percentages of the oil, gas, and other substances to be produced, saved, and sold under his lease, he cannot defeat the assignment by voluntary transfer to another of his right of entry to prospect for and recover oil. Title to an undivided interest in the oil produced will vest in the holders of percentage interests in like manner as if the oil had been produced by the original lessee."

[1, 2] Appellant contends, on the other hand, that if the doctrine of potential possession is inapplicable then section 1725 of our Civil Code would apply and the royalty assignment should be construed as an agreement to sell when the oil and gas came into existence and consequently he contends respondent's right to receive money, not in kind, in either contingency, is barred. In this respect he cites the ordinary case of an installment contract. But in none of those cases does it appear that the obligor acted as a trustee for the party to whom payments were due. In the present case we are satisfied that the agreement constitutes the West American Oil Company a trustee of the funds derived from the sale of the oil and gas and respondent was entitled to rely upon the belief that its trustee was faithfully performing its services under the contract until the contrary appeared. We believe that the assignment and the acceptance of it constituted an express trust and that the statute of limitations did not commence to run until respondent had knowledge of the repudiation of its terms and a violation thereof by the trustee. This doctrine is set forth in the case of Allsopp v. Joshua Hendy Machine Works, 5 Cal.App. 228, page 234, 90 P. 39, page 42, where the court said: "But, again, there was an express trust created by the transaction between the parties, and the statute of limitations would not begin to run until there was brought home to plaintiff knowledge of the repudiation of the trust or the violation of its terms on the part of defendant. * * * The position of the agent is that of a trustee, and claims against him are governed by a rule similar to that controlling trustees."

In the case of San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, at page 91, 53 P. 410, page 416, the court said: "The statute of limitations cannot be successfully invoked. Reynolds was acting in a fiduciary capacity. Such of his acts as resulted in loss to the corporation were concealed breaches of his trust. The statute of limitations would not begin to run in his favor, so as to enable him to escape the results of an accounting, until after knowledge by his principal of his derelictions. In this case the accounting was promptly demanded after discovery."

The evidence shows that in March of 1938, Mr. Heaston, president of respondent corporation, visited the well and discovered that it was producing a large amount of gas, and was informed by a man who was reading the gas meter installed in the well that three per cent of the gas was more than enough to have paid the entire claim. Thereupon Mr. Heaston contacted Mr. Kohlbush, who was the president of the former and the present West American Oil Company, and complained about the mistake and also complained about the deduction for operating costs, and demanded an accounting in full. Mr. Heaston testified that he said to Mr. Kohlbush: "If there is a mistake there now, where you have not been paying me for the gas, and have been charging for operating costs, you undoubtedly got enough money accumulated to pay me off in full", and that Mr. Kohlbush answered: "Yes, if you get away with it." That was the end of the conversation.

The findings of the trial court relative to the date of the discovery by respondent of the nonperformance of the terms of the assignment are amply supported by the evidence.

[3] Appellant claims that it was a transferee of the lease and assumed the liability to pay respondent only from the oil produced, and challenges the ninth finding of the trial court which is as follows: "That the said Equitable Oil Company, and the present West American Oil Company each in turn were assignee and transferee of said lease, and had transferred to them in turn all assets of the former West

American Oil Company, all done with knowledge of plaintiff's said royalty agreement."

The court found that there was no change in the terms of the contractual relationship of the parties and respondent takes the position that appellant both by implication and as a matter of equity expressly assumed the obligations of the former West American Oil Company. As we have heretofore pointed out, the royalty assignment was recorded and both West American Oil Company corporations had the same president, active manager and practically the same stockholders, and at the time of trial the carbon copy of the assignment was produced by the present appellant. There is sufficient substantial evidence in the record from which the trial court was justified in drawing the inference that the present West American Oil Company was not alone obligated to perform under the assignment which had been made by the former West American Oil Company, but that appellant took the lease with notice of this assignment and cannot equitably refuse its performance. Richardson v. Callahan, 213 Cal. 683, 3 P.2d 927. Mr. Kohlbush, who was president of both of the West American Oil Companies, testified that when the oil well was finally sold to the Kiesau Petroleum Company the sale was made subject to the contingent agreement with Heaston & Glimpse "which we agreed to take care of the same as if we had not sold the well".

Also, Mr. Kohlbush, who originally negotiated the agreement, testified that after the agreement was made there was no change made in it. In addition to the statement by President Kohlbush that no change had ever been made in the written agreement between the parties, Mr. Heaston, president of the respondent corporation, testified that the agreement was never modified in any respect and that no conversation in reference to any modification had ever occurred.

[4] Lastly, appellant contends that the trial court erred in granting leave to respondent to file the amended complaint upon which this action was tried. The transcript shows that at the time this action came on for trial on the original complaint, respondent moved the court for an order permitting it to file an amended complaint alleging the proper date of incorporation of the present West American Oil Company, and also alleging that the present appellant was a transferee with notice. The motion was granted and the matter was continued. No showing has been made that any damage has resulted from the court's ruling. We feel that under the circumstances shown in the record of this case that the trial court might reasonably have concluded that the change of corporate names, without in any manner affecting the corporate structure, might have confused counsel for respondent, and we feel that the interest of justice was served by permitting the amendment.

[5] Appellant cites numerous cases where amendments were refused and on appeal it was held that no reversible error was committed. It is, of course, elementary that the right to amend a pleading rests in the sound discretion of the trial judge and each particular case must be decided upon its own particular facts. Here the cause of action was not changed in any respect and we are unable to determine in what respect appellant suffered any damage by reason of the amendment.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

44 Cal.App.2d 84

PEOPLE v. LEE.

Cr. 3440.

District Court of Appeal, Second District, Division 1, California.

April 7, 1941.

Homicide 🔑244(1)

Evidence sustained conviction of manslaughter as against claim of self-defense, in absence of evidence that deceased struck any blows in course of altercation or that he committed any acts of aggression aside from statements made and the shaking of his finger at defendant.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Oren Elmer Lee was convicted of manslaughter, and he appeals from the judgment of conviction and the order denying his motion for new trial.

Judgment and order affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was found guilty by the jury of the crime of manslaughter and appeals from the judgment of conviction which was thereafter entered, and also from the order denying his motion for a new trial.

The charge upon which appellant was convicted grew out of a beating administered to John William Kinnemann by appellant under the following circumstances: On July 20, 1940, Mrs. Emily W. Dybens was visiting with Mr. and Mrs. Donaldson at their home in Lynwood; appellant, a miner by occupation, arriving there around 5 o'clock in the afternoon accompanied by Mrs. Dybens' son. Shortly thereafter, appellant procured a bottle of whiskey from his car and he and Mrs. Dybens prepared some drinks in the Donaldson's kitchen which they were about to serve when Mr. Kinnemann (deceased) arrived with some eggs for the Donaldsons, whereupon it was suggested by appellant that Mr. Kinnemann serve the drinks in view of the fact that he was an ex-bartender. Mr. Donaldson, appellant, Mrs. Dybens and deceased each had two drinks when a neighbor, Mr. Gilliam, came in with some groceries for Mrs. Donaldson, whereupon Mr. Gilliam and his wife each had a drink. In the meantime, Mr. Donaldson was eating his dinner and soon after left for the Vultee Aircraft plant where he was employed; the Gilliams returned to their home, thus leaving appellant, Mrs. Donaldson, Mrs. Dybens and Mr. Kinnemann together in the kitchen of the Donaldson home. Mr. Kinnemann then said they would all have another drink and he would have to go; whereupon he served another round of drinks. At this time, appellant spoke to Mr. Kinnemann, saying, "This is my fiancee", referring to Mrs. Dybens. Mr. Kinnemann turned to the latter and said, "Is that so, Emily?" She replied that it was and something was then said about her and appellant going to Reno or Las Vegas that night to be married. Mr. Kinnemann said nothing more but turned around and walked out of the house.

Appellant and Mrs. Dybens then left the Donaldson home and visited neighbors of Mrs. Dybens in Lynwood, where they had several more drinks and talked about their engagement. Later, Mrs. Dybens discovered she had misplaced her purse and, with appellant driving, they returned to the Donaldson residence, but the house being in darkness they sat in the car debating whether or not they would go to the door, when they saw Mr. Kinnemann step off the curb across the street, and as he walked toward the car he said, "What are you two doing back here?" Mrs. Dybens then asked him where Mrs. Donaldson was, and he said she had gone to a show. Mr. Kinnemann then asked where they had been and Mrs. Dybens told him and also volunteered the information that they had had some drinks, whereupon Kinnemann said, "You are drunk." Appellant spoke up and said, "You cannot talk to my fiancee that way"; to which Kinnemann replied, "Your fiancee, hell; I have known her for six years and she hasn't—didn't tell me anything about it." Appellant said, "She didn't have to tell you nor anyone else", and deceased replied, "Well, you cannot marry her." During this conversation the deceased was shaking his finger at appellant, and Mrs. Dybens turned to him and told him to keep still, whereupon he (deceased) said, "Well, Emily, all I can say is that you are a damn fool." At this point, appellant, who was sitting in his car back of the steering wheel, reached out and struck Kinnemann, who was standing along the running board on the driver's side of the car. Mr. Kinnemann backed up, took out his handkerchief and wiped blood from his upper lip, and Mrs. Dybens turned to appellant and said, "Look what you have done." Mr. Kinnemann then said, "Yes * * * I am going to call the cops"; and appellant said, "Why, you", opened the door of his car and chased Mr. Kinnemann across the street, Mrs. Dybens following. While on the parkway in front of Mr. Gilliam's residence, appellant struck deceased several times, the latter falling to the ground. Mrs. Dybens took appellant's arm and asked him not to hit deceased again, but he shoved her aside and said, "Leave me alone." All of this affray took place in front of and in the driveway of the house occupied by Mr. Gilliam, who hearing the deceased call for help went to his aid. Appellant had hold of deceased, who was slumped to the ground, and Mrs. Dybens was holding appellant by the arm and was pleading with him not to hit deceased any more, but he told her to let him go or he would give her the same thing he had given to Mr. Kinnemann. Appellant also turned to Mr. Gilliam and told him to "get the hell back into the house and stay there", and as Mr. Gilliam went into the living room of his home he saw the three, appellant, deceased and Mrs. Dybens going back across the street to appellant's car. However, as Mr. Gilliam resumed his seat and picked up a magazine he had been reading, he saw two heads go by the kitchen door and getting up and going to the door, he saw appellant fall on top of deceased, whereupon he called out, "Boys, stop your fighting; cut out your noise." Appellant replied, "Don't you call no cops; so stay inside or I will take a pop at you." While deceased was on the ground and appellant was standing over him, appellant hit deceased first right and then left and appeared to be beating him in the face or head, and also kicked him.

Appellant then left the scene. Mr. Gilliam rushed out of his house and, finding Mr. Kinnemann unconscious and his pulse quite weak, he bathed his face with a wet towel and called police. By the time the officers arrived, a doctor, who had also been summoned, pronounced Mr. Kinnemann dead.

After leaving the scene, appellant and Mrs. Dybens proceeded to a cocktail lounge where they had more drinks, and when they were leaving that place around 10:30 o'clock that evening, appellant was arrested and charged with the homicide.

The county autopsy surgeon testified that the prime cause of death was concussion of the brain and subdural hemorrhage.

Appellant here urges that the verdict of guilty is contrary to the law and the evidence, contending that deceased was the aggressor in the fatal affray and that appellant was acting in his own defense.

This contention is not borne out by the record herein which discloses that deceased was a man 61 years of age, 5 feet 5 inches in height, weighing 118 pounds; that he shook his finger at appellant and told him he could not marry Mrs. Dybens, calling the latter a damn fool. Moreover, deceased backed away from the automobile after appellant struck him the first time, and so far as the record shows no blow was ever struck by deceased during the course of the altercation.

Appellant, on the other hand, was a miner employed at the Monte Cristo Mine at Palmdale, and when deceased threatened to call the police after he was hit the first time, appellant jumped out of his car and took after deceased, and thereupon administered the beating resulting in the latter's death.

The evidence adduced at the trial herein is not only amply sufficient, but conclusively points to the guilt of appellant.

There was no error in the admission or the rejection of evidence and the jury was properly instructed by the jury. The appeal is destitute of merit.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

We concur: DORAN, J.; WHITE, J.

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44 Cal.App.2d 75

SPENCER et al. v. CITY OF ALHAMBRA et al.

Civ. 12353.

District Court of Appeal, Second District, Division 1, California.

April 7, 1941.

1. **Municipal corporations** 🔑108

The legislative power of a municipality resides in the people thereof, and by providing in charter for initiative and referendum laws, the people have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent political power. Const. art. 1, § 2.

2. **Constitutional law** 🔑50

Acts which constitute a declaration of public purpose and ways and means for the accomplishment thereof are generally classified as calling for exercise of legislative power.

3. **Municipal corporations** 🔑108

Where city charter reserved in electors the power through the initiative or otherwise to enact appropriate legislation to carry out and enforce any of the general powers of the city or any of the specified powers of the commission, and the provisions pertaining to such powers were phrased in broad, general and unambiguous language, conclusion was warranted that it was intended that legislation on every municipal subject should, unless expressly or by clear and necessary implication excluded by other sections, be subject to initiative action through adoption of ordinances by the people. St.1915, pp. 1756, 1772, §§ 60, 78; Const. art. 1, § 2; art. 11, § 8.

4. Municipal corporations ⚷108

The people through their charter had a right to vest in voters of city the right and power to deal through initiative action with any matter within realm of local affairs or municipal business, whether or not strictly legislative as that term is generally used. Const. art. 1, § 2; art. 11, § 8.

5. Constitutional law ⚷50

Generally speaking, the fixing of salaries of public officers and employees is a legislative function.

6. Municipal corporations ⚷108

The charter of the city of Alhambra reserves to the electors the broadest possible powers in the matter of initiative legislation including power to adopt any ordinance which the commission might enact, as well as to carry out and enforce any of the general powers of the city or any of the specified powers of the commission. St.1915, pp. 1756, 1770, 1771, 1772, 1792, §§ 60, 73, 76, 78, 176; St.1927, p. 2055, § 75; Const. art. 1, § 2; art. 11, § 8.

7. Municipal corporations ⚷108

The charter of the city of Alhambra permits adoption, by the electors, of an initiative ordinance establishing a scale of minimum salaries for members of the city's police department. St.1915, pp. 1756, 1770, 1771, 1772, 1792, §§ 60, 73, 76, 78, 176; St. 1927, p. 2055, § 75; Const. art. 1, § 2; art. 11, § 8.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus by M. R. Spencer and others against the City of Alhambra and others, to compel defendant to carry into effect the provisions of an initiative ordinance. Judgment for petitioners and the city and others appeal.

Affirmed.

James B. Ogg, City Atty., of Alhambra, for appellants.

Marcus, Rabwin & Nash, Eugene H. Marcus, Harold W. Nash, and Emmett A. Tompkins, all of Los Angeles, for respondents.

WHITE, Justice.

On the 8th day of November, 1938, by a majority vote, the electors of the City of Alhambra adopted an initiative ordinance establishing a scale of minimum salaries for members of the city's police department. The legislative body, known as the commission, of said city, refused to give effect to the provisions of the ordinance, contending that the fixing of minimum salaries for police officers was not subject to vote by the people and was beyond and in excess of the initiative powers of the electors under the terms of the city charter.

Certain members of the police department joined in a petition to the superior court praying for a writ of mandate directing the city commission to put into effect the provisions of the initiative ordinance and to pay them the salaries therein provided for. The City of Alhambra and its officers, respondents in the superior court, interposed a demurrer and a motion to strike, the first of which was overruled and the second denied by the court, with leave granted the city to file its answer. The city declining to file an answer, default was entered against it, following which judgment was rendered directing the issuance of a peremptory writ of mandate as prayed for by petitioners. From that judgment the city prosecutes this appeal.

The charter of the City of Alhambra was framed in accordance with the provisions of section 8 of article XI of the state Constitution, and was approved by the legislature on January 26, 1915. Stats.1915, p. 1740; Stats.1927, p. 2053.

The main contention of appellants is that the city charter provides that the compensation of all members of the police department, save and except the chief of police, shall be fixed by the city manager, who is the chief administrative officer of the municipality, subject to the approval of the city commission. Further, that because there is no requirement that such salaries be fixed by ordinance, the act of the city manager in fixing them is purely administrative and not legislative; and that only ordinances of a municipality which involve an exercise of the legislative prerogative are subject to the initiative or referendum.

[1] There is very creditable authority for the statement that generally speaking the fixing of salaries of public officers and employees is a legislative act. State ex rel. Pike v. City of Bellingham, 183 Wash. 439, 48 P.2d 602; Leo v. Tacoma, 184 Wash. 160, 49 P.2d 1113; Taxpayers' Ass'n v. City of Houston, 129 Tex. 627, 105 S.W.2d 655; and cases therein cited; Eddy v. Ashley Borough, 281 Pa. 4, 125 A. 308; State ex rel. Elliott v. Kelly, 154 Wis. 482, 143 N. W. 153; 46 Cor.Jur. 1018, 1019; McQuillan on Municipal Corporations, 2d Ed., vol. XI, p. 225; 21 Cal.Jur. 952, 953. It is a basic principle inherent in the American system of representative government, as declared in article I, section 2, of our state Constitution, that "all political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it." From the foregoing, it follows that the legislative power of the municipality resides in the people thereof. By writing into the charter initiative and referendum laws, the people of the city have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent political power. We must therefore look to the provisions of the city charter to ascertain whether therein the people have excluded from the operation of the initiative the determination and fixing of salaries for members of the city police department.

[2] The initiative ordinance here in question does more than fix salaries of members of the police department. It establishes a scale of minimum salaries. Manifestly the ordinance sought to declare a public policy or purpose, to the effect that in the police department, concededly a vital arm of the public service, and the medium through which personal and property rights are protected, the salaries paid the members of such department must not be fixed below a certain minimum, lest thereby the public interest and welfare might be adversely affected. That acts which constitute a declaration of public purpose and ways and means for the accomplishment thereof, are generally classified as calling for the exercise of legislative powers, was the holding in McKevitt v. City of Sacramento, 55 Cal.App. 117, 203 P. 132.

[3-5] Article XIII, section 78, of the Alhambra city charter reads: "The commission, subject to the provisions of this charter, shall have power to organize the police division and change the same and make all necessary rules and regulations for its efficient administration, ordain penalties for violation thereof, establish the number of its members and the amount of their salaries, including that of the chief of police, and do all other acts necessary to the efficient equipment and operation of the police division of the city."

Article VII, section 60, of the same charter contains the following language: "The qualified electors of the city shall have power through the initiative or otherwise, as provided by this charter and the general laws of the state, to enact appropriate legislation to carry out and enforce any of the general powers of the city or any of the specified powers of the commission."

When, therefore, the people phrased the foregoing sections pertaining to these powers in such broad, general and unambiguous language, the conclusion seems inevitable that thereby it was intended that legislation on every municipal subject should, unless expressly or by clear and necessary implication excluded by other sections, be subject to initiative action through the adoption of ordinances by the people. After all, the people through their charter have a right to vest in the voters of the city the right and power to deal through initiative action with any matter within the realm of local affairs or municipal business, whether strictly legislative or not, as that term is generally used (Hopping v. City of Richmond, 170 Cal. 605, 150 P. 977); and as heretofore noted, the consensus of authority is to the effect that the fixing of salaries of public officers is a legislative function. Certainly no other incident of municipal government engages more legislative attention.

[6, 7] Appellants earnestly contend that the charter of the City of Alhambra provides that the city manager shall be the administrative head of the city government and that he shall appoint the chief of police and all members of the police department and fix the compensation of the members of such department, with the exception of the chief thereof. In support of these claims we are referred to certain provisions contained in the city charter, the first of which is section 73, article XII, which reads: "The office of city manager

of the city of Alhambra is hereby created, and he shall be the administrative head of the city government and shall have supervision and control of and be head of all of the departments of the city and be responsible for their efficient administration, except as by this charter or otherwise provided." Also section 75 of the same article (as amended, Stats.1927, p. 2055), which reads as follows:

"Except as otherwise provided by this Charter, the powers and duties of the city manager shall be:

"* * *

"2. To appoint all chief appointive officials, subject to the approval of such appointments by the Commission.

"3. To appoint all subordinates and employees in all departments, not otherwise provided for in this Charter, and to determine their duties and fix their compensation. All such appointments and the fixing of compensation shall be subject to the approval of the Commission and shall not be effective without such approval. To remove any appointee and no removal shall be made without his consent.

"4. To have supervision and control of all departments, boards and divisions created herein or that may be hereafter created by the Commission, except as otherwise provided by this Charter. * * *"

It should be noted, however, that in adopting the foregoing sections of the charter creating the office of city manager and defining the scope of the powers and duties of that office, the people used the explicit and significant language in the first-quoted section, "Except as by this charter or otherwise provided"; while in the last-quoted section appears the following: "Except as otherwise provided by this Charter." In subdivision 4 of section 75 the city manager is vested with control of all boards, departments and divisions "except as otherwise provided by this Charter". In addition to the sections previously cited herein, we find positive and unequivocal language which impels the conclusion that in adopting their charter the citizens of Alhambra clearly intended to vest exclusively in the city commission power to organize the police department, determine its personnel and fix the salaries of the members thereof. We refer to sections 76 and 78 of article XIII, the first of which provides as follows:

"Sec. 76. The police division of the city of Alhambra shall consist of a chief of police and such officers and policemen as the commission shall, from time to time, fix and determine"; and the latter of which is hereinbefore set forth.

From the foregoing it is at once apparent that the charter of the City of Alhambra has reserved to the electors the broadest possible powers in the matter of initiative legislation; powers so extensive as to permit adoption by the voters of any ordinance which the commission might enact (§ 176, art. XXIII), as well as to carry out and enforce any of the general powers of the city or any of the specified powers of the commission. The power to fix salaries of its policemen is included both in the general powers of the city and is reserved among the specified powers of the commission. Also, the ordinance here under consideration qualifies as an act declaratory of a public purpose and the ways and means of its accomplishment, thereby bringing it within the purview of the legislative prerogative. The initiative ordinance in question is therefore a valid exercise of the initiative powers vested in the electorate of the city.

The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

44 Cal.App.2d 14

PENLAND v. GOODMAN et al.

Civ. 2635.

District Court of Appeal, Fourth District, California.

April 3, 1941.

Hearing Denied May 29, 1941.

1. Appeal and error ⟹1024(4)

Where the affidavits and evidence presented upon hearing of motion to vacate default judgment were sharply conflicting upon question of whether movant had been personally served with summons as required by law, appellate court could not disturb the finding of trial court whatever might be appellate court's feeling with respect to the weight of the evidence. Code Civ.Proc. §§ 473, 473a.

2. Appeal and error ⚷1024(4)

The minute order of trial court granting motion to vacate default judgment on ground that movant had not been personally served with summons as required by law is conclusive upon appellate court. Code Civ. Proc. §§ 473, 473a.

3. Judgment ⚷137

Where defendant was not personally served with summons, court had power under statute to vacate default judgment at any time within one year after rendition thereof. Code Civ.Proc. §§ 473, 473a.

4. Judgment ⚷137

The court has power to vacate a judgment not void on the face of the judgment roll, but void in fact for want of jurisdiction of the person of the defendant by reason of nonservice of process upon such defendant, independently of statute, provided motion is made within a reasonable time. Code Civ.Proc. §§ 473, 473a.

5. Judgment ⚷138(3)

Where defendant was not personally served with process, default judgment was properly set aside by court where within one year thereafter, and as soon as defendant learned of the judgment, defendant applied under statute to have judgment set aside, although judgment was not void on its face and no question of fraud was raised. Code Civ.Proc. §§ 473, 473a.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Elledge R. Penland against Stella Goodman and others. From an order granting the named defendant's motion to vacate a default judgment and all subsequent proceedings against her, the plaintiff appeals.

Order affirmed.

Elledge R. Penland, in pro. per.

Clarence A. Jones, of Los Angeles (Willis O. Tyler, of Los Angeles, of counsel), for respondent.

CONWAY, Justice pro tem.

This is an appeal from an order granting respondent's motion to vacate and set aside a default judgment and all subsequent proceedings against her upon the ground that she had never been served with process and was not in any manner before the court. The plaintiff, who appears in propria persona, filed a complaint in the superior court seeking specific performance of an alleged contract for the sale of real estate. His second amended complaint, upon which the default was entered, was filed April 22, 1937, and summons was issued thereon April 2, 1938. Thereafter, on April 27, 1938, an affidavit of a process server was filed to the effect that he had served Stella Goodman, the respondent, on April 23, 1938, by leaving with her a copy of said summons, to which was attached a copy of the amended complaint referred to therein. Upon the request of the plaintiff the default of Stella Goodman was entered May 4, 1938, and judgment was thereafter entered against her November 25, 1938, six months and sixteen days after entry of the default by the clerk. Notice of entry of judgment was served upon respondent November 29, 1938. On December 9, 1938, the respondent filed and served upon plaintiff a notice of intention to move to set aside the judgment and all subsequent proceedings. The motion was supported by an affidavit of the respondent which averred that no summons or complaint was ever served upon her and that she had not been informed that an action was instituted against her until she received, through the mail, an alleged copy of the judgment. Her affidavit in support of the motion to set aside the default contained the necessary averments that she had a meritorious defense to the action, and prayed that the default and judgment entered thereon be vacated and that she be allowed to answer. The motion to vacate was heard upon sharply conflicting affidavits and oral testimony and the court, on December 15, 1938, directed the entry of a minute order to the effect that the motion was granted. The plaintiff prosecutes this appeal from said order.

The appellant contends that the court had no "power" to grant the motion for the reason that the entry of respondent's default by the clerk of the court more than six months prior to the granting of the order vacating the judgment constituted a final judgment within the meaning of section 473 of the Code of Civil Procedure and that the trial judge had no "power", in the absence of a showing of fraud, to set aside the default and judgment entered thereon within the year provided in sections 473 and 473a of the Code of Civil Procedure.

[1, 2] Since the affidavits and evidence presented upon the hearing of the motion

to vacate the default judgment were sharply conflicting upon the question of whether or not respondent was personally served with summons as required by law, we cannot disturb the finding of the trial court in this respect whatever might be our feeling with respect to the weight of the evidence. Hammond Lumber Co. v. Gilkey, 120 Cal.App. 252, 259, 7 P.2d 724; Ingrim v. Epperson, 137 Cal. 370, 372, 70 P. 165. Therefore, the sole matter presented at the hearing of the motion to vacate the judgment was the question of actual personal service of the summons and complaint, and the minute order of the court granting respondent's motion is conclusive upon this court. We shall therefore discuss the issues presented upon the assumption that the respondent was an entire stranger to all of the proceedings and was never, in fact, served with process.

[3] It is conceded that the judgment in question was not void on its face and no question of fraud was raised by respondent before the superior court. Consequently those matters are not involved on this appeal. The sole legal question involved, therefore, is whether a party against whom a default judgment was entered and who was not served with summons and complaint may, within a year after the entry of a judgment based upon an alleged service, have the same set aside on motion under the provisions of section 473 and 473a of our Code of Civil Procedure. There are many California cases directly in point on this matter and we have not found any conflict in the decisions with respect to the right of a person to set aside such a judgment within a year after its entry. Section 473a of our Code of Civil Procedure (enacted in 1933), reads as follows:

"When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

In the case of Waller v. Weston, 125 Cal. 201, 57 P. 892, the court had under consideration a case where a party appealed from a default judgment entered against him and in which he was not personally served with summons. The judge of the superior court refused to vacate the judgment and in reversing this order the court, at page 203, of 125 Cal., at page 893 of 57 P. said:

"Appellant's motion was made, not upon the ground that the judgment had been taken against him through mistake, surprise, or his excusable neglect, but solely upon the ground that he had not been served with process at all. In making its conditional order quashing service of summons, the court must have determined the fact to be in accordance with appellant's contention. Such being the case, appellant was not a suitor before the court, under section 473 of the Code of Civil Procedure, seeking relief from his own error or mischance, and becoming entitled to such relief only by compliance with such proper terms as the court might exact. He was not seeking to be permitted upon terms to come in and answer. He was before the court, insisting that it had never obtained jurisdiction over him, and that a judgment against him, void for want of jurisdiction, should be set aside. His case is like those considered in Norton v. [Atchison, etc.] R. R. Co., 97 Cal. 388, 30 P. 585, and 32 P. 452 [33 Am.St.Rep. 198], and Mott Iron Works v. West Coast Plumbing Co., 113 Cal. 341, 45 P. 683. Knowledge—even actual knowledge of the suit against him—was not the equivalent of legal notice and process, and did not make it compulsory upon him to appear in the action, or warrant the court in entering judgment against him for his failure so to do. In re Central Irr. Dist., 117 Cal. 382, 49 P. 354."

[4] However, the power and authority of a court to vacate a judgment not void on the face of the judgment roll but void in fact for want of jurisdiction of the person of the defendant by reason of nonservice of process upon such defendant, exists independently of the provisions of section 473 of the Code of Civil Procedure or of any other statutory provisions, if the motion is made within a reasonable time. Norton v. Atchison, etc., R. R. Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am.St.Rep. 198; Mott Iron Works v. West Coast Plumbing Supply Co., 113 Cal. 341, 45 P. 683; Waller v. Weston, supra; Smith v. Jones, 174 Cal. 513, 163 P. 890; George Frank Co. v. Leopold & Ferron Co., 13 Cal. App. 59, 65, 108 P. 878. Respondent's motion was made pursuant to the provisions of section 473a of the Code of Civil Procedure, which was enacted in 1933, and this particular section was construed in the case of Doxey v. Doble, 12 Cal.App.2d 62, 54 P.2d 1143, 1145, where the court had under consideration the identical question

presented upon this appeal and, in construing section 473a, said:

"But, as will be seen, the provisions of section 473a cover an entirely different class of cases, namely, those where there has been no personal service of summons, and consequently no default on the part of the defendant brought about by his own omission from which he seeks to be relieved on the ground of his mistake, inadvertence, surprise, or excusable neglect; and in such cases it was evidently the intention of the Legislature, as indicated by the plain provisions of said Code section, to allow the trial court one year after the rendition of a judgment within which it may exercise its discretionary power in granting appropriate relief to enable the defendant to answer to the merits of the action."

In the case of Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann.Cas. 990, the court had the same question here involved under consideration under the former provisions of section 473, which has been copied verbatim in the second code section of 473a, enacted in 1933, and directly held that a defendant is not required to present any excuse for his failure to appear in the action except that he was not personally served with summons. The court, in that case, points out the obvious fact that it would be utterly futile to require a defendant to make any further showing for the reason that he would be ignorant of the entire proceedings in court, as far as any actual legal notice is concerned.

The same section was further construed in Altpeter v. Postal Telegraph-Cable Co., 25 Cal.App. 255, 143 P. 93, 97, as follows:

"The above quoted provision of section 473 was intended to mean something. It cannot be treated as a provision having no substantial or vital purpose in its enactment. The section plainly says that where, from any cause, a defendant has not been personally served with summons, he may, within a year after the rendition of judgment, answer to the merits of the action."

Our Supreme Court, in the very recent case of In re Estate of Jean Estrem, Cal. Sup., 107 P.2d 36, 41, construed sections 473 and 473a of the Code of Civil Procedure and expressly held that the court "may set aside a default judgment or order issued without proper jurisdiction over the person of a defendant who at no time was before the court if motion for such relief is made within one year". In construing these two sections the court there held that the amendment in no wise changed the effect of section 473 of the Code of Civil Procedure prior to 1933, with respect to the right to vacate default judgments, where the defendant had not been served with process. In discussing these matters, the court says:

"These principles were not changed by the amendment of 1933, St.1933, p. 1851, adding the above-quoted provision to section 473 of the Code of Civil Procedure. We need not be concerned with the proper characterization of such proceedings as a direct or collateral attack. Long prior to this amendment it was well established that the superior court had jurisdiction at any time to set aside a judgment or order void on its face. Capital Bond, etc., Co. v. Hood, 218 Cal. 729, 24 P.2d 765; Baird v. Smith, 216 Cal. 408, 14 P.2d 749; Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann.Cas. 1915C, 737; In re Dahnke's Estate & Guardianship, 64 Cal.App. 555, 222 P. 381; Vaughn v. Pine Creek Tungsten Co., 89 Cal.App., 759, 265 P. 491; People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am.St. Rep. 448; People v. Temple, 103 Cal. 447, 453, 37 P. 414; Michel v. Williams, 13 Cal. App.2d 198, 56 P. 546. It was further settled that it had the power within a reasonable time, which by analogy to Code of Civil Procedure section 473a was limited to one year, to set aside a default judgment or order void, not on its face, but because of want of jurisdiction over the person of a defendant who had at no time been present in the proceedings. Richert v. Benson Lumber Co., 139 Cal.App. 671, 34 P.2d 840; Smith v. Jones, 174 Cal. 513, 163 P. 890; In re Dahnke's Estate & Guardianship, supra; Barnett v. Reynolds, 124 Cal.App. 750, 13 P.2d 514; Vaughn v. Pine Creek Tungsten Co., supra. In addition, a judgment could be attacked at any time either by motion or in an independent action in equity on the grounds, that it was secured by extrinsic fraud. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; McKeever v. Superior Court, 85 Cal.App. 381, 259 P. 373; Kasparian v. Kasparian, 132 Cal.App. 773, 23 P.2d 802; Tomb v. Tomb, 120 Cal.App. 438, 7 P.2d 1104; Kronman v. Kronman, 129 Cal.App. 10, 18 P.2d 712."

[5] In the light of the foregoing authorities construing section 473a of the Code of Civil Procedure, under which the motion was made and granted in this case,

it seems clear that the relief granted respondent in setting aside the default judgment entered against her within the year, where she was not served with process, conforms to the universal rule in this state. Under the circumstances, neither the question of extrinsic fraud nor of a judgment void on its face is involved on this appeal.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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44 Cal.App.2d 38

LUNDBERG v. KATZ.

Civ. 11457.

District Court of Appeal, First District, Division 1, California.

April 5, 1941.

1. Executors and administrators 🔑431(2)

The general rule is that a claimant against an estate shall not maintain an action thereon unless the claim, supported by affidavit is filed, reciting the amount due, that no payments have been made thereon which are not credited and that to the knowledge of plaintiff, there are no offsets. Probate Code, §§ 705, 716.

2. Executors and administrators 🔑227(1)

A claim against an estate need not be as precise and detailed as a complaint. Probate Code, §§ 705, 716.

3. Pleading 🔑72

It is not essential that a complaint state a cause of action for the relief which plaintiff seeks provided that facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled.

4. Executors and administrators 🔑431(2)

If the cause of action is substantially based upon the claim filed against the estate and the estate has not been placed in a position of disadvantage, as by lack of opportunity without additional expense to pay or compromise the claim, the action against administrator may be maintained. Probate Code, §§ 705, 716.

5. Executors and administrators 🔑227(5)

A claim against an estate for services rendered deceased would be amended by stating reasonable value of services upon request for clarification by executor. Probate Code, §§ 705, 716.

6. Executors and administrators 🔑227(4)

The failure of an administrator to request further information would not supply a fatal defect in claim but such failure may be considered in determining sufficiency of claim as basis of a complaint. Probate Code, §§ 705, 716.

7. Executors and administrators 🔑431(2)

Claim against estate framed on theory of validity of oral agreement to devise all property of the deceased to plaintiff and for its specific enforcement was sufficient to support action and judgment for reasonable value of services notwithstanding failure to state in claim reasonable value of services, where there was no showing of prejudice to estate. Probate Code, §§ 705, 716.

8. Executors and administrators 🔑221(5)

In action against estate for services as housekeeper and nurse to decedent, judgment for $5,200 was sustained by the evidence.

9. Evidence 🔑571(7)

In matters of continuous domestic service, opinion evidence if given need not be followed if the trier of the facts is convinced that the opinion expressed is not sound.

10. Evidence 🔑507

If the trier of the facts possesses the common knowledge of the value of domestic services, their reasonable value may be determined without the aid of opinion testimony.

◆

Appeal from Superior Court, San Francisco; Robert McWilliams, Judge.

Action by Rosalynd Lundberg against Phil C. Katz, etc., to recover the reasonable value of services performed as housekeeper and nurse. From a judgment for plaintiff for $5,200, interest and costs, the defendant appeals.

Judgment affirmed.

Henry F. Boyen, Frank J. Fontes, and Percy V. Long, all of San Francisco, for appellant.

Raymond D. Williamson and Arthur J. Healy, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment in favor of plaintiff in the sum of $5,200, interest and costs. The action was brought by her against the administrator of the estate of Robert Hart Overton to recover the reasonable value of services performed as housekeeper and nurse for a period of more than sixteen years immediately preceding the death of decedent, the services being rendered at his special instance and request and upon his promise to pay therefor by bequest. The major question on appeal is the sufficiency of a claim filed with the administrator as the basis for a money judgment. It is also contended that if the claim is sufficient to permit recovery, the evidence does not sustain a judgment for the amount awarded.

The complaint alleges the death of Robert Hart Overton, the appointment of the administrator, the filing of the claim in due course and the rejection thereof; the performance of the services and that their reasonable value was the sum of $20,000; the agreement to pay; that no provision was made, by will or otherwise, in accordance with an agreement to pay and reimburse plaintiff; that demand for payment has been made and that the entire amount remains due, etc. The claim does not appear in the record but it is set forth in respondent's brief, and we assume that to be correct. The claim, after setting forth the terms of the agreement, states: "That claimant accepted and performed the terms and conditions of said agreement on her part to be performed; that, because of the performance of said conditions by claimant and said agreement of decedent, claimant is the owner of and entitled to all of the property of said decedent, the value of which claimant estimates at Twenty Thousand Dollars ($20,000); * * * Wherefore claimant prays that all of the estate and property of said decedent be delivered to her as her property." The written rejection of the claim reads as follows: "You will please take notice that the claim heretofore presented by you against the estate of the above named decedent in the amount of the value of all of the property owned by said decedent at the time of his death and estimated by you at the sum of Twenty Thousand Dollars ($20,000.00) for alleged compensation due under agreement with said decedent, was by me on this day rejected."

The claim is drawn on the theory that under and by virtue of the agreement plaintiff is entitled to all of decedent's property. The question is whether a claim of that character will support a recovery upon quantum meruit.

[1-3] The general rule is that a claimant against an estate shall not maintain an action thereon unless a claim, supported by affidavit, is filed, reciting the amount due, that no payments have been made thereon which are not credited; and that to the knowledge of claimant there are no offsets. Prob.Code, §§ 705, 716. The filing of the claim is statutory and need not be set forth with the precision and detail of a complaint. "It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled." Warder v. Hutchison, 69 Cal.App. 291, 297, 298, 231 P. 563, 565; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Hayden v. Collins, 1 Cal.App. 259, 81 P. 1120.

[4] From the foregoing we conclude that if the cause of action is substantially based upon the claim, and the estate has not been placed in a position of disadvantage as by lack of opportunity without additional expense, to pay or compromise the claim, the action may be maintained. The strict rule laid down in Giles v. Reed, 44 Cal.App. 367, 186 P. 614; Etchas v. Orena, 127 Cal. 588, 60 P. 45; Estate of Dutard, 147 Cal. 253, 81 P. 519; Faulkner v. Hendy, 123 Cal. 467, 56 P. 99, and many other cases, that a claimant may recover only when the cause of action specifically follows the claim, has been modified.

Furman v. Craine, 18 Cal.App. 41, 121 P. 1007 and McKay v. Security-First Nat. Bank, 35 Cal.App.2d 349, 96 P.2d 376, cited by appellant, do not involve a variance between claim and complaint, and do not support appellant's contention that a claim to specific property will never support a money judgment. If the contract had been in writing, an action thereon could have been maintained. In the absence of a written contract, an action for the reasonable value of the services was proper. To sustain his contention that the claim does not support the form of action appellant relies upon Giles v. Reed, supra. In that case the claim averred performance of services under an agreement to devise specific property to the promisee, a specified figure following the description of the property. The case cited supports his contention. However, if a suit on such a claim should now be brought the same result would probably not be reached in the light of the more liberal construction of the code section.

The claim in the present case is framed on the theory of the validity of the oral agreement to devise all property of the deceased to plaintiff, and for its specific enforcement. The claim prays that "all of the estate and property of said decedent be delivered to her as her property". In Warder v. Hutchison, supra, the court held that the claim would support an action for reasonable value, notwithstanding the sum stated in the claim and prayed for in the complaint is in the latter alleged to be the amount of damages for breach of the agreement to devise specific property.

The complaint in Zellner v. Wassman, supra, was framed on the theory of validity of a broken oral promise to leave the promisee $5,000 by will. It was held that although the agreement was not enforceable because not in writing, plaintiff was entitled to the reasonable value of services. In Manford v. Coats, 6 Cal.App.2d 743, 748, 749, 45 P.2d 395, 397, the court said: "Appellant refers us, however, to the case of Giles v. Reed, 44 Cal.App. 367, 186 P. 614, where the court refused to receive evidence of the reasonable value of services, but in that case the agreement was to compensate plaintiff by devising a specific parcel of real property, and no claim was based on the implied contract, whereas, in the instant case, the agreement was to see that the parties, in consideration of services rendered by plaintiff at the request of deceased, were well provided for." In Lauritsen v. Goldsmith, 99 Cal.App. 671, 674, 675, 279 P. 168, 169, the court said: "Apparently the claim filed in the instant case avoided the consequences of relying on the ordinary contract implied by law, as was done in the Etchas v. Orena Case, and at the same time avoided relying entirely upon the express promise to compensate by will, as did the claim in Giles v. Reed. The claim here is evidently framed to steer a middle course between these two cases and follows closely the language of the findings of Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, at page 181, 188 P. 1034. Those findings were held to support a judgment upon a quantum meruit, and it should follow that a claim setting out substantially similar facts should be a sufficient claim upon quantum meruit."

In the present case the record does not indicate that defendants demurred to the complaint. The insufficiency of the claim to support the action was not urged as a defense in the first answer filed. In an amendment to the answer, filed eighteen days after the submission of the case on the merits, the following appears: "In this connection, defendant alleges that the claim referred to in said complaint was and is an insufficient claim and at variance with the claim here sued upon in that it did not apprise defendant of the nature of the claim here sued upon nor of the amount demanded." There is no suggestion herein that the amendment to the answer was improperly filed but rather that it was an "afterthought" subsequent to filing the original answer.

In Reeves v. Vallow, Cal.Sup., 104 P.2d 1017, in considering a contention that an alleged contract was oral and therefore recovery was limited to a period of two years, the court, page 1018 of 104 P.2d, said: "If the evidence is sufficient to support the cause of action for the reasonable value of the continuing services, it is now too late for the defendant to object to any formal deficiencies in the claim or in the statement of the cause of action. Both were sufficient to apprise the administrator of the general nature of the claim and the cause of action upon which the plaintiff would be entitled to rely under the foregoing authorities. Syler v. Katzer, 12 Cal.2d 348, 84 P.2d 137, 119 A.L.R. 422; Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84."

The claim in this case noted the date of the agreement, the nature of the services performed and the estimated value of the property asked in payment therefor. In Syler v. Katzer, 12 Cal.2d 348, 350, 84 P.2d 137, the court said: "The contention is then, that the claim was insufficient in form, and reliance is placed on such cases as Etchas v. Orena, 127 Cal. 588, 60 P. 45, and Estate of Steuer, 77 Cal.App. 584, 247 P. 211. Without discussing these in detail, it may be said that there is no necessity that a creditor's claim be drafted with precision and completeness of a pleading. The only requirement is that it state such facts as will apprise the executor or administrator of the amount of the demand. See Standiford v. Cantrell, 87 Cal.App. 736, 262

P. 800; United States Gypsum Co. v. Shaffer, 7 Cal.2d 454, 60 P.2d 998. The claim in the instant case clearly called to the attention of the executor the fact of the services, the period during which they were rendered (up to the time of death), and the amount demanded. If any uncertainty remained, it was incumbent upon the executor to call for clarification (Standiford v. Cantrell, supra) * * *."

[5, 6] The only objection to the present claim is that there is an absence of averment of the reasonable value of the services. If any request for clarification had been made by the executor as to the form of the claim it could have been amended. United States Gypsum Co. v. Shaffer, 7 Cal.2d 454, 60 P.2d 998. The failure of an administrator to request further information would not supply a fatal defect in the claim but it may be taken into consideration in determining its sufficiency as the basis of a complaint.

In this case there is nothing to indicate that had the administrator been informed the claim was for the reasonable value of services, he would have allowed or compromised it, thereby saving the estate the expense of litigation. If a demurrer had been filed to a complaint setting forth the claim as filed with the administrator of the estate, a ruling sustaining the demurrer without leave to amend would have been erroneous. Under proper circumstances, a claim filed within the statutory time may be amended after the expiration of the statutory period. United States Gypsum Co. v. Shaffer, supra. It would have been proper to permit plaintiff to petition the probate court to file an amended claim before final action on a demurrer. It must be remembered that the pleadings did not contain any objection to the form of the claim as a basis for the complaint until eighteen days after the submission of the cause on its merits. The trial court, upon application, would have been justified in delaying decision until an application to the probate court to file an amended claim could be seasonably made. If so made and rejected, the complaint in the present action could have been amended. To send the case back to the trial court at this stage of the proceeding would be a waste of time of the respective litigants.

[7] The form of the claim as the basis for the complaint is not approved as a model. However, we agree with the trial judge in his statement made at the time judgment was directed for plaintiff that "it would be sacrificing substance to form if I should hold that the claim is fatally defective".

[8-10] The next question to consider is whether the amount of the judgment, $5,200, is excessive. The appraised value of the estate was $8,845.46. The court found that the value of the services was $15,600, but that the estate was entitled to a credit of $10,400 on account of supplies, etc. paid for by decedent. The evidence upon this subject is meager but it cannot be said that the trial judge arrived at the various figures through conjecture or surmise. There was testimony by the daughter of plaintiff, who was quite young at the time of the making of the agreement, as follows: "A. Yes, he asked my mother if she would please come to make a home for him, and care for him the rest of his life; that if she did, that upon his death, she was to receive everything he possessed, for making a home for him, and caring for him in every respect, and cooking and everything. * * *

"Q. Now, from the time you moved into the home, did you observe the work that your mother did there? A. Why, yes, my mother cleaned and kept the house up, and cooked Mr. Overton's meals; he had a midnight meal; and she did his mending; and he insisted upon the garden being kept up, and my mother did all that; she laid carpets and put up curtains for his room, and just everything, that is all; and she was at his service every minute of the day that he wanted her; she just did everything possible for him."

There was also ample evidence by other witnesses of the performance of the agreement. The trial judge was convinced by this evidence and it is therefore sufficient on appeal. In matters of continuous domestic service, opinion evidence if given need not be followed if the trier of the facts is convinced that the opinion expressed is not sound. As a rule the facts do not call for the testimony of an expert. If the trier of the facts possesses the common knowledge of the value of such services, their reasonable value may be determined without the aid of opinion testimony. Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281; Nylund v. Madsen, 94 Cal. App. 441, 271 P. 374; Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609; John H. Spohn Co. v. Bender, 18 Cal.App.2d 447, 64 P.2d 152. We are not prepared, even with the aid of appellant's able dissertation on this subject, to hold that the trial court erred in its findings or in the judgment rendered thereon.

The judgment is affirmed.

We concur: PETERS, P. J.; GOODELL, J. pro tem.

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44 Cal.App.2d 27

PEOPLE v. L'HOMMEDIEU et al.
(two cases).
Cr. 2148.

District Court of Appeal, First District, Division 2, California.

April 4, 1941.

1. Robbery 🔑24(1)

Evidence, including testimony of person robbed identifying defendant's companion as one who personally robbed her, together with sworn testimony of defendant and companion that they continuously remained together, authorized jury to infer that defendant was with companion when robbery was committed, and that he was the one who drove automobile away from robbery, and sufficiently established "corpus delicti" of the offense.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

2. Weapons 🔑17(4)

Evidence showing defendant's unlawful possession of pistol sufficiently established "corpus delicti" of offense of unlawful possession of a pistol. St.1931, p. 2316, § 2.

3. Criminal law 🔑406(6)

In prosecution for robbery and unlawful possession of pistol, interviews between officers of police department and two defendants in which each defendant admitted in toto his acts and participation in each offense charged against him was admissible. St.1931, p. 2316, § 2.

4. Robbery 🔑26
Weapons 🔑17(5)

In prosecution for robbery and unlawful possession of pistol against two defendants, where each defendant at trial attempted to testify to a set of facts at variance with his admissions previously made to officers, defendants' evidence merely created conflicts which were addressed to jury for determination. St.1931, p. 2316, § 2.

5. Criminal law 🔑1175

Defendant could not complain that his conviction of robbery of second degree was inconsistent with conviction of his companion of robbery of first degree.

6. Criminal law 🔑404(4)

In prosecution for robbery and unlawful possession of pistol against two defendants, pistol and bullet found in defendants' room by officer when arresting defendants on day after alleged robbery were sufficiently identified to be admissible, where officer identified bullet and pistol at trial, and victim testified that pistol resembled one used in robbery. St.1931, p. 2316, § 2.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Edward L'Hommedieu was convicted of second degree robbery and of unlawful possession of a pistol, and he appeals from the judgment of conviction and from orders denying motion for new trial and in arrest of judgment.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

This is an appeal from a final judgment that the defendant was guilty of the crimes of second degree robbery and of the unlawful possession of a pistol in violation of section 2, chapter 1098, Statutes of 1931, and from the orders of the trial court denying defendant's motion for a new trial and his motion in arrest of judgment. The defendant contends that except certain admissions introduced in evidence there was no other evidence that he participated or was guilty of any of the acts charged against him. Clearly that contention is without foundation.

On the trial of the action both Physioc and L'Hommedieu, the accused offenders, tendered themselves as witnesses and were examined at length. From their testimony and the testimony of other witnesses, the following facts appeared.

Prior to the 13th day of February, 1940, Louis Physioc had been employed by Judd Goodrich and was residing in Los Angeles In his employment he acted as delivery man and for the purpose of making deliveries drove a Chevrolet coupe owned by his employer. He had made the acquaintance of the defendant Edward L'Hommedieu. On the morning of the day last stated the two were seated in the automobile. Physioc asked Goodrich for permission to use the automobile as he was changing his room. The permission was granted. Shortly thereafter Physioc and this defendant drove to the summer home of defendant's mother. There the defendant entered the house in his mother's absence, picked up his mother's diamond wrist watch and a Gladstone bag which contained nothing except a pistol. The two thereupon left for San Francisco. On arriving there they registered at the Hotel Jessie. Physioc registered as Lewis Davis. This defendant registered as Jim Davis. Both registered as from Reno. They were assigned to room 71. The next morning L'Hommedieu delivered his mother's watch to Physioc and the latter pawned it borrowing the sum of $15. In making out the pawn ticket Physioc gave his address as room 71, Hotel Jessie. During the day of the 14th the two traveled about San Francisco visiting dance halls and places where drinks were served. That evening at about 10 o'clock, Physioc, dressed in his street clothes and wearing a brown corduroy overcoat, entered a barroom at 698 San Jose avenue. Leona Hough was the attendant in charge. The room was well lighted. He was not disguised in any manner but carried a pistol in his right hand. He walked to the cash drawer and commanded Leona to give him the cash. When she opened the drawer he reached in with his left hand, took about $45 currency and coin, and then backed out of the store. As he did so he said to her, "Take it easy". She followed him to the outside and there she saw him step into the right-hand side of an automobile which she believed to be moving slowly as he entered it. At once she telephoned the police and a little later gave a full written statement. That statement described the automobile and also set forth that the individual who robbed her was wearing a brown corduroy coat. The evidence discloses that according to the contention of Physioc and L'Hommedieu, as appears from their testimony in court, they were together continuously from the time they left Los Angeles until the morning of February 15, when they were arrested while in bed at the Hotel Jessie.

Something regarding the pawn of the watch caused the police to investigate. At about 10:30 a. m. on February 15, Officer Jesse Ayer and his assistant went to room 71 in Hotel Jessie, regarding the pawning of the watch hereinabove mentioned. On arriving there the door was opened in response to their knock. Physioc and L'-Hommedieu were in bed. On a bureau Ayer found a bullet, some keys, and also some money. After talking to the defendant and his companion Ayer made a further investigation. A Gladstone bag was under the bed. With one of the keys on the bureau he opened the bag which was empty except in a pocket there was a pistol. The bullet on trial fitted the pistol. Still pursuing the watch transaction Ayer directed the defendant and his companion to dress and go to the Hall of Justice. Physioc put on his brown corduroy overcoat. As they approached the hall of justice, Officer Butz, in charge of the robbery detail, was on the sidewalk and had in his possession the report of the police regarding the robbery. When he saw the brown corduroy overcoat he became interested. It will suffice to state that within a few hours Physioc was identified as the individual who had robbed Leona Hough and that he had held at that time the pistol located by Officer Ayer. In company with Officer Butz and his assistant, Physioc went to locate the automobile. Shortly it was located near Twenty-Second and Guerrero. Not long after the automobile had been taken to the police garage it was definitely ascertained that it was the automobile owned by Goodrich and which had been driven to San Francisco, according to the sworn testimony of Physioc and L'-Hommedieu, by them. Moreover, shortly after their arrest photographs were taken of Physioc and L'Hommedieu, numerous interviews were had, and some of those interviews were taken down by a stenographic reporter attached to the police department.

[1, 2] Without examining the evidence adduced in the interviews just mentioned

it is proper to note that on the 28th day of February the district attorney filed an information against Physioc and L'Hommedieu charging them with robbing Leona Hough; with using a revolver in committing the offense, and charging a prior conviction against L'Hommedieu and two prior convictions against Physioc. On the 19th day of April the district attorney filed an information against the two defendants charging them with grand theft in stealing the Goodrich automobile and also charging that they used a revolver. In the latter information each defendant was charged with a prior conviction. On the same day an information was filed charging L'Hommedieu with the violation of section 2, chapter 1098, Statutes of 1931 (defining the unlawful possession of a pistol). An information was also filed against Physioc charging the same offense. When called upon to plead, the priors were admitted and a plea of not guilty was entered as to each of the charges above mentioned. At the time of the trial all actions were consolidated for the purposes of the trial. Pen.Code, sec. 954. As to the first charge, Physioc was found guilty of robbery in the first degree, L'Hommedieu of robbery in the second degree. As to the second charge, it was dismissed as to L'Hommedieu and Physioc was found guilty. As to the third and fourth charges, each was found guilty as alleged in the information. Applying the evidence recited above to the actions just enumerated, it is clear the corpus delicti was sufficiently established. In other words, the testimony of Leona Hough established a complete case against Physioc as the one who personally robbed her and, taking the sworn testimony of the two defendants that they continuously remained together, the jury could infer that L'Hommedieu was with Physioc when the robbery was committed, and that he was the one who drove the car away from the robbery and was therefore a party to that offense. The proof also showed that this defendant had unlawful possession of the pistol from the time the pistol was obtained in Los Angeles until the time of his arrest. As to both the charge of robbery and the charge of unlawful possession of the pistol the corpus delicti was proved.

[3] Returning to the interviews between the officers of the police department and the two offenders, it is obvious that said interviews were therefore admissible. Being admissible the guilt of each defendant was clearly established and each admitted in toto his acts and participation in each offense charged against him.

[4] True it is that at the time of the trial each defendant attempted to testify to a set of facts at variance with his admissions made to the peace officers. Such evidence merely created conflicts which were addressed to the jury for determination and with which this court has no concern.

[5, 6] As noted above the jury found Physioc guilty of robbery of the first degree and it found L'Hommedieu guilty of the same offense in the second degree. This defendant asserts this was error. That assertion is not well founded. Perhaps L'Hommedieu did not know that Physioc was going to use or did use a pistol in committing the robbery. If so he was not as culpable as Physioc. Be that as it may he may not complain because the verdict in his behalf was more favorable than it should have been. People v. O'Neal, 2 Cal.App.2d 551, 562, 38 P.2d 430. The defendant also contends that the trial court erred in admitting the pistol and bullet in evidence. In that connection he contends they had not been sufficiently identified. When Mr. Ayer took posession of the bullet he marked it and identified it when called as a witness. When he took possession of the pistol he retained possession thereof until it was produced at the hearing. Leona Hough when called as a witness was shown the pistol and allowed to examine it. She testified that it looked like, in general size, color and appearance, and resembled the gun the defendant (Physioc) had in his hand. That testimony taken in connection with the fact that the robbery occurred on February 14, that the defendant was arrested the next morning, that the pistol was in his room at the time of the arrest, and that a complete identification of the defendant was made and his confession was obtained on February 15, we think the identification was sufficient. People v. Hale, 81 Cal.App. 734, 254 P. 639.

The judgments and orders appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

44 Cal.App.2d 122

SCHULMAN et al. v. LOS ANGELES RY. CORPORATION et al.

Civ. 12941.

District Court of Appeal, Second District, Division 2, California.

April 9, 1941.

1. Appeal and error ⇨930(1)

On appeal from judgment for plaintiffs, appellate court must accept as true all evidence tending to support the verdict and must indulge in favor of plaintiffs every inference that can reasonably be drawn from the evidence.

2. Automobiles ⇨245(72)

In action for death of pedestrian struck while crossing a street by a bus, whether pedestrian was contributorily negligent was for jury if reasonable minds could draw different conclusions from the evidence.

3. Automobiles ⇨217(2)

In determining whether pedestrian killed by a bus at crossing was contributorily negligent, the jury could consider that at the time pedestrian stepped from curb to cross street she was at a crosswalk.

4. Automobiles ⇨160(4)

It is the duty of driver of a vehicle to yield the right of way to a pedestrian crossing within an unmarked crosswalk at an intersection. Vehicle Code, § 560, St.1935, p. 188.

5. Automobiles ⇨242(8)

In action for death of pedestrian killed while crossing street by a bus, the plaintiffs in establishing their case could rely upon the presumption that pedestrian used ordinary care for her safety at the time of the accident and such presumption was sufficient to support verdict unless overcome by other evidence.

6. Automobiles ⇨244(50)

In action for death of pedestrian killed while crossing street by a bus, evidence sustained implied finding of jury that pedestrian was not contributorily negligent.

7. Automobiles ⇨246(60)

In action for death of pedestrian killed while crossing street by a bus, instruction that there was presumption that pedestrian used ordinary care for her safety was not error where facts established by the evidence were not irreconcilable with such presumption.

8. Trial ⇨296(4)

In action for death of pedestrian killed while crossing street by a bus, instruction that there was no rule of law that absolutely required a person to keep a continuous gaze in the direction from which motor vehicles are expected after having once looked and justifiably concluded that he could cross an intersection in safety was not misleading in view of other instructions on care required of pedestrian and duties of driver.

9. Trial ⇨244(1)

The court in instructing the jury need not repeat the rules of law applicable to the case in such manner as to emphasize the points made by either party.

10. Trial ⇨260(8)

In action for death of pedestrian killed while crossing street by a bus, where jury was adequately advised that pedestrian had duty of exercising due care at all times in crossing street, refusal to instruct that it was duty of pedestrian to look for approaching traffic at such point and in such manner as would enable her to determine whether she could proceed across the street in safety was not error.

11. Death ⇨104(4)

In action by adult nondependent children for death of mother, 66 years of age, court properly told jury that in case they should find for plaintiffs jury could include the pecuniary value of the society, comfort, care, protection, and right to receive support, if any, which each plaintiff had lost by reason of mother's death. Code Civ.Proc. § 377.

12. Death ⇨95(1)

In an action brought by heirs of one who has been killed by negligent act of another, such damages may be given as under all the circumstances of the case may be just. Code Civ.Proc. § 377.

13. Death ⇨88

In proper cases, adult and nondependent children may recover damages estimated upon a pecuniary basis for loss of society, comfort and protection. Code Civ.Proc. § 377.

14. Appeal and error ⇨1004(1)
Death ⇨97

It is within the sound discretion of the jury to fix the amount of damages to be awarded for wrongful death, and the award of the jury should not be disturbed by a reviewing court unless the amount is so large as to suggest passion, prejudice, or corruption on the part of the jury. Code Civ.Proc. § 377.

15. Death ⟹99(4)

$2,500 for wrongful death of woman, 66 years of age, in action by adult and nondependent children, was not excessive. Code Civ.Proc. § 377.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Max Schulman and others against the Los Angeles Railway Corporation and another for death of pedestrian struck by bus of named defendant. From a judgment for $2,500 for plaintiffs, the defendants appeal.

Judgment affirmed.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellants.

Harry C. Cogen, of Los Angeles, for respondents.

WOOD, Justice.

Mrs. Sarah Schulman, 66 years of age, was struck by a bus owned by defendant corporation and driven by defendant Richards on June 3, 1939. The injuries she received resulted in her death and this action was commenced by her five adult children to recover damages from defendants. A jury returned a verdict in the sum of $2,500 against defendants, who have appealed from the ensuing judgment.

[1] There is a vast difference between the views of the parties on the subject of the alleged contributory negligence of decedent. Defendants concede that there is sufficient evidence to support a finding that the bus driver was negligent but they assert that decedent was guilty of contributory negligence as a matter of law. On the other hand plaintiffs assert that "only one conclusion is possible from these facts—the deceased had correctly judged her ability to cross the street in ample time but failed to take into account that, though in plain sight, at a regular crosswalk, a bus would suddenly and without warning change its course and run her down within 1½ feet from safety". In deciding between these two views this court must accept as true all evidence tending to support the verdict and must indulge in favor of plaintiffs every inference that can reasonably be drawn from the evidence. Cope v. Goble, 39 Cal.App.2d 448, 103 P.2d 598.

The accident occurred at about 8 o'clock in the evening at the intersection of Soto and Folsom streets in the city of Los Angeles. Soto street runs in a northerly and southerly direction and is 56 feet in width. Folsom street runs in a westerly and easterly direction and is 40 feet in width. There is a "jog" in the street, the westerly extension from Soto street being about 45 feet south of the easterly extension. At the time of the accident the street lights were in operation. Taking the evidence in the light most favorable to plaintiffs, in accordance with the above mentioned rule, it appears that defendants' bus was traveling in a northerly direction on Soto street at a rate of speed "a little better than 35 miles per hour". The bus was several minutes late and its speed was not slackened before it struck decedent. Mrs. Schulman was standing at the curb on the west side of Soto street at a point opposite the north curb line of the easterly extension of Folsom street. At that time there was considerable south bound traffic on Soto street but there was no north bound traffic on the street except defendants' bus and a car driven by Donald Erickson, which was following the bus at a distance of about 30 feet. Mr. Erickson testified that his car was approximately 100 feet south of the south curb line of the easterly extension of Folsom street when he saw Mrs. Schulman step from the curb. At that time Mr. Erickson saw an "opening" in the south bound traffic and was intending to pass the bus. He testified that Mrs. Schulman looked to the north and to the south as she stepped from the curb and then walked directly toward "the sidewalk or curb line on the northeast part of Folsom. It looked as though she walked directly across". Mrs. Schulman was walking rapidly. Erickson further testified that although he observed Mrs. Schulman she did not look "either way" when she reached the center of the street. He stated: "From the time she stepped off the curb I did not see her look again toward the bus."

Police officer Sullivan testified that the district was posted at a 25 miles per hour speed limit; that he arrived shortly after the accident and found the body of decedent lying near the east curb of Soto street at a point 12 feet north of the north curb of the easterly portion of Folsom street. The bus was standing 35 feet north of the north curb of the easterly portion of Folsom street with its "right hand edge being approximately 6 feet west of the east curb". The right front fender had been damaged slightly, "right on the right edge, the crown of the fender". The bus driver told the officer that the position of the bus at that time "was the same in which it came to a stop after the impact".

[2-6] If reasonable minds could draw different conclusions upon the issue of the alleged contributory negligence of decedent, the question was one of fact for the determination of the jury. Wise v. Stott, 114 Cal.App. 702, 300 P. 883. The jury could take into consideration the fact that at the time Mrs. Schulman stepped from the curb to cross Soto street she was at a pedestrian crosswalk. It is the duty of the driver of a vehicle to yield the right of way to a pedestrian crossing within an unmarked crosswalk at an intersection. Cal.Vehicle Code, sec. 560, St.1935, p. 188. They could conclude that Mrs. Schulman looked in the direction of the bus and saw it approaching at a distance of approximately 110 feet from the crosswalk, since Erickson testified that his car was approximately 100 feet south of the south curb of Folsom street, the width of Folsom street being greater than the distance between the bus and the Erickson car. At the time she started across the street Mrs. Schulman had the right to assume that the bus driver would obey the law and drive in a proper manner. Since the bus was lighted it was difficult for decedent to judge accurately of its speed. She did in fact arrive at the far side of the street before she was struck by the right front fender of the bus, and this notwithstanding the fact that the bus was traveling at a greater speed than was to be expected and did not slow down and yield to her the right of way. Moreover, the jury might have concluded that the witness Erickson, who was looking for a chance to pass the bus, was not entirely dependable in his statement that Mrs. Schulman did not look toward the bus a second time. It is true that he stated that he did not see her turn her head again in the direction of the bus but under the circumstances shown in the evidence it is reasonable to argue that she might have turned her head sufficiently to see the bus without the movement of her head being noticed by Mr. Erickson. Furthermore, plaintiffs in establishing their case could call to their aid the presumption that decedent used ordinary care for her safety at the time of the accident. This presumption is evidence and is sufficient to support a verdict unless it be overcome by other evidence in the case. Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590. We are satisfied that the evidence is sufficient to support the implied finding of the jury that decedent was not guilty of contributory negligence.

[7] Plaintiffs contend that the court erred in instructing the jury that there was a presumption that Mrs. Schulman used ordinary care for her safety as she was crossing Soto street. Instructions containing this presumption have given rise to many decisions of reviewing courts of California. In the leading case of Mar Shee v. Maryland Assurance Corp. 190 Cal. 1, 9, 210 P. 269, 273, the rule is laid down in the following language of Mr. Justice Myers: "From the foregoing we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case." In Westberg v. Willde, supra, decided in October, 1939, the authorities are extensively reviewed and it is stated that the giving of the instruction is of doubtful propriety in a case other than a death case, where the plaintiff has testified respecting his acts and conduct and his testimony and that of his witnesses did not clearly and unmistakably clear him of the charge of negligence. But it is expressly held that the situation is different where the acts and conduct of a deceased person are the subject of inquiry and that in such a situation the rule of the Mar Shee case should be followed. In the case under review it cannot be successfully contended that facts were established by plaintiffs' witnesses which are wholly irreconcilable with the presumption embodied in the instruction attacked by defendants.

[8] The defendants complain of the giving of instruction No. XV, which is as follows: "You are instructed that there is no rule of law that absolutely requires a person to keep a continuous gaze in the direction from which motor vehicles are expected, after having once looked and justifiably concluded that he can cross an intersection in safety." This instruction is in language very similar to that used by

the court in Filson v. Balkins, 206 Cal. 209, 212, 273 P. 578. It does not contain an erroneous statement of the law but defendants contend that it invades the province of the jury by assuming that decedent was justified in concluding that she could cross with safety. Although the instruction is subject to improvement in that it could well have been made more clear that the jury could pass upon the reasonableness of the conclusion made by decedent as she started to cross the street, we are satisfied that the instructions as a whole fairly informed the jury on the subject matter and that the jury was not misled in any particular. The court gave the jury a clear definition of ordinary care and told them that a failure to use ordinary care at all times while crossing the street would be negligence which would prohibit a recovery by plaintiffs. The court specifically referred to the duties of the driver and the pedestrian and stated that "a pedestrian * * * too, will be alertly conscious of the mechanical power acting, or that may act, on the public roadway, and of possible serious consequences from any conflict between himself and such forces. And the caution required of him is measured by the possibilities of injury apparent in the conditions at hand".

[9, 10] Defendants also complain of the failure of the court to instruct the jury at their request that it was the duty of decedent "to look for approaching traffic at such point and in such manner as would enable her to determine if she could proceed across said street in safety". The court in instructing the jury need not repeat the rules of law applicable to the case in such manner as to emphasize the points made by either party. In Johnston v. Brewer, 40 Cal.App.2d 583, 105 P.2d 365, 369, the plaintiff was struck on a street at a point between two intersections. He requested the court to instruct the jury concerning the duty of a pedestrian crossing at a point other than in a crosswalk to yield the right of way and asked the court to further instruct the jury that the provisions of the code section did not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway. In sustaining a judgment for the defendant the reviewing court stated: "The asserted error in the refusal of the court to give this instruction is that the jury was not instructed that defendant was bound to exercise due care toward plaintiff even though the latter was not in a crosswalk at the time of the accident. The court did not err in refusing to give the above instruction, for by other instructions the jury was clearly and adequately advised that both plaintiff and defendant were bound to exercise ordinary care under all the circumstances and that neither was required to use a greater degree of care than the other." The remarks of the court in the Johnston case are applicable to the present situation, for the jury was adequately advised that decedent had the duty of exercising due care at all times in crossing the street. In Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631, 632, the plaintiff was an elderly woman who crossed at a street intersection in a pedestrian lane. She testified that she looked to the right and to the left, saw a car approaching in each direction, that she thought that she was safe and started across the street at a fast walk. She did not look again either to the right or to the left and was struck by a passing car. The court instructed the jury: "I instruct you that it is a duty resting upon any person attempting to cross a street that is likely to be dangerous, before placing himself or herself in a position of danger, to look in the direction from which such danger is to be anticipated. This is a continuing duty, and is not met by looking once and then looking away. In the exercise of ordinary care it is the duty of the pedestrian to look to the right and to the left whenever he or she has voluntarily put himself or herself into a position which may be one of peril coming from either direction." In holding that the trial court committed prejudicial error in giving this charge to the jury the Supreme Court stated the rule as follows: "Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was negligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive."

[11-15] Defendants contend that the verdict is excessive and that the court erred in refusing to give the jury any instruction that would have told them in effect that plaintiffs could not recover more than nominal damages. They point out that decedent was 66 years of age and that she was not supporting the plaintiffs, her adult children. In arguing that the judgment for $2,500 is not excessive plaintiffs point out that the funeral expenses amounted to $212.75. The court properly told the jury that

in case they should find for plaintiffs they could include the pecuniary value of the society, comfort, care, protection and right to receive support, if any, which each plaintiff has lost by reason of the death of their mother. In an action brought by the heirs of one who has been killed by the negligent act of another "damages may be given as under all the circumstances of the case, may be just". Code Civ.Proc., sec. 377. In proper cases adult and non-dependent children may recover damages estimated upon a pecuniary basis for loss of society, comfort and protection. Williams v. McDowell, 32 Cal.App.2d 49, 54, 89 P. 2d 155. It is within the sound discretion of the jury to fix the amount of the damages and the award of the jury should not be disturbed by a reviewing court unless the amount is so large as to suggest passion, prejudice or corruption on the part of the jury. Williams v. McDowell, supra. In Corvin v. Hyatt, 10 Cal.App.2d 107, 51 P. 2d 176, a verdict of $5,000 for the death of the mother of the plaintiffs, who was 77 years of age, was held not to be excessive. The amount of the award in the instant case does not justify a reversal of the judgment.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

* * *

WILES v. STATE PERSONNEL BOARD OF CALIFORNIA et al.

Civ. 6493.

District Court of Appeal, Third District, California.

April 9, 1941.

Rehearing Denied May 9, 1941.

Hearing Granted May 29, 1941.

1. Officers 🔑11

Under the Civil Service Act the State Personnel Board is vested with authority to fix the probationary period of an employee at not less than six months and not to exceed one year. St.1937, pp. 2088, 2099, §§ 35(a), 118.

2. Officers 🔑11

A probationary employee is not entitled to a vacation period with pay, under the Civil Service Act. St.1937, p. 2102, § 150.

3. Officers 🔑11

Under the state Civil Service Act, the appointing power has no authority to extend the probationary term fixed by law for probationary employee by allowing an additional period of time for vacation. St.1937, p. 2102, § 150.

4. Officers 🔑11

Under the state Civil Service Act, where an employee has not been removed from office in manner required by law, he may acquire the status of a permanent employee even though he performs only a part of his prescribed duties while he is confined to a hospital during probationary period as a result of personal injuries. St.1937, pp. 2086, 2088, 2099, 2100, §§ 10, 35(a), 118, 122.

5. Officers 🔑69

Notice served three days before expiration of probationary period of personnel record officer of National Guard stating that his services would be terminated as of certain date more than three weeks after his tenure became permanent did not have the effect of dismissing the officer "during probationary period" as required by statute permitting probationer to be rejected by the appointing authority during the probationary period. St.1937, p. 2100, § 122.

See Words and Phrases, Permanent Edition, for all other definitions of "During Probationary Period".

6. Officers 🔑69

A notice of unsatisfactory work which specifically assumes to dismiss an employee at some future time beyond the probationary period does not conform to the Civil Service Act permitting appointing authority to reject any probationer "during probationary period". St.1937, p. 2100, § 122.

7. Officers 🔑69
States 🔑60

Where personnel board exercised authority under Civil Service Act and fixed probationary period of an employee at six months, and petitioner was appointed to position of personnel record officer of National Guard on August 13, 1938, his probationary service terminated February 12, 1939, notwithstanding during six weeks petitioner was confined in hospital because of personal injuries, he performed only a portion of duties imposed upon him, and notwithstanding that three days before his probationary period expired he was served with notice that his term would expire at a specific date more than three weeks after his tenure became permanent, and he was entitled to reinstatement and compensation from time of his discharge. St.1937, pp. 2086, 2088, 2099, 2100, 2102, 2106, §§ 10, 35(a), 118, 122, 150, 173.

8. Officers ⟹76

Where personnel record officer of National Guard was improperly removed from his position after termination of his probationary service, the fact that the particular classification of personnel record officer had been abolished or reclassified after the officer's discharge did not defeat his right to reinstatement with compensation from date of discharge, where the particular work which he was performing was being done under a different classification. St.1937, p. 2093, § 64.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Proceeding by Elmer J. Wiles against the State Personnel Board of the State of California and others. From a judgment refusing to grant a writ of mandamus to require the reinstatement of petitioner, the petitioner appeals.

Judgment reversed, with directions.

Albert Sheets, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Wilmer W. Morse and Bayard Rhone, Deputy Attys. Gen., for respondents.

THOMPSON, Justice.

The petitioner has appealed from a judgment of the trial court refusing to grant a writ of mandamus to require the State Personnel Board of California to reinstate him in the permanent position of personnel record officer of the California national guard, and to pay his fixed salary of $140 per month. It is contended his appointment to that position as a probationary officer was wrongfully terminated.

On August 13, 1938, Elmer J. Wiles was appointed by the adjutant general of California to the position of personnel record officer of the national guard of this state at a salary of $140 per month, with a probationary period of six months. He served efficiently in that position, with a high rating of 88 per cent, until September 11, 1938, at which time he sustained serious injuries in an automobile casualty, resulting in two fractured vertebrae, on account of which he was confined in a hospital until October 24, 1938. During the time he remained in the hospital he continued to perform a part of his official duties. While he was in that institution the petitioner did not receive his salary from the state, but was paid full disability compensation from the state compensation insurance fund. February 9, 1939, the petitioner received a letter from the adjutant general, notifying him that his probationary appointment as personnel record officer would be terminated March 4, 1939, on account of unsatisfactory work and failure to perform the duties of his employment. After the last-mentioned date, the petitioner was not permitted to continue his employment and he was paid no further salary. A copy of the notice of future dismissal was filed with the State Personnel Board, February 11, 1939. The trial court adopted findings adverse to the petitioner upon all material issues. A judgment was rendered against him in accordance with the findings. From that judgment this appeal was perfected.

The chief question to be determined on this proceeding is whether the petitioner's probationary tenure of office was terminated within six months from the time of his appointment, in the manner required by law and in accordance with the duly-adopted rules of the State Personnel Board. If it was not so terminated, we assume that he automatically attained permanent tenure entitling him to retain his office with its fixed compensation, and that he could not thereafter be lawfully removed for cause except in the manner provided by section 173 of the State Civil Service Act. Stats. 1937, p. 2085, 1 Deering's Gen.Laws of Cal. of 1937, p. 742, Act 1404.

[1] By the provisions of that act the Personnel Board is vested with exclusive authority to fix the probationary period of an employee at not less than six months, and not to exceed one year. Secs. 35(a) and 118, State Civil Service Act, supra; Spaletta v. Kelly, 30 Cal.App.2d 656, 86 P.2d 1074. Pursuant to the foregoing statutory authorization, the board adopted rule nine, which definitely fixed the probationary period of service at six months. In accordance with that rule, the petitioner's probationary service terminated February 12, 1939.

When an employee has served his full probationary term without having been dismissed as provided by section 122 of the act, he then automatically becomes a permanent employee. Section 10 of the act provides in that regard: "'Permanent employee' means an employee who has permanent status. 'Permanent status' means the status of an employee who is lawfully retained in his position after the completion of the probationary period provided in this act and the rules prescribed by the board."

[2, 3] We are of the opinion a probationary employee is not entitled to a vacation period with pay. Certainly the appointing power has no authority to extend the probationary term fixed by law, by allowing an additional period of time for his vacation. Section 150 of the act authorizes the allowance of fifteen days' vacation, only, during "each year of continuous service". That section reads: "Each employee shall be entitled to a vacation of not to exceed fifteen days' duration, excluding Sundays and holidays, with pay, during each year of continuous service. The time when such vacations shall be taken shall be determined by the appointing power of such employee. The board shall provide by rule for the regulation and accumulation of vacations and may provide for vacations for employees who have been employed for a period of at least six months and less than one year."

The clear inference from the foregoing section is that an employee is not entitled to vacation unless and until he has been employed continuously for at least six months.

Pursuant to that section the board adopted rule thirteen. Section 1 of that rule provides that: "After six months of continuous service, each employee in the State Civil Service shall be entitled to a vacation on the basis of one and one-quarter working days for each month or major portion of a month of service up to the first of January next following the completion of such six months of service."

[4] It is true that the petitioner in this case performed only a portion of the duties imposed upon him, after his injury was received and during the six weeks he was confined in the hospital. In construing statutes similar to the State Civil Service Act, with relation to acquiring permanent tenure of office, it has been determined that when the employee has not been removed from office in the manner required by law, he may acquire the status of a permanent employee even though he is relieved of his duties a portion of the time or when he performs only a part of his regular work by consent or without objection on the part of the appointing power. Eisenhuth v. Department of Motor Vehicles, 2 Cal. App.2d 207, 37 P.2d 725; Gastineau v. Meyer, 131 Cal.App. 611, 22 P.2d 31. In both of the last-cited cases, hearings were denied by the Supreme Court. The same principle applies when an employee performs only a part of his prescribed duties while he is confined to a hospital as the result of personal injuries, in the absence of a termination of his employment by the appointing power, in the manner required by law.

It is true that three days before the petitioner's probationary period expired, he was served with notice that his term would expire March 4, 1939. That notice reads:

"February 9, 1939.

"Mr. Elmer J. Wiles
"116 State Office Building
"Sacramento, California
"Dear Sir:

"Effective March 4, 1939, your services as Personnel Officer, California National Guard, will be terminated.

"This action is found necessary due to unsatisfactory work during your probationary period. During your probationary period you failed to carry the responsibilities and duties prescribed for this position by the Personnel Board and the Personnel Section of this office fell far behind in its work.

"It was found during this period that the responsibilities and duties required of this position had been shifted to a Junior Stenographer-Clerk in the Personnel Section.

"I find it necessary to take this action for the good of the service.

"You will be allowed your accumulated vacation from February 10th to March 3, 1939, inclusive.

"Very truly yours
"(Signed) P. J. H. Farrell
"Brigadier General, CNG
"The Adjutant General.
"cc State Personnel Board."

[5, 6] The foregoing notice did not have the effect of dismissing the petitioner "during the probationary period", as required by section 122 of the act. It purports to dismiss him on March 4, 1939, more than three weeks after his tenure became permanent. A notice of unsatisfactory work, which specifically assumes to dismiss the employee at some future time beyond the probationary period does not conform to the statute. If such notice could be deemed to be sufficient, the appointing power might with equal

effect give notice that the employee would be dismissed three months or three years after his probationary period had expired. Section 122 provides in that regard: "Any probationer may be rejected by the appointing authority during the probationary period for reasons relating to the probationer's qualifications or the good of the service, or failure to demonstrate merit, efficiency, fitness and moral responsibility. Notice of such action accompanied by the statement of the specific reasons therefor, truthful within the knowledge of the appointing power or other officer or person in charge of the employee, shall be filed by the appointing power with the board and a copy served upon the probationer to give effect to the rejection."

[7] Since the appointing power had no authority to extend the petitioner's probationary period beyond the limitation thereof fixed by the rules of the board, by allowing him credit for three weeks' vacation time, and he was not dismissed "during the probationary period", he must be deemed to have automatically acquired permanent tenure, entitling him to reinstatement and a judgment for his fixed compensation at the rate of $140 per month from March 4, 1939.

It is true that the board attempted to correct the failure to dismiss the petitioner within his probationary term as required by law, by filing on February 20, 1939, a report pursuant to its regularly-adopted form therefor, as required by section 121 of the act. That notice is ineffectual for several apparent reasons. The section last mentioned prescribes the form upon which such notice shall be made and that it shall be sent to the appointing power "not less than ten working days before the expiration of any probationer's probationary period", and that the report, duly signed by the appointing power, shall be filed with the board "before the expiration of the probationary period", and a copy thereof served upon the employee. None of these essential requirements were performed. The very form relied upon by the respondent is headed, "Certificate to be submitted during probation period". It was not filed until after the probationary period expired. No copy of that report was ever served on the petitioner. It is ineffectual for any purpose.

[8] It is immaterial that the particular classification of the petitioner as personnel record officer has been abolished or reclassified since March 4, 1939. It is specifically provided in section 64 of the act that the status of the employee "shall not be affected" thereby. It appears that the particular work which he was performing is now being done under a different classification.

The judgment is reversed and the trial court is directed to issue the writ of mandate reinstating the petitioner as a permanent employee with his fixed salary of $140 per month from March 4, 1939, as prayed for.

We concur: PULLEN, P. J.; TUTTLE, J.

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44 Cal.App.2d 6

BROWN v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 6531.

District Court of Appeal, Third District, California.

April 3, 1941.

1. Workmen's compensation 🔑2061

An order terminating liability for compensation payments to an employee should be affirmed if there is any evidence substantially tending to support the finding of the Industrial Accident Commission.

2. Workmen's compensation 🔑2026

In workmen's compensation case, the burden of proving the termination of liability upon the part of employer's insurance carrier rests upon the carrier.

3. Workmen's compensation 🔑2061

In workmen's compensation case, if there is any evidence from which the Industrial Accident Commission could reasonably infer or conclude that employee had fully recovered from his injuries, award terminating liability of employer's insurance carrier must be upheld.

4. Workmen's compensation 🔑1409

In workmen's compensation case, where the finding purporting to support an award is necessarily based on surmise, speculation or conjecture or guess the award will be annulled.

5. Workmen's compensation ⚷1939

It is within the province of court, in reviewing an award for workmen's compensation based wholly on circumstantial evidence, to determine whether there are inferences reasonably deducible from the evidence to sustain the Industrial Accident Commission's finding.

6. Workmen's compensation ⚷2030

In workmen's compensation case, where evidence on second hearing showed that employee's physical condition had not improved, that he was still suffering the same pain and that he was unable to do any kind of work on account of injury, and testimony of medical witnesses was still to the same effect as that of medical experts who appeared at first hearing, which was that something was wrong but that they were in the dark regarding the exact cause, evidence regarding change in employee's condition was not sufficient to justify an order terminating liability for payment of further compensation. St.1937, pp. 265, 304, §§ 3202, 5952.

7. Workmen's compensation ⚷52

The Workmen's Compensation Act is to be liberally construed for the purpose of extending its benefits for the protection of persons injured. St.1937, p. 265, § 3202.

◆

Proceeding by William James Brown against the Industrial Accident Commission of the State of California and others to review an order of the commission terminating liability for the payment of further compensation.

Order annulled.

Keith & Creede, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., Asst. Atty., both of San Francisco, for respondents.

TUTTLE, Justice.

Petitioner seeks to annul an order of respondent Commission terminating the liability of respondent fund for the payment of further compensation to him from and after March 13, 1940.

[1] It is the rule that an order terminating liability for compensation payments should be affirmed if there is any evidence substantially tending to support the finding of the Industrial Accident Commission. Newman v. Ind. Acc. Comm., 137 Cal.App. 477, 30 P.2d 571. The sole question here is whether or not the record measures up to the rule stated.

On January 30, 1939, petitioner filed with the Commission his claim for compensation for an injury arising out of his employment. He was a lumber scaler, and while working, slipped on an icy runway and fell some five feet, striking the upper left portion of his abdomen on the top end of certain upright timbers or piles.

After a hearing, and on March 31, 1939, findings and award were made in petitioner's favor and against the respondent, the employer's insurance carrier, granting petitioner compensation in the sum of $20.44 per week beginning October 3, 1937. In said findings it was also found that petitioner was entitled to further medical, hospital and surgical treatment necessary to cure and relieve him from the effects of his injury. Pursuant to said award compensation was paid to petitioner to and including December 30, 1939, and treatment was furnished him. The employer was dismissed from the proceeding.

On February 9, 1940, respondent filed its petition to terminate liability as of December 30, 1939, setting forth therein that compensation had been paid and medical treatment had been furnished to said date, and further alleging that petitioner has fully recovered from any and all disability chargeable to his said injury.

After a hearing at which considerable evidence was presented, the Commission made the following order:

"Findings and Award issued herein March 31, 1939, and thereafter, and on February 9, 1940, the defendant carrier filed its petition to terminate, and all parties having appeared and the matter having been regularly heard before W. Lee DeMara, Jr., Referee, and at such hearing the defendant carrier having first moved to amend its petition to supplement in support thereof an examination of the applicant by three independent medical examiners, and said matter having been submitted for decision and said motion having been granted the said Referee now makes his order on said proceedings, as follows:

"Good Cause Appearing Therefor:

"It is hereby ordered that defendant's liability under Findings and Award herein be and it is hereby terminated as of March 13, 1940."

[2, 3] It must be conceded at the outset that the burden of proving the termina-

tion of liability upon the part of an insurance carrier rests upon the latter. Witt's Dairy v. Ind. Acc. Comm., 37 Cal.App.2d 16, 98 P.2d 812. On the other hand, if there is any evidence from which the Commission could reasonably infer or conclude that petitioner had fully recovered from his injuries the award must be upheld.

Ever since the accident, petitioner complained of severe pains in various parts of his body. The many doctors who examined him accepted his statements of subjective pain, but were unable to prescribe a remedy which would relieve him. No doctor found anything subjectively wrong with him. On the hearing which resulted in the order under attack, several doctors testified that only an exploratory operation could determine whether or not petitioner was suffering from an internal injury. On May 31, 1940, an exploratory operation was offered by the defendant to the applicant, without qualification, by letter addressed to the Industrial Accident Commission with a copy to applicant's attorney. When the applicant did not accept the offer for a period of more than thirty days, an order was made (July 26, 1940) terminating liability. On the last hearing three medical experts were appointed by the Commission to report on petitioner's condition. The testimony of those doctors appeared by way of signed statements. Dr. Falconer stated that: "If, as there is some reason to think might happen, nothing abnormal is found on exploratory operation which could be attributed to his injury, or which can be causing his pain and disability, then we will have to consider that the man is undoubtedly a malingerer." Dr. Callander stated: "I do not think that this luetic condition is entering into his picture in any way. In the event that careful exploration through an adequate upper abdominal incision fails to show anything thought to be sufficient to cause this extraordinary amount of pain on pressure in the upper abdomen, then I would revert to a diagnosis of absolute malingering. I do not often accuse a person of this, but this will have to be my opinion in the event that nothing is found on exploration." Dr. Twitchell stated: "My examination of this man shows him to be neurologically practically negative, with the exception of partial Argyll Robertson pupils. This of course is indication of neurosyphilis but I can find no active evidence of any disease of the central nervous system. He cannot be classed either as a tabetic or a paretic and I do not feel that this man can be looked upon as a case of functional disease. He is about as tough a looking sailor man as I have ever seen, and I fail to see how the injury that he received could have produced the long standing effects which he declares he is suffering from. I cannot hazard an opinion as to the possibilities of a perisplenitis but I should as neuropsychiatrist advise against any exploratory work on his abdomen. As a rule I am most reluctant to hint at malingering, but in this case the temptation is strong to withstand. Verbum sap!" Dr. Twitchell further stated: "Wednesday morning I had a long conference with Drs. Falconer and Callander in the matter of William James Brown. I still adhere to the opinion that this man is endeavoring to make us believe that he is suffering from things from which he is not suffering. At the same time I am willing to concede what both Drs. Falconer and Callander say, i. e., that there is possibly some physical thing within the abdomen, for example, a tiny knuckle of gut as an incomplete hernia in the abdominal wall or a string of adhesion. While I consider this as a possibility, I think that the likelihood is extremely remote. An exploratory operation to be of any value would necessitate, according to Dr. Callander an incision about six inches long and a great deal of handling of the abdominal contents. If this man were a neurotic, I should consider such procedure highly dangerous in that it would probably provide him with a new line of symptoms and complaints which would last indefinitely. Even though I regard him as free of neurosis, I feel that he could capitalize upon such an operation by remaining in the hospital for an indefinite period and get out of the hospital with more complaints than ever."

The foregoing is all the evidence referred to by respondents as sustaining their position, and as justifying the termination of liability.

The record presents an amazing series of conflicting and contradictory diagnoses. Here are some of them which were made prior to the last hearing, and between September 1, 1937, and December 13, 1938:

"1. September 25, 1937, S. W. Cartwright, M.D., Nubieber, Cal. 'Contusion, with possible fracture of ribs on left side.' Prognosis—indefinite.

"2. October 1, 1937, P. W. McKenney, M.D., Alturas. 'Contusions costal cartilages lower left chest, with separation

5-6. Sprain muscles abdomen and left lumbar muscles.'

"4. October 19, 1937, P. W. McKenney, M.D., Alturas. 'Sprain muscles left lumbar region, left side, with separation lower left costal cartilages.'

"5. November 6, 1937, F. H. Olberg, M. D., Redding. 'Contusion lower ribs left side of chest Lumbo-sacral strain.'

"8. December 9, 1937, John W. Cline, M.D., San Francisco. Diagnosis: Tear of diaphragmatic attachment on left side or of diaphragm itself. No diseases of gastro-intestinal tract. No kidney damage. Possible cardiac lesion.

"9. December 10, 1937, H. M. F. Behneman, M.D., and Gerald F. Doyle, M.D., San Francisco. Diagnosis: (omitting orthopedic factors): Injury to spleen with intrasplenic hemorrhage. Possible secondary infection or pathology in diaphragm. No pathology in urinary tract or digestive system.

"10. January 14, 1938, Henry L. White, M.D., Redding. Merely repeats Dr. Behneman's diagnosis of 'ruptured spleen.'

"11. February 4, 1938, Henry L. White, M.D., Redding. 'Kinking of bowel' at 'splenic flexure'. Operative interference suggested.

"12. February 28, 1938, Frederick G. Linde, M.D., San Francisco. Back symptoms cleared up; residual trouble intra-abdominal or intra-thoracic.

"13. February 28, 1938, John W. Cline, M.D., San Francisco. No trouble with intestines; no cardiac symptoms; no trouble with diaphragm. Trouble to (a) Contusion to spleen (b) Perisplenitis (c) Traumatic aneurism of splenic artery.

"14. March 2, 1938, Emile Holman, M.D., San Francisco. Troubles not related to large bowel, to stomach, spleen, or anterior abdominal wall. Diagnosis: Probable injury to pancreas.

"15. March 9, 1938, John W. Cline, M. D., San Francisco. Disagrees with Dr. Holman's diagnosis under 14. Insists trouble in spleen and immediate exploratory operation needed.

"17. April 22, 1938, John W. Cline, M. D., San Francisco. Diagnosis: Pathology in region of spleen.

"20. October 6, 1938, Emile Holman, M.D., San Francisco. Diagnosis: 'Something wrong with pancreas.'

"21. December 13, 1938, Leo Eloesser, M.D., San Francisco. 'In my opinion Mr. Brown probably sustained a fracture of the lower left rib cartilages and now has signs of a chronic basal left side pleurisy.'"

It was apparent, as the Commission then concluded, that petitioner had suffered an internal injury of some character.

Upon the second hearing the undisputed evidence shows that petitioner's physical condition had not improved at all, and that he was still suffering the same pain. Furthermore, it appears, without contradiction, that he was unable to do any kind of work on account of the injury. Did respondents sustain the burden of proving that there had been such a change in the condition of petitioner that he was, as they must have found, fully recovered from a disability which they found to have existed on the original hearing? We think not. The testimony of the three doctors mentioned above is still to the same effect as that of the medical experts who appeared at the first hearing—they all admit that something was wrong, but they are still in the dark as to the exact cause. One of them makes the rather obvious statement that if an operation does not disclose the cause of the pain, then he would be justified in saying that petitioner was malingering. In other words, if there is nothing wrong, then the patient must be well. The record shows that the three medical examiners themselves were not ready to state that petitioner's continuing disability was not due to his original injury—unless and until the exploratory operation had been performed. No point is made by respondents of the refusal of petitioner to submit to such an operation. It is scarcely believable that such experts would recommend a capital operation unless they were satisfied that there was a sufficient objective basis for the disability.

[4] It is firmly established in the law of California that where the finding purporting to support an award is necessarily based on mere surmise, speculation, conjecture or guess, the award will be annulled. 27 Cal.Jur. 581. The foregoing principle was first announced in Roebling's Sons Co. v. Ind. Acc. Comm., 36 Cal.App. 10, at pages 13 and 14, 171 P. 987, at page 988, in which the court said: "The burden of proving, as has often been said in the decisions both of our own Supreme Court and courts of last resort in other

states where similar conditions of statute exist, that the injury for which compensation is asked was suffered in the course of the employment and arose out of the employment, is upon the claimant. Where various theoretical conclusions may be drawn from the state of facts established, each being equally plausible, some indicating that the injury may have arisen out of the employment, and others that the misconduct of the person injured was the producing cause, then it may not be said that the evidence is sufficient to sustain the case of him upon whom the burden of proof rests. A finding in such a case in favor of the claimant is said to be speculative."

In the same case this court, at page 14, refers to Sanderson's Case, 224 Mass. 558, 113 N.E. 355, in which the Massachusetts court set aside a finding of the Industrial Commission because it was based upon surmise, speculation and conjecture, and did not rest upon proof by a preponderance of evidence.

[5] In Clapp's Parking Station v. Ind. Acc. Comm., 51 Cal.App. 624, 197 P. 369, 370, this court said: "It is always within the province of the court, in reviewing an award based wholly on circumstantial evidence, to determine whether there are inferences reasonably deducible from the evidence to sustain the Commission's findings. The findings, in such case, must be based on reasonable inferences; conjecture or guesswork will not suffice. In Kerr v. Ayre S. S. Co. (1915) App.Cas. 217, 233, Lord Shaw draws the distinction between conjecture and inference in these words: 'The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not.'"

In the present case the Commission's decision rests, not on an inference or a presumption of fact, but on a conjecture as to which of three possibilities might be revealed by the exploratory operation which all the doctors insisted was prerequisite to their giving a final medical opinion in the case.

[6, 7] Finally, the duty is enjoined upon us to liberally construe the Workman's Compensation Act for the purpose of extending its benefits for the protection of persons injured. Labor Code, sec. 3202, St. 1937, p. 265. The showing made in justification of the order is such that it must be concluded that the Commission acted without, and in excess of its powers. Labor Code, sec. 5952, St.1937, p. 304. There is not only a failure to sustain the burden of proof, but an utter lack of any substantial evidence to sustain the order, nor could it be said that it may be reasonably inferred that petitioner had recovered from the injury. Conjectures will not suffice.

The order is annulled.

We concur: PULLEN, P. J.; THOMPSON, J.

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44 Cal.App.2d 33

FOSTER v. FISHER et al.

Civ. 12919.

District Court of Appeal, Second District Division 2, California.

April 4, 1941.

1. Bailment ⚷20

Where oil well drilling equipment was leased under an express contract to pay therefor a certain percentage "overriding royalty in the production of oil wells", the lessor's only remedy upon nonpayment of such royalty was an action for breach of the contract of lease, and he could not recover the reasonable rental value of such equipment.

2. Bailment ⚷20

Where oil well drilling equipment was leased to sublessee of oil property under an express contract providing for payment therefor of a percentage "overriding royalty in the production of oil wells", upon termination by sublessor of the sublease on the oil property due to failure of the well to produce oil in commercial quantities, the rights of lessor of drilling equipment as holder of royalty interest also terminated.

3. Bailment ⚷31(1)

Where oil well drilling equipment was leased to sublessee of oil property under express contract providing for payment therefor of percentage "overriding royalty in production of oil wells" and sublease of oil property was subsequently terminated for failure of wells to produce oil in commercial quantities, in the absence of proof as to production of the well during time sublease was in effect, lessor of drilling equipment failed to establish right to recover any sum for lessee's failure to perform contract provision for payment of royalty.

4. Bailment ⚷20, 32

Where oil well drilling equipment was leased to sublessee of oil property under express contract providing for payment therefor of a certain percentage "overriding royalty in production of oil wells", it was the duty of the lessee to procure a permit from the commissioner of corporations to issue "overriding royalty per cent interests" and deliver proper certificates to lessor, and failure to do so constituted a breach of the contract of lease for which lessor was entitled to recover at least nominal damages. Civ. Code, § 3360.

5. Bailment ⚷32

Where oil well drilling equipment was leased to sublessee of oil property under express contract providing for payment therefor of certain percentage "overriding royalty in production of wells", lessee's breach of contract in failing to procure from commissioner of corporations a permit to issue "overriding royalty per cent interests" did not entitle lessor of equipment to damages in the amount of the reasonable rental value of equipment, and, where sublease of oil property was canceled for failure of wells to produce oil in commercial quantities, the royalty interest of lessor of equipment was apparently worthless and he was entitled to nominal damages only. Civ.Code, § 3360.

6. Mines and minerals ⚷97

In lessor's action to recover the reasonable rental value of oil well drilling equipment, evidence was sufficient to sustain finding that lessee of oil property from whom lessee of equipment subleased the property on which the well drilling equipment was used, and who took an active interest in the drilling operations, was a "partner by estoppel" within the meaning of the statute, and hence obligated to lessor of well drilling equipment under the contract of lease. Civ. Code, § 2410.

See Words and Phrases, Permanent Edition, for all other definitions of "Partner by Estoppel".

7. Pleading ⚷428(3)

Although estoppel must ordinarily be pleaded, a failure to do so was "waived" by the admission without objection of evidence tending to establish a partnership by estoppel under statute. Civ.Code, § 2410.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

8. Mines and minerals ⚷97, 101

In lessor's action to recover reasonable rental value of oil well drilling equipment, evidence was insufficient to support a finding that person who financed the drilling operations was a "joint adventurer" or "partner by estoppel" with lessee of well drilling equipment, so as to be obligated to lessor under written contract of lease of equipment. Civ.Code, § 2410.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventurer".

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by George N. Foster against Herman Fisher, W. G. Johnson and others, to recover the reasonable rental value of certain oil well drilling equipment. From a judgment for plaintiff, W. G. Johnson and others appeal.

Judgment against appealing defendants, reversed.

Henry E. Carter, of Los Angeles, for appellant Day.

Emmett A. Tompkins, of Los Angeles, for appellant Johnson.

Otto B. Willett, of Los Angeles, for respondent.

WOOD, Justice.

Appellants Day and Johnson have taken this appeal from a judgment in favor of respondent and against appellants and their codefendant Fisher in an action brought by respondent to recover the reasonable rental value of certain oil well drilling equipment.

The action is founded upon three written agreements, all executed on January 7, 1938, although one was antedated as of September 30, 1937. The agreements provide in substance for the rental by respondent's assignor, P. W. Willett, Inc., of certain drilling equipment consisting of boilers, drill pipe, etc., to be used in the drilling of two oil wells. The consideration for the use of such equipment was to be an "overriding royalty" of 2 per cent or 3 per cent in the production of such oil wells, depending upon the length of time the equipment was used not to exceed 120 days. In two of the agreements defendant Fisher and appellant Johnson were named as lessees, while in the third Fisher was named as the sole lessee. All three agreements were signed by Fisher alone. Although the equipment was in fact used, no papers showing royalty interests were ever issued to respondent's assignor and nothing was ever paid to him as a percentage of the production of the wells.

Appellant Day and one Dilley were lessees of certain oil property known as the Watkins lease and the Washburn lease. In August, 1937, they executed a sublease of the Watkins lease to W. H. Martgan. On October 22, 1937, Martgan sublet the Watkins lease to defendant Fisher. On December 15, 1937, Day and Dilley executed a sublease of the Washburn lease to defendant Fisher. Fisher obtained a drilling permit and with the equipment of respondent's assignor commenced the drilling operations which consisted of deepening the two wells which were already on the leased property. Defendant Johnson financed the drilling operations under an agreement with Fisher whereby he was to receive a 21 per cent overriding royalty interest in the two wells. In July, 1938, Day and Dilley repossessed the leased premises and terminated the subleases because of the failure of the wells to produce oil in paying quantities. The only evidence presented tended to prove that defendants diligently attempted to produce oil, but without success.

By this action, which was commenced on March 1, 1939, respondent sought to recover the reasonable rental value of the equipment from Fisher, Day and Johnson on the theory that they were joint adventurers or partners in the drilling of the two wells. The trial court found that Fisher, Day and Johnson were joint adventurers and awarded respondent a judgment for $4,200 as the rental value of the equipment.

[1-3] The allegations of the complaint disclose an express contract between the parties, whereby respondent's assignor agreed to furnish certain equipment for a limited period, for which defendants agreed "to pay and deliver" a two or three per cent overriding royalty in the production of the wells. Respondent must stand upon the terms of the express agreement and must pursue the remedy permitted for such breach of the agreement as can be shown. The ruling in Gillin v. Hopkins, 28 Cal. App. 579, 153 P. 724, 725, is applicable to the present situation. In that case the plaintiff was employed by the defendant to sell certain oil stock and agreed to accept 15,000 shares of such stock as compensation for his services. Upon the failure of the defendant to deliver the stock, the plaintiff filed an action against the defendant in which he sought to recover $4,500 as the reasonable value of the services rendered. The trial court found the reasonable value of plaintiff's services to be as alleged and awarded him a money judgment. In reversing the judgment the appellate court observed: "In this case there was no express or implied contract to pay plaintiff $4,500 or any other amount in money. The contract was that he would accept 15,000 shares of stock in full as his compensation for his services in making the sale. For a breach of this contract this plaintiff has no cause of action upon an indebtedness of $4,500 but only an action for damages for a breach of the contract." In the instant case it was not shown that any oil was produced during the period prior to the forfeiture of the subleases. Indeed, it is not so alleged in the amended complaint, which contains the allegation that the wells were at the time of the filing of the complaint producing oil in commercial quantities. The only evidence before the trial court showing any production of oil from the wells in question was that at the time of the filing of the complaint and at the time of the trial the wells were producing small quantities. When the subleases were forfeited the rights of respondent's assignor as holder of royalty interests came to an end. Smith v. Drake, 134 Cal. App. 700, 26 P.2d 313. Manifestly, respondent has not established the right to an award of any sum for the failure of defendants to pay a percentage of the oil produced.

[4, 5] It is alleged in the complaint, and found by the court to be true, that plaintiff's assignor did not receive "formally said 3 per cent overriding royalty as provided in said contract", and that at the time the contract was executed respondent's assignor was informed by defendants that they had permission from the commissioner of corporations to issue "overriding royalty per cent interests". It appears that defendants did not seek a permit from the corporation commissioner. It was the duty of defendants to procure a proper permit from the commissioner and

to deliver proper certificates to respondent's assignor. Domestic and Foreign Pet. Co. v. Long, 4 Cal.2d 547, 51 P.2d 73. Their failure so to do constituted a breach of the contract. The measure of damages for the breach of the contract in this respect is not the reasonable rental value of the equipment. Although there is no direct evidence on the point it appears by necessary implication that the royalty interests of plaintiff's assignor were valueless and that no actual damages were suffered, for approximately eight months before the present action was commenced the subleases were terminated and the premises repossessed because of the failure of the wells to produce oil in paying quantities. For the breach of the contract in this respect plaintiff is, however, entitled to recover at least nominal damages. Civ.Code, sec. 3360.

[6, 7] The appealing defendants contend that they were not joint adventurers with defendant Fisher as found by the trial court. Disregarding the conflicts and accepting as true the evidence most favorable to respondent, there is substantial evidence to support such finding as to appellant Day, who took an active part in the discussions leading up to the execution of the agreements upon which this action is based and actually represented himself to respondent's assignor as a partner in the drilling operations. On several occasions Day informed respondent's assignor that he was in charge of the issuance of the royalty interests and would see that the agreed interests were delivered as soon as possible. Such evidence is sufficient to support a finding that appellant Day was a partner by estoppel within the meaning of section 2410 of the Civil Code. Although it is true that estoppel must ordinarily be pleaded, respondent's failure to do so is not fatal, for the evidence upon which the estoppel is based was admitted without objection and the defect in the pleading was therefore waived. Chain v. Ehrman, 92 Cal.App. 334, 268 P. 438; Woody v. Security Trust & Savings Bank, 137 Cal.App. 29, 29 P.2d 898.

[8] There is no evidence of an express agreement of joint adventure or partnership as between appellant Johnson and his codefendants. His liability, if any, must therefore be predicated upon an estoppel. The evidence, however, is insufficient to support a finding that he was a joint adventurer or partner by estoppel. It does not appear that he ever represented himself to be a partner with Fisher and Day to plaintiff's assignor or any other person, or consented that another could represent him to be such, within the meaning of section 2410 of the Civil Code. His sole part in the transaction was to finance the drilling operations, for which he was to receive an agreed royalty interest. The fact that he paid bills which were submitted to him by Fisher and guaranteed the payment of other bills did not constitute him a partner by estoppel. Such conduct was entirely consistent with his agreement to finance the drilling. He was interested in the drilling and was present on the leases on numerous occasions but there is no evidence that he took part in the general management of such operations or in the hiring and firing of employees. We conclude therefore that the evidence is insufficient to support the finding that appellant Johnson was a joint adventurer or partner with Fisher and Day.

The judgment against the appealing defendants is reversed.

We concur: MOORE, P. J.; McCOMB, J.

* * *

44 Cal.App.2d 81

MACHADO v. SUPERIOR COURT IN AND FOR SAN LUIS OBISPO COUNTY.

Civ. 13033.

District Court of Appeal, Second District, Division 1, California.

April 7, 1941.

1. Appeal and error ⇐323(1)

Each party in a partition suit is an "adverse party" within the meaning of the Code in relation to appeals, and hence one of several defendants could not appeal from a judgment in favor of the plaintiff without making the other defendants parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Party".

2. Appeal and error ⇐612(1)

Where proffered reporter's transcript contained only a portion of the proceedings had on the motion to confirm or modify referees' report, and did not contain a full or sufficient record to enable a reviewing court to determine if any error were committed, trial court properly refused to certify transcript to be used on appeal, and could not be compelled to do so by writ of mandate.

3. Appeal and error ⚷612(1)

The trial judge is not required nor can he be compelled to certify a defective record to be used on appeal.

4. Appeal and error ⚷607(1)

On an appeal from an order it is possible to bring up a complete record under the alternative method in accordance with statute only in cases where all the evidence was documentary, or where a transcription of oral evidence may be secured. Code Civ. Proc. § 953a et seq.

5. Appeal and error ⚷612(3)

In authenticating evidentiary matter on appeal from an order under the alternative method, the judge's certificate must not only state that the evidence contained in the record on appeal was considered by him, but also that the record contains all evidentiary matter so considered, and when such authentication is impossible, an appellant must proceed by bill of exceptions unless he elects to bring up the "judgment roll" alone. Code Civ.Proc. § 953a et seq. Rules for Supreme Court and District Courts of Appeal, rule 29.

◆

Proceeding for writ of mandate by Domingo Machado against the Superior Court of the State of California, in and for the County of San Luis Obispo, to compel respondent to settle, allow, and certify a transcript to be used on appeal from a judgment rendered in a partition suit.

Alternative writ discharged, and peremptory writ denied.

Fred A. Shaeffer, of Santa Maria, for petitioner.

John H. Machado, of San Jose, and Nelson & Castro, of San Luis Obispo, for respondent.

WHITE, Justice.

Petitioner seeks a writ of mandate to compel the respondent superior court to settle, allow and certify a transcript to be used on appeal from a judgment rendered in a partition suit.

The action in question was commenced by one Roza Williams against several defendants, including petitioner herein, as owners in common of the real property involved. Also named as defendants were several parties who were alleged to be holders of certain liens upon the interests of some of the defendants in the lands in question. By its final judgment respondent court partitioned the real property and allotted and set apart in severalty to the respective owners their undivided interests therein, subject to the liens heretofore mentioned.

[1] Upon presentation of the reporter's transcript, the trial judge declined to certify it, for the reasons that the same allegedly contained "but a portion of said proceedings had on the motions to confirm or modify the referees' report, and does not contain a full or sufficient record to enable a reviewing court to determine if any error were committed". As a further ground for his refusal to certify the transcript, the judge of respondent court asserts that two of the lienholders, although real parties in interest, were not given notice as such lienholders of the time and place for the settlement of the transcript on appeal. It appears, however, that the main reason for the refusal of the judge to certify the transcript was because in taking his appeal petitioner herein, as a defendant in the partition suit, appealed from "a judgment in said action rendered in favor of the plaintiff and against the defendant Domingo Machado". In other words, the judge of respondent court contends that in a partition action all parties thereto are actors and adverse parties and are affected by a reversal or modification of the judgment, or any part thereof; and that therefore an appeal in such a case must be from the judgment against all the defendants and not from that part of the judgment which concerns the rights in the partitioned property only of the appellant. In this last-mentioned claim the judge of respondent court must be sustained.

Without doubt all persons, both plaintiffs and defendants, in a partition suit are actors as against each other, and each, therefore, is an "adverse party" within the meaning of the law in relation to appeals. The notice of appeal herein is directed to all defendants except the lienholders, and reads in substance as follows: "You and each of you will please take notice that Domingo Machado, one of the defendants in the above entitled action, hereby appeals to the District Court of Appeal of the State of California, Second Appellate District, from a judgment in said action rendered in favor of the plaintiff and against the defendant Domingo Machado and entered on the 19th day of October, 1940, in judgment book V, page 351 of the records of the Superior Court of the State of California, in and for the County of San Luis Obispo, and from the whole thereof." It is at once apparent from a reading of the notice of appeal that the phrase "and from the whole thereof" as contained in the notice refers solely and exclusively to the judgment only so far as it affects one of the defendants, namely, petitioner herein. All of the other defendants who claimed an interest in the property of necessity will be affected by a reversal or modification of the judgment from which the appeal was taken, and each is therefore an "adverse party" within the meaning of the pertinent provisions of the Code. Petersen v. Klitgaard, 103 Cal.App. 241, 284 P. 519; Senter v. De Bernal, 38 Cal. 637. Such being the rule, it follows that petitioner herein as appellant in the lower court cannot maintain his appeal as against any of his codefendants, because they have not been made parties to the appeal as they should have been, because a reversal or modification of the judgment in the partition action will of necessity affect them.

[2-5] There is a further ground upon which the refusal of the judge of respondent court to certify the transcript must be upheld. From respondent court's return to the alternative writ it appears and is uncontradicted that the proffered reporter's transcript contained only a portion of the proceedings had on the motion to confirm or modify the referees' report, and "does not contain a full or sufficient record to enable a reviewing court to determine if any error were committed". The trial judge is not required, nor can he be compelled, to certify a defective record. As was said by our Supreme Court in Wynecoop v. Superior Court, 17 Cal.2d 657, 111 P.2d 332: "It is apparent that the trial judge properly refused to certify the transcript on the grounds stated. In an appeal from an order it is possible to bring up a complete record under the alternative method, Code Civ.Proc., § 953a et seq., only in cases where all of the evidence was documentary or where a transcription of oral evidence may be secured. In authenticating the evidentiary matter on such an appeal, the certificate of the judge must state not only that the evidence contained in the record on appeal was used or considered by him in the determination of the matter appealed from, but also that the record contains all of the evidentiary matter so used or considered. When such authentication is impossible, an appellant must proceed by bill of exceptions unless he elects to bring up the 'judgment roll' alone. See Rule XXIX, Rules for Supreme Court and District Courts of Appeal; Charles v. City of Crescent City, 12 Cal.2d 241, 83 P.2d 34."

In view of the foregoing, consideration of other points raised becomes unnecessary.

The alternative writ is discharged and a peremptory writ of mandate is denied.

We concur: YORK, P. J.; DORAN, J.

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44 Cal.App.2d 47

HAMM v. SAN JOAQUIN & KINGS RIVER CANAL CO., Inc., et al.

FITTJE v. HAMM et al.

Civ. 6479, 6480.

District Court of Appeal, Third District, California.

April 5, 1941.

Rehearing Denied May 5, 1941.

Hearing Denied May 29, 1941

1. Automobiles 🔑201(8)

Motorist would be liable for negligence contributing to collision with approaching motorist who was not contributorily negligent, though driver of automobile approaching intersection from right was guilty of concurrent negligence.

2. Automobiles 🔑226(2)

Motorist who approached intersection with automobile under full control, on his proper side of the highway, and at reasonable and moderate rate of speed, was not barred by contributory negligence from recovering for injuries sustained in collision with automobile which was catapulted across highway by collision with third automobile, since motorist could not have reasonably anticipated the first collision nor have reasonably expected that automobile would be catapulted into the course of his own.

3. Automobiles ⚷244(10, 11)

In actions for injuries sustained in collision between approaching automobiles and third automobile which arrived on intersecting highway, evidence sustained recovery by one of approaching motorists and denial of recovery by other.

4. Trial ⚷2

Where separate cross-suits for damages growing out of the same automobile casualty were filed in the same court, and identical issues were involved, the court acquired jurisdiction in both cases and could consolidate the cases for trial, notwithstanding prior service of summons in the one case. Code Civ.Proc. § 416.

5. Appeal and error ⚷1042(1)

Where separate cross-suits for damages growing out of the same automobile casualty were filed in the same court, and the actions were consolidated for trial, at which all issues of both consolidated cases were presented, striking of cross-complaints was not prejudicial. Const. art. 6, § 4½.

6. Abatement and revival ⚷6

Action for injuries sustained in automobile collision was not abated merely because one of defendants in that cause subsequently filed in the same court a complaint involving the same collision and served his summons first. Code Civ.Proc. § 430.

7. Abatement and revival ⚷4

Abatement of an action will occur under statute only when there is another action pending between the same parties for the same cause. Code Civ.Proc. § 430.

8. Abatement and revival ⚷4

Abatement is recognized to prevent a multiplicity of suits and unnecessary vexatious litigation. Code Civ.Proc. § 430.

9. Abatement and revival ⚷9

Abatement does not necessarily lie with respect to cross-suits pending in the same court, where the relationship of the parties to the suits is reversed. Code Civ.Proc. § 430.

10. Appeal and error ⚷1170(6)

Where separate cross-suits for damages growing out of the same automobile casualty were filed in the same court, consolidation of the actions for trial was not prejudicial. Code Civ.Proc. § 416; Const. art. 6, § 4½.

11. Appeal and error ⚷930(2)

The District Court of Appeal could not presume that jury would deliberately disregard court's statement in presence of jury that neither party in automobile case would be permitted to prove that he did or did not carry insurance.

12. Appeal and error ⚷1170(6)

In actions for injuries sustained in collision between three automobiles at highway intersection, where court stated in presence of jury that neither party would be permitted to prove that he did or did not carry insurance and that there was no question of insurance in the case, eliciting from two of the motorists that they did not carry public liability insurance was not prejudicial though it created inference that third motorist was thus protected. Const. art. 6, § 4½.

13. Appeal and error ⚷216(1)

Parties who offered no instruction defining "prima facie evidence" could not complain of failure to define "prima facie evidence" in instruction that traversing blind intersection at speed in excess of 15 miles an hour is "prima facie evidence" of negligence. Vehicle Code, § 511, St.1937, p. 618.

14. Automobiles ⚷245(47)

In actions for injuries sustained in collision between three automobiles at highway intersection, whether view of motorist as he approached intersection was obstructed so as to require that he reduce speed to statutory maximum under such circumstances was for the jury. Vehicle Code, § 511, St. 1937, p. 618.

15. Appeal and error ⚷999(3)

Jury's implied finding that motorist's view was obstructed as he approached intersection so as to require that he reduce speed was binding on the District Court of Appeal. Vehicle Code, § 511, St.1937, p. 618.

16. Automobiles ⚷246(20)

In actions for injuries sustained in collision between three automobiles at highway intersection, instruction that approaching an intersection at a speed in excess of 15 miles an hour with view obstructed is prima facie evidence of negligence was properly given under the evidence. Vehicle Code, § 511, St. 1937, p. 618.

17. Trial ⚷260(8)

In actions for injuries sustained in collision between three automobiles at highway intersection, where jury was clearly instructed on burden of proof, and the terms negli-

gence, contributory negligence and proximate cause of injury as employed in the instructions were fully defined, refusal to instruct that traversing a blind intersection at speed in excess of 15 miles an hour is not negligence as a matter of law was not reversible error. Vehicle Code, § 513, St.1935, p. 177.

18. Appeal and error ⚷1068(3)

Where absence of instruction on brakes would not have warranted jury in returning a different verdict, giving of such instruction was not ground for reversal, though there was no contention or evidence that brakes on automobile were defective.

◆

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Actions, consolidated for trial, by Lloyd Hamm against the San Joaquin & Kings River Canal Company, Inc., and others and by Alwin Fittje against J. L. Hamm and others, to recover damages arising out of an automobile collision. From a judgment in favor of plaintiff in the first case, the defendants appeal. From judgment in favor of the defendants in the second case, plaintiff appeals.

Affirmed.

C. Ray Robinson, W. Eugene Craven, and Willard B. Treadwell, all of Merced, and Cooley, Crowley & Supple, of San Francisco, for appellants.

F. M. Ostrander, of Merced, L. M. Linneman, of Dos Palos, and Hugh H. Griswold, of Merced, for respondents.

THOMPSON, Justice.

A collision occurred at the intersection of two highways in Merced county, between three automobiles operated respectively by Messrs. Hamm, Fittje and Yoest. Cross-suits, based on that accident, were filed by two of the participants in the same court. For the purpose of identity we shall refer to the actions as the Hamm case and the Fittje suit. A summons was first served in the Fittje suit, which was last instituted. Mr. Fittje moved the court to dismiss the Hamm complaint for lack of jurisdiction. That motion was finally denied. The cases were consolidated and tried together with the aid of a jury. A verdict of $20,000 was returned in favor of the plaintiff in the Hamm case. A separate verdict was returned against the plaintiff in the Fittje suit. Judgments were rendered in accordance with the verdicts. From those judgments the appeals were perfected.

The accident which is involved in these appeals occurred one mile north of Dos Palos in Merced county, in broad daylight, at an intersection of Cornelia avenue with highway number 33. The state highway extends north and south, at the point where the casualty occurred. It is paved with concrete sixteen feet in width. A white line is painted along the center of the paved portion. The highway is sixty feet in width between the property lines. Cornelia avenue crosses the highway at a right angle, upon substantially level ground. It has an oiled surface sixteen feet in width. Its right of way is also sixty feet in width between property lines. A man by the name of Thompson owns the premises at the northeast corner of the intersection of the roads in question. Upon that property there is a dwelling house and outbuildings. Along the southerly line, adjacent to Cornelia avenue, there are several trees which, to some extent, obstruct the view to the north, of one traveling along that avenue. Southeast of the intersection there is an open grain field adjacent to the roadways, affording motorists on either highway a clear and unobstructed view across that corner, except that there was then deposited along the easterly border of the state highway a pile of gravel to be used for surfacing the roadway, three and a half feet in height and 150 feet in length, beginning at a point thirty feet south of the intersection. There was a heavy growth of weeds along the top of this pile of gravel. There is evidence this gravel obstructed the view of highway motorists toward the east. In traveling along the state highway one has a clear view either north or south of the intersection for a distance of a mile or more.

The accident occurred at 5:30 p.m. of June 10, 1938. Both Mr. Fittje and Mr. Yoest were employed by the Canal Company. They were engaged in that employment just prior to the accident. Mr. Fittje was driving his Chevrolet car northerly along the state highway at a speed of forty-five miles an hour. Mr. Hamm was driving his Ford "pick-up" machine southerly along the same highway at a speed of about thirty-five miles an hour. Mr. Yoest was operating his Chevrolet automobile westerly along Cornelia avenue at a speed of thirty or forty miles an hour. There was then no other traffic in that vicinity. As Mr. Hamm approached the intersection he observed the Fittje car 150 or 200 feet south of the crossing, coming toward him on the proper side of the highway. He claimed to have looked but failed to see the Yoest machine approaching from the east on Cornelia avenue. It will be recalled there are buildings and trees on the Thompson premises at the northeast corner of the intersection which may have obstructed his view to some extent. Yoest testified that he looked to the south as he approached the highway and saw no machine; that he reduced the speed of his car and stopped a few feet from the easterly line of the highway; that he saw Mr. Hamm 400 feet north of the intersection, driving south on the highway. Mr. Yoest said that, after he stopped his machine, he again looked south and saw no approaching vehicle. Mr. Campbell, a constable, who lives in that vicinity, testified that he experimented with the use of an automobile parked on Cornelia avenue eight feet east of the eastern line of the state highway, and that from his position seated in the car he was able to see a distance of 250 feet south along the highway but beyond that point his vision of the highway was obstructed by the pile of gravel and the weeds which grew along its top. That evidence was corroborated by another witness. It is obvious that the farther east from the state highway Mr. Yoest's machine was parked, the more limited would be his view of the roadway. After stopping and observing no car approaching from the south, Mr. Yoest resumed his course, traveling at the rate of about ten miles an hour. His machine was struck by the automobile of Mr. Fittje, before he reached the center line of the highway.

[1] Mr. Fittje testified that he was driving north along the highway at a speed of forty-five miles an hour; that he plainly saw the Hamm machine approaching from the north on its proper side of the highway; that he also observed the Yoest car traveling westerly along Cornelia avenue at a speed of about fifty miles an hour; that he never lost sight of the Yoest machine until the first collision occurred; he saw the Yoest car reduce its speed and stop at the intersection; he said he thought Mr. Yoest would not attempt to cross the highway ahead of his machine. Mr. Fittje claims he retarded the speed of his vehicle, but admits that he did not apply his brakes nor sound his horn to give warning of his presence. It is reasonable to assume he was traveling very rapidly. He saw the Yoest car continuously and observed the driver's conduct. As Yoest started his machine to resume his journey, Fittje should have observed and appreciated the danger of the emergency, yet he failed to apply his brakes or sound his horn. A collision of the Yoest and Fittje machines occurred in the northeast portion of the intersection. There is a conflict as to whether Yoest's car struck the Fittje machine or vice versa. It seems immaterial what the fact may be in that regard. If Fittje was guilty of negligence which contributed to the second collision and Hamm was free from contributory negligence, it would not matter whether Yoest was also guilty of concurrent negligence. Fittje would still be liable for damages. The Fittje car was diverted by the first collision to the western side of the highway and ran directly in the course of the Hamm car. The second collision occurred on the west side of the highway, at a point about 40 feet northerly from the north line of Cornelia avenue. Both of the last-mentioned machines were badly demolished. The Fittje car landed at the extreme western edge of the state highway. As a result of the impact both Mr. Fittje and Mr. Hamm were rendered unconscious.

[2] It seems quite evident that Mr. Hamm was guilty of no contributory negligence. He was operating his machine under full control, on his proper side of the highway, at a reasonable and moderate rate of speed. He could not have reasonably anticipated the collision between the Fittje and Yoest machines, nor could he have reasonably expected the Fittje car to have been suddenly catapulted across the highway into the course of his own automobile. Mr. Hamm was seriously and permanently injured. The jury returned a verdict of $20,000 for plaintiff in the Hamm case. A separate verdict was returned against plaintiff in the Fittje case. Judgments were rendered in accordance with those verdicts. It is not contended the amount of the verdict in Mr. Hamm's favor is excessive.

The appellants assert the verdicts and judgments are not supported by the evidence; that the court was without jurisdiction to try the Hamm case; that the court erred in giving to the jury and in refusing to give certain instructions, and that the attorney for Mr. Hamm was guilty of prejudicial misconduct in wrongfully informing the jury that his client did not carry liability insurance on his automobile.

[3] We are of the opinion the judgments in both cases are adequately supported by the evidence. There is a conflict of evidence on many important issues, but there is substantial proof to support the judgments. We have not attempted to recite the evidence. We have merely told the story supported by the record, which is favorable to the theory upon which the judgments are evidently founded. The effect of the verdict and judgment in the Fittje case is to relieve both Mr. Hamm and Mr. Yoest from the charge of negligence. There may be some reason to doubt Mr. Yoest's freedom from negligence, but there is substantially no evidence that Mr. Hamm performed or refrained from doing anything in propelling or managing his machine prior to the accident, which a reasonably prudent person would have done or omitted to perform under the same circumstances. Likewise, the great weight of evidence in the Hamm case indicates that the plaintiff was free from contributory negligence, and that Fittje's negligence, which caused the first collision, also resulted in the subsequent collision with the automobile of Mr. Hamm. Assuming that Fittje was guilty of negligence which caused the first collision, and that Hamm was free from contributory negligence, it is immaterial that Yoest may have also been guilty of concurrent negligence which contributed to the second collision. Under such circumstances, Fittje would still be liable for damages incident thereto.

[4, 5] The appellants contend that the judgment for plaintiff Hamm is void for the reason that the court lacked jurisdiction to try his cause since the court first acquired jurisdiction of the parties in the Fittje case on account of prior service of summons therein. There is no merit in that contention. Separate cross-suits for damages growing out of the same automobile casualty were filed in the same court by the appellants and the respondent, Mr. Hamm. The court acquired jurisdiction in both cases. The actions were consolidated for trial. The appellants were deprived of no opportunity to present every issue upon which they rely in both cases. Every material issue relied upon was tried and determined.

For the purpose of considering this question of alleged lack of jurisdiction, in order to identify the actions, we shall refer to them by naming the plaintiffs in each separate case as the Hamm case or the Fittje case. The facts upon which the jurisdiction of the court in the Hamm case is challenged are as follows: June 29, 1938, Mr. Hamm filed his suit in Merced county against the appellants, but failed to serve summons therein until October 28, 1938. October 4, 1938, Fittje filed his suit against Hamm, Maron and Yoest, in the same county, serving his summons on the defendants therein prior to October 12th. February 17, 1939, Hamm and Maron filed an answer to the Fittje complaint, but, assuming their original complaint presented all necessary affirmative demands, they did not then file a cross-complaint in the Fittje action. By leave of court subsequently obtained, Hamm filed a cross-complaint to the Fittje pleading May 11, 1939. That cross-complaint was answered by Fittje May 19, 1939. February 23, 1939, the appellants filed their answer and cross-complaint in the Hamm case. Hamm answered that cross-complaint March 6th of the same year.

On motion of appellants the court dismissed the Hamm case May 15, 1939, on the theory that, having first acquired jurisdiction in the Fittje case under section 416 of the Code of Civil Procedure, because the summons was first served in that case, the court therefore lacked jurisdiction in the Hamm case. Upon due notice and motion by the respondent, the order dismissing the Hamm case was set aside, and it was reinstated. Both cases were thereupon consolidated for trial. At the trial on February 7, 1940, appellants renewed their motion to dismiss the Hamm case for lack of jurisdiction. That motion was denied. As a result of a controversy over the effect of the issues presented by the two consolidated cases and the cross-complaints therein, the court struck from the record the cross-complaints in both cases, and directed that the causes be tried together upon the two complaints and the answers thereto. The court favored the appellants by granting them the opening and closing of the arguments. The causes were tried by a jury which returned a verdict in the Hamm case against the defendants. A separate verdict was also returned in the Fittje case in favor of Mr.

Hamm. Judgment was rendered in accordance with the verdicts.

In support of their contention that the judgment for the respondent Hamm is void for lack of jurisdiction the appellants rely on section 416 of the Code of Civil Procedure, which provides in part: "From the time of the service of the summons and of a copy of the complaint in a civil action, * * * the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings."

There is nothing in the language of that section in conflict with the theory that the Merced superior court did not also acquire jurisdiction of the same parties, and retain control of all the subsequent proceedings in both cross suits involving the same automobile casualty, which were instituted and consolidated for trial in that same court. There was no conflict of jurisdiction between different courts. The same jury and judge tried and determined all issues of both cases at the same time. It is true that the court is deemed to acquire jurisdiction of the parties at the time of the service of the summons and complaint. That does not mean the same court may not subsequently acquire jurisdiction of the same parties in a cross suit involving the identical issue so as to consolidate the cases and determine the issues at one time. The court might have properly left in the record the cross-complaints, but neither party was prejudiced by striking them from the record since all issues of both consolidated cases were presented and determined on the respective complaints and answers. At most, the ruling of the court resulted in nothing more than an error in either pleading or procedure. Peak v. Key System Transit Co., 88 Cal.App. 354, 263 P. 578. Under article VI, section 4½ of the Constitution that does not constitute reversible error.

The case of Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774, upon which the appellants rely, is not in conflict with what we have previously said regarding the alleged lack of jurisdiction. That case arose over a conflict of jurisdiction between the courts of two different counties in each of which counties suits between the identical parties involving the same automobile casualty were filed. One suit was commenced in Merced county and the other was instituted in Fresno county. It was there properly held in accordance with section 416 of the Code of Civil Procedure that the county in which the summons and complaint were first served was entitled to retain and control all subsequent proceedings in the litigation. The reason assigned for that ruling was that "this will work no injustice to them while to permit them to proceed in an independent action [in another county] will lead to unnecessary duplication and confusion, with resulting injustice to some of the parties". That situation does not exist in the present case where both actions are pending in the same court, and they are consolidated for trial and the court retains, not only the jurisdiction, but the control of all proceedings in both cases. The last-mentioned procedure is not in violation of section 416 of the Code of Civil Procedure.

[6-9] This case really presents a question of the application of the doctrine of abatement. Was the Hamm case abated merely because one of the defendants in that cause subsequently filed in the same court a complaint involving the same cause, and served his summons first? We think not. Abatement of an action will occur under section 430 of the Code of Civil Procedure only when there is another action pending between the same parties for the same cause. It is recognized to prevent a multiplicity of suits and unnecessary vexatious litigation. Lindsay v. Stewart, 72 Cal. 540, 14 P. 516; 1 Cal.Jur. 23, § 4. It has been held that abatement will not lie unless the suits are founded on the same issues and the plaintiffs are the same in both actions. Ayres v. Bensley, 32 Cal. 620, 630; Coubrough v. Adams, 70 Cal. 374, 11 P. 634; 1 Cal.Jur. 32, § 12. Abatement does not lie with respect to cross suits pending in the same court where the relationship of the parties to the suits is reversed. In 1 Corpus Juris, page 82, § 107, it is said in that regard:

> "The general rule is to the effect that the plea of a prior action pending applies only where plaintiff in both suits is the same person, and both are commenced by himself, and not to cases in which there are cross suits by a plaintiff in one suit who is defendant in the other." 1 C.J.S., Abatement and Revival, § 61.

[10] Neither prejudice to the appellants nor reversible error occurred in trying the consolidated actions together as the court did in the present cases.

[11, 12] The appellants contend that misconduct and reversible error occurred when the attorneys for respondents Hamm

and Yoest elicited evidence at the trial that neither of them carried liability insurance on their respective automobiles, which left the inference that there was insurance on the car which was operated by the appellant Fittje.

It appears that both Yoest and Fittje were employed by the San Joaquin and Kings River Canal and Irrigation Company. Each of them owned the machine which he drove at the time of the accident. Upon examination of the prospective jurors on their voir dire they were properly asked if they owned stock in any insurance company. During the trial of the case Mr. Yoest was asked, and answered the question without objection, that he carried no insurance on his automobile. The alleged prejudicial misconduct occurred later when Mr. Hamm was being examined by his attorney, as follows:

"Q. You were the owner of that car, I believe, were you not? A. I was, yes, sir.

"Q. And you carried no public liability insurance on it? A. I didn't have—

"Mr. Robinson: Just a second, object to that question as incompetent, irrelevant and immaterial and assign the asking of it as misconduct and ask for a mistrial at this time.

"The Court: Well, the objection will be sustained.

"Mr. Ostrander: If your Honor please, there were certain questions asked by Mr. Robinson of this jury which left the inference that there was some insurance either on the part of Mr. Hamm or Mr. Maron and we expect to rebut that inference by asking them both and showing there was none.

"The Court: Neither one of you will be permitted to show they had insurance or did not have; so far as this jury is concerned, there is no insurance in this case, no insurance company is a party to this case. It is simply to settle the question between the individuals.

"Mr. Robinson: I want to assign the remarks of counsel as misconduct, your Honor, and ask at this time for a mistrial upon that ground.

"The Court: The declaration for a mistrial will be denied."

We think the challenged question was improper and that it should not have been asked. It will be observed the witness did not complete his answer. We believe the asking of the question did not constitute reversible error under the circumstances of this case, chiefly because it appears from the record there was no miscarriage of justice in finding that Mr. Hamm, from whom this objectionable question was asked, was free from negligence and that a judgment for damages against him was properly refused. The present case presents the reverse of the usual situation with relation to the question of wrongfully eliciting evidence of insurance carried by a defendant who is charged with negligently operating his automobile. Generally the error which is criticized in numerous authorities occurred in proving that the defendants carried insurance on their machines on the theory that the jury might therefore wrongfully find verdicts against them because the judgments would ultimately be paid by insurance companies which were not parties to the actions. It is true that Mr. Hamm was also a defendant in one of these consolidated cases being tried. Ordinarily, the evil would be equally harmful, where both parties to such litigation appear as defendants in opposing suits regarding the same automobile casualty, to prove that one of the defendants did not carry insurance, if it also appeared that the other defendant was insured. It is true that Mr. Fittje was not asked if he carried insurance. It is asserted that proof of the fact that neither Hamm nor Yoest carried insurance left the clear inference that Mr. Fittje did carry insurance. We believe the challenged question was improperly asked, and the statement of counsel for Mr. Hamm was made without justification. Nevertheless, the court sustained the objection to the question and clearly stated in the presence of the jury that neither party would be permitted to prove that he did or did not carry insurance. The court further said "there is no [question of] insurance in this case". The jurors must have known from that statement that it was improper for them to consider the question of insurance. We may not presume they would deliberately disregard that declaration. But, acknowledging the error of asking that improper question, and conceding that the jury would thereby obtain the information that Mr. Hamm was not insured, we are of the opinion the incident does not constitute reversible error for the reason that there was not a miscarriage of justice in the rendering of judgment in this case. Art. VI, § 4½, Const. of California.

[13-16] We are of the opinion the jury was fully and fairly instructed upon every

issue which was involved in the trial, and that no prejudicial error occurred in giving to the jury or refusing to give instructions. The appellants complain chiefly of an instruction given at the request of Mr. Hamm, which is couched in the language of paragraph four of section 511 of the Vehicle Code, St.1937, p. 618, as it then existed. It merely asserted that it constitutes prima facie evidence of negligence to propel a vehicle on a public highway at a speed in excess of fifteen miles an hour "when traversing any intersection of highways", if obstructions exist within one hundred feet of the crossing, which prevents a clear view of the traffic on the intersected highway. The term "prima facie evidence" was not defined. The appellants may not complain of the omission to specifically define the term "prima facie evidence" for the reason that they offered no such instruction to the court. The preceding instruction was applicable to the facts of these cases and it was therefore properly given to the jury. It appears without conflict that Mr. Yoest stopped his machine before he entered the highway from Cornelia avenue, as required by sections 552 and 577 of the Vehicle Code, St.1935, pp. 187, 190. The jury was properly instructed with respect to the last-mentioned sections. There is substantial evidence that the gravel pile, which extended southerly from the intersection a distance of 150 feet along the easterly border of the state highway, obstructed the view of Yoest's approach on Cornelia avenue for more than 100 feet and that Mr. Fittje entered the intersection at a speed far in excess of fifteen miles an hour, without applying his brakes or sounding his horn. It is true that he testified his view of Mr. Yoest's automobile was never obstructed. But other witnesses testified that his view of an automobile approaching on Cornelia avenue would be effectively obstructed. That issue presented a question of fact for the determination of the jury. We are bound by the implied finding of the jury in that regard. All of the necessary elements which rendered section 511 of the Vehicle Code applicable in these cases were sufficiently established by substantial proof. The challenged instruction might have been more explicit in applying the principle of prima facie evidence, but we are convinced the jury could not have been misled thereby.

In the case of Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 22 P.2d 554, 555, upon which the appellants rely, it does not appear that the approach to the intersection where the accident occurred was obstructed so as to conceal the view. Moreover, that case appears to have been reversed on account of the giving of a similar instruction, because the person involved in the accident failed to stop at the boulevard before entering the intersection. The court says in that regard: "The evidence introduced by plaintiffs, as well as that offered by defendant, showed that Hamilton failed to stop before entering the boulevard, that he entered the intersection while driving at a speed of thirty miles an hour, and crashed into the side of the stage."

The Gritsch case, therefore, is readily distinguishable from the cases at bar.

[17] The appellants assign the refusal to give a proffered instruction based on section 513 of the Vehicle Code, St.1935, p. 177, as prejudicial. That section provides that the excess speed in traversing a "blind" intersection, beyond the prima facie rate of fifteen miles an hour, "shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence". That proffered instruction is a correct declaration of the law, and might well have been given to the jury. But we think the refusal to give that instruction does not constitute reversible error, under the circumstances of this case. The jury was clearly instructed that the burden was on Mr. Hamm to prove that his injuries were sustained as the proximate result of the negligence of Mr. Fittje, and that Hamm could not recover if it appeared that either his conduct or that of Mr. Yoest contributed to the accident in the slightest degree. The terms "negligence", "contributory negligence" and "proximate cause of injury" were fully defined.

[18] Finally, the appellants assign as prejudicial error the giving of an instruction to the effect that it is unlawful to operate a motor vehicle on a public highway at a speed in excess of thirty miles an hour, unless it is equipped with brakes by means of which it may be stopped within a distance of 83.3 feet. It is contended by the appellants this instruction is not applicable to the issues of these cases for the reason that there is no evidence that the brakes of Mr. Fittje's machine were defective, and because it was not contended at the trial

that they were defective. That claim is true. There is absolutely no evidence that the brakes of his car were defective. Mr. Fittje admitted that he did not apply his brakes or attempt to stop his car before the collisions occurred. It must be conceded the last-mentioned instruction was inapplicable, but we are unable to see how it could have been prejudicial, or that the absence of that instruction would have warranted the jury in returning a different verdict. It is a well-established rule that the giving of an instruction upon a question regarding which there is no evidence in the record will not justify a reversal of the judgment, even though the instruction is inapplicable, unless it appears that it was likely to mislead the jury or prejudice the appellant. Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855; Estate of Clark, 180 Cal. 395, 398, 181 P. 639; 2 Cal.Jur. 1027, § 611.

We are persuaded there was no miscarriage of justice in the present case.

The judgments are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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44 Cal.App.2d 131

SMETHERHAM v. LAUNDRY WORKERS' UNION, LOCAL NO. 75, et al.

Civ. 6537.

District Court of Appeal, Third District, California.

April 9, 1941.

1. Mandamus 🔑125

Mandamus is a proper proceeding to compel the reinstatement to membership of one who has been illegally expelled from a duly organized association such as a trade union.

2. Trade unions 🔑4

Damages may be awarded to a member who has been illegally expelled from an association such as a trade union for wages lost on account of having been deprived of the opportunity to work or to obtain employment.

3. Trade unions 🔑5

The executive board of an association such as a trade union acts in a quasi judicial capacity in administering the disciplinary laws and rules of the association.

4. Trade unions 🔑4

The courts will not interfere with the disciplining or expelling of members of association such as trade union, where the action is taken in good faith and in accordance with association's adopted laws and rules, but if decision of tribunal is not authorized by its by-laws, a court may review ruling of the board and direct reinstatement of member.

5. Trade unions 🔑4

Where member of laundry workers' union was not served with a copy of charges against her by the executive board as required by the by-laws of the union, member by attending proceedings before the board and participating therein "waived" right to be served with copy of the charges.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Trade unions 🔑4

Under laundry workers' union by-law which did not purport to regulate the personal conduct of members in any matter which did not affect their interests with relation to organization or their employment, a member who engaged in a personal conflict with another member of union, which conflict did not affect the other member's employment in laundry nor impair her standing in organization, and had nothing to do with her business relations, could not properly be expelled by union.

7. Trade unions 🔑4

The constitution and by-laws of a voluntary association, such as a trade union, is the measure of the authority conferred upon the organization to discipline, suspend, or expel its members.

8. Trade unions 🔑4

No member of a voluntary association, such as a trade union, can be expelled and deprived of his interests in the property of the association except for violation of some provision of the law of the association creating the offense charged and prescribing expulsion as a penalty, or in the absence of such provision for offenses of an infamous character indictable at common law or for offenses against a member's duty to the organization.

9. Trade unions ⇐4

A member of a voluntary association, such as a trade union, may be expelled for violation of a law of the association which provides for expulsion.

10. Trade unions ⇐3

Any uncertainty in construing by-law of laundry workers' union must be considered in the light of the intention of the parties as determined from a consideration of the language employed and the subject matter of the by-law.

11. Trade unions ⇐3

Under laundry workers' union by-law that no member shall injure the interests of another member by undermining him or her in wages or in any other manner by which the interests of the other may be placed in jeopardy, and providing for expulsion for violation of the law, objectionable conduct to come within the provision must be directed to the injury of the member as an employee, and any physical or mental injury which is not intended or calculated to harm a member in his employment cannot be considered a violation.

12. Trade unions ⇐4

A construction of a contract existing between members and trade union by virtue of by-laws and constitution which would make the contract unusual or extraordinary is to be disregarded if the contract may reasonably be subject to a construction which is fair and just.

13. Trade unions ⇐4

It is presumed that the parties intended that a contract between members and laundry workers' union existing by virtue of provisions of by-laws and constitution, to be reasonably construed.

14. Action ⇐63

"Laches" is founded principally upon the equitable maxims "he who seeks equity must do equity", "he who comes into equity must come with clean hands" and "the laws serve the vigilant and not those who sleep upon their rights", and the propriety of the application of the rules depends upon the conduct and situations of all of the affected parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

15. Action ⇐63

Delay in the enforcement of a right brought about by the conduct of adverse party does not constitute "laches" barring action.

16. Mandamus ⇐143(2)

Where member was wrongfully discharged from local laundry workers' union, and appeal to higher authorities in the union was not determined for a year or more after which the member instituted mandamus proceeding, member was not barred by "laches" from maintaining the action on ground that had she brought her action promptly damages assessable against the defendant would have been minimized.

17. Master and servant ⇐42(1)

Generally, it is the duty of an employee who has been wrongfully discharged before his term of service has expired to seek other employment and thus diminish the damages sustained by him.

18. Master and servant ⇐341

Rule that an employee who has been wrongfully discharged before his term of service has expired must seek other employment and diminish damages sustained by him applies where the employee sues a trade union for wrongfully bringing about his discharge.

19. Master and servant ⇐42(1)

Generally, an employee who is wrongfully discharged is not obliged to seek or to accept other employment of a different or inferior kind in order to mitigate damages.

20. Master and servant ⇐41(1)

Contract price is the correct measure of damages to which an employee wrongfully discharged before his term of service has expired is entitled if there is no claim made that the employee could have obtained other employment.

21. Trade unions ⇐4

Where member of laundry workers' union was wrongfully expelled from the union as result of which she lost position, and member thereafter obtained employment in another laundry but left position because the wages were too low, member was entitled to recover from the union the amount which she would have earned in original employment less the amount which she would have earned had she continued employment in second laundry.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Mandamus proceeding by Josie Smetherham against the Laundry Workers' Union, Local No. 75, and others to compel reinstatement of petitioner to membership in defendant union and to recover for loss of wages. From a judgment for the petitioner, defendants appeal.

Affirmed.

J. M. Inman and E. Richard Vaughn, both of Sacramento, for appellants.

Sumner Mering, of Sacramento, for respondent.

THOMPSON, Justice.

This is an appeal from a writ of mandate directing the reinstatement of the petitioner to membership in a laundry workers' union of Sacramento on the ground that she was illegally expelled and awarding damages against the union for loss of wages amounting to $1,761.60.

The Laundry Workers' Union, Local No. 75, is an unincorporated association at Sacramento, auxiliary to the Laundry Workers' International Union. The objects of the organization, expressed in the constitution of the International Union, are, among others, "to cooperate in every movement which tends to benefit the organization, * * * to * * * perfect an impregnable labor organization; to improve the industry by increasing the efficiency of the service and creating a feeling of confidence and good will between employer and employee." For many years, the petitioner, Josie Smetherham, has been a member in good standing of the local laundry union. She was employed in a Sacramento laundry at wages averaging $23 per week. Mrs. Dorothy Burrus was a member of the same local union and she was also employed in the laundry where the petitioner worked. A quarrel arose between the petitioner and Mrs. Burrus over personal affairs. It culminated in a physical conflict between them at the laundry during working hours. Blows were exchanged. The glasses of Mrs. Burrus were knocked off and broken, but no personal injury resulted to either party. A charge of battery was filed against the petitioner, but it was subsequently dismissed. Thereafter, Mrs. Burrus filed written charges with the executive board of the local union in the following language: "I, Dorothy Burrus, herewith prefer charges of assault and battery against Josie Smetherham, with deliberate intent to injure me and for mental abuse, caused by same Josie Smetherham through falsehoods told me after the assault."

Josie Smetherham was not furnished a copy of the charges as required by article VII, section 2 of the by-laws, but she attended the hearing before the board and participated in the proceeding, thereby waiving her objection to a lack of notice. On August 13, 1939, the executive board, sitting in a quasi-judicial capacity, heard the charges, and recommended that: "Josie Smetherham be expelled from Local Union No. 75 for assaulting and abusing one of our fellow members, namely Dorothy Burrus."

Subsequently the recommendation of the local union was approved and adopted by a divided vote of the members of the organization. On August 20, 1939, the petitioner was notified by the union that she "had been expelled from local No. 75, * * for conduct unbecoming a member of our organization, the charges having been assault and battery".

The petitioner was further informed that no member of the local union would thereafter be permitted to work with her during the time she was in bad standing.

An appeal to the Laundry Workers' International Union, which was not determined for a year or more, resulted in affirmance by that organization. This petition for a writ of mandamus was then filed in the superior court of Sacramento county. The cause was heard upon the testimony which was adduced at the hearing before the executive board of the local union. That evidence is presented to this court in a settled bill of exceptions. The court adopted findings in accordance with the facts which we have previously recited, and determined that the petitioner had been illegally expelled from the union, for the reason that she was tried by the executive board, found guilty and expelled from membership for a personal offense of which the board had no jurisdiction under the by-laws or constitution of the organization. It was further found that the petitioner was damaged on account of said illegal action of the board, in the loss of wages during the time she was unable to secure other employment, in the aggregate sum of $1,761.60. A writ of mandamus was thereupon issued, directing the Laundry Workers' Union, Local No. 75, and its officers, to promptly reinstate the petitioner to membership in that organization, in full standing. The petitioner was also awarded judgment for damages against the local union No. 75, only, for the sum of $1,761.-60. From that judgment this appeal was perfected.

[1-4] Mandamus is a proper proceeding by means of which to compel the reinstatement to membership of one who has been illegally expelled from a duly-organized association. 63 C.J. 691, sec. 59; 4 Am.Jur. 474, sec. 29; 31 Am.Jur. 865, sec. 69. Damages may also be awarded to one who has been illegally expelled from such an organization for wages lost on account of having been deprived of the opportunity to work or to obtain employment. Greenwood v. Building Trades Council of Sacramento, 71 Cal.App. 159, 171, 233 P. 823; 63 C.J. 691, sec. 60. In hearing and determining charges against a member of the organization, the executive board acts in a quasi-judicial capacity in administering the disciplinary laws and rules of the association. McConville v. Milk Wagon Drivers' Union, 106 Cal.App. 696, 289 P. 852. It is true that courts will not interfere with the disciplining or expelling of members of such associations where the action is taken in good faith and in accordance with its adopted laws and rules. But if the decision of the tribunal is contrary to its laws or rules, or it is not authorized by the by-laws of the association, a court may review the ruling of the board and direct the reinstatement of the member. Sweetman v. Barrows, 263 Mass. 349, 161 N.E. 272, 62 A.L.R. 311; Most Worshipful United Grand Lodge, etc., v. Lee, 128 Md. 42, 96 A. 872, Ann.Cas.1918E, 1174; 25 R.C.L. 57, sec. 14.

[5] In the present proceeding, the petitioner may not complain of a failure on the part of the executive board to serve her with a copy of the charges as required by the by-laws, for the reason that she attended the proceedings before the board and participated therein and thereby waived that right. 63 C.J. 687, sec. 56.

The by-law upon which the organization relies to support its action in excluding the petitioner from membership is found in section 2 of article VI of the regularly-adopted by-laws of Laundry Workers' Union, Local No. 75. It reads: "No member shall injure the interests of another member by undermining him or her in wages, or in any other willful manner, by which the interests of the other may be placed in jeopardy. Any member found guilty of such conduct shall be subject to fine, suspension, or expulsion as the Union may direct."

[6, 7] We are satisfied the petitioner was wrongfully expelled as a member of the organization for the reason that she engaged in a personal conflict with another member of the association. Her conduct did not tend to undermine or injure the interests or standing of Mrs. Burrus in the laundry union or with her employer. It is apparent the foregoing by-law does not purport to regulate the personal conduct of members of the union in any manner which does not affect their interests with relation to the organization or their employment. The conflict which is involved in this proceeding did not affect Mrs. Burrus' employment in the laundry nor did it impair her standing in the organization. It had nothing to do with her business relations. The constitution and by-laws of a voluntary association is the measure of the authority conferred upon the organization to discipline, suspend or expel its members. The provisions of the constitution and by-laws become the contract between the organization and its members, limiting the power to regulate the conduct of its members. Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400.

In determining that the petitioner was wrongfully expelled as a member of the organization; that she is entitled to be reinstated and that she is entitled to recover judgment from the amount of wages which she lost on that account, Honorable Dal M. Lemmon, the learned judge of the trial court, rendered a well-considered opinion which we adopt in part as the decision of this court, as follows:

[8] "No member can be expelled and thus deprived of his interest in the property of the association, except for violation of some provision of the law of the association creating the offense charged and prescribing expulsion as a penalty, or, in the absence of such provision, for offenses of an infamous character indictable at common law, or for offenses against the member's duty to the organization. 4 Am.Jur. 469. The offense here was not of the infamous character indictable at common law, named in the rule. Nor can it be maintained that it was against the member's duty to the organization. The most that can be said is that the offense was

against an individual member rather than against the association.

[9] "If the expulsion is to be sustained it must therefore find basis in the laws of the association. A member may be expelled for violation of a law of the association which provides for expulsion. 7 C.J.S. [Associations, § 25] 60.

[10-13] "Defendants argue that the charge against the plaintiff comes within the inhibitions of the following provision of the union's constitution and by-laws: '* * *' The question depends upon what is meant by the word 'interests' of a member. Any uncertainty which exists must be considered in the light of the intention of the parties and that intention must be determined from a consideration of the language employed and the subject-matter of the by-laws. Obviously the words relate to employment and working conditions. The objectionable conduct to come within this provision must be directed to the injury of the member as an employee. Any physical or mental injury which is not intended or calculated to harm a member in his employment cannot be considered a violation of this section. To hold otherwise one must read into the contract something beyond the reasonable and proper construction thereof. Where one construction would make the contract unusual or extraordinary, courts are to disregard such construction if the contract may reasonably be subject to a construction which is fair and just. Indeed it must be presumed that the parties intended the contract to be reasonably construed. Hettinger v. Thiele, 15 Cal.App. 1, 113 P. 121.

"Upon the defendant's motion the court reopened this case after submission and permitted defendants to present certain testimony which had been given before the Executive Committee. This additional testimony was to the effect that plaintiff had stated after the difficulty between her and Mrs. Burrus that the latter was mentally unbalanced and that her husband had endeavored to have her confined in an asylum. What has been stated herein with reference to the physical injuries apply to this further testimony. In the absence of some showing that the conduct has a reasonable tendency to substantially injure a fellow member's employment, the court must conclude that this section has no bearing.

"It is not necessary to consider closely whether circumstances have been shown which amount to laches on the part of the plaintiff. The change in the conditions and relative positions of the parties upon which defendants rely relate to the damages which plaintiff claims to have sustained. Had she brought her action promptly after her cause of action accrued, it is claimed that the damages assessable against defendants in case plaintiff prevailed would have been minimized. Assuming but not deciding, that this is sufficient factual basis for invoking the doctrine, this defense must fall because it would be inequitable under the facts disclosed.

* * * * * *

[14-16] "Laches is founded principally upon the equitable maxims 'He who seeks equity must do equity', 'He who comes into equity must come with clean hands', and 'The laws serve the vigilant, and not those who sleep upon their rights'. The propriety of the application of the rules depends upon the conduct and situations of all of the affected parties, not solely upon one. It may be equitable to apply it against one who denies a liability as well as against one who seeks to enforce a right. The rule is developed that lapse of time brought about by the conduct of an adverse party cannot avail him. 10 R.C.L. 404; 19 Am. Jur. 348. A delay is excusable where it was caused or contributed to by the conduct of the party who claims laches. 21 C. J. 243. Or as is said in 10 Cal.Jur. page 535, under such a situation a defendant is estopped to urge the defense.

[17-20] "As to the matter of damages, the only pertinent evidence is found in the plaintiff's own testimony. She testified that her earnings in the laundry averaged $23 per week and that since her discharge she has worked one day as a floor lady, three months conducting a restaurant, and a week in a North Sacramento laundry. It is clear that she lost her employment at the Palace Laundry as a direct and proximate result of her expulsion from the union. It is a general rule that it is the duty of an employee who has been wrongfully discharged before his term of service has expired, to seek other employment, and thus diminish the damages sustained by him. 8 Cal.Jur. 787. Apparently this rule applies where the employee sues a third party for wrongfully bringing about his discharge. Adams v. Cameron, 27 Cal.App. 625, 150 P. 1005, 151 P. 286. It is also a general rule that an employee who is wrongfully discharged is not obliged to seek or to accept other employment of a

different or inferior kind, in order to mitigate damages. Note to 28 A.L.R. 737; Elbert v. Los Angeles Gas Co., 97 Cal. 244, 32 P. 9. And the contract price is the correct measure of damages if there is no claim made that the employee could have obtained other employment.

* * * * * *

[21] "Plaintiff's employment at the North Sacramento laundry was early in January, 1939. It may be inferred that she might have continued with that employment had she been so inclined. She left that position because she considered the wages too low. Her wages there were at the rate of $ .37 per hour for a five-hour day. Had she worked at that laundry for the period between December, 1938, and June, 1939, she would have earned approximately $377.40. Her wages at the Palace Laundry for the period between August, 1937, and June, 1939, would approximate $2,139. The difference, or $1,761.60, is the measure of damages."

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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44 Cal.App.2d 114

BIG BOY DRILLING CORPORATION, Limited, v. ETHERIDGE et al.

Civ. 12349.

District Court of Appeal, Second District, Division 1, California.

April 9, 1941.

Hearing Denied May 29, 1941.

1. Contracts 🔑312(3)

Where continuance of work under a contract is made to depend upon payments due, failure to make such payments constitutes "prevention" of performance and entitles the contractor to sue for damages on the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Prevention".

2. Contracts 🔑313(1)

Repudiation or renunciation by opposite party will entitle contractor to sue on the contract for damages as for an entire breach.

3. Mines and minerals 🔑109

A contract calling for drilling of an oil well to a specified depth for a stated compensation payable in installments during progress of the work was entire and not severable.

4. Mines and minerals 🔑109

Where contract called for drilling of an oil well to a specified depth for a stated compensation payable in installments as the work progressed, and provided that, in event of default in installment payments for 90 days, contractor could consider default permanent and remove his drilling equipment, payment of installments was a "condition precedent" to further work on part of contractor and nonpayment entitled contractor to bring action on the contract for damages sustained through the breach, including loss of profits.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

5. Evidence 🔑448

Where contract called for drilling an oil well to specified depth for a stated compensation payable in installments as work progressed, and provided that, on default in installment payments for 90 days, contractor could consider default permanent and remove his equipment, contract would permit of reasonable interpretation without resort to extrinsic evidence, and rejection of parol evidence to aid in interpretation and of proof of a contemporaneous oral contract was proper, since contract was complete in itself.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by the Big Boy Drilling Corporation, Limited, against John L. Etheridge and others, to recover damages for breach of an oil well drilling contract. Judgments of nonsuit in favor of each of the defendants, and plaintiff appeals.

Reversed.

Carleton B. Wood and Schell & Delamer, all of Los Angeles, for appellant.

H. L. Carnahan and Rodney F. Williams, both of Los Angeles, and Carey Martin, of Portland, Or., for respondents Arnold Blitz and Virgil Crum.

Ben L. Blue, of Los Angeles, for respondent John L. Etheridge.

DORAN, Justice.

This is an appeal by plaintiff, taken by means of a bill of exceptions, from separate judgments of nonsuit in favor of each of the defendants, rendered by the trial court sitting without a jury in an action brought to recover damages for the breach of an oil well drilling contract. The judgments were rendered following the sustaining of objections to the introduction of certain evidence offered by the plaintiff (appellant).

Appellant was the drilling contractor under the agreement in question. The contract called for the drilling of an oil well to a specified maximum depth for a specified total sum, payable partly in cash and partly in certificates of beneficial interest in a certain common law trust. Payments of cash were to be made in installments at specified intervals during the progress of the work and until the full sum of $120,000 in cash had been paid. The provision of the contract most pertinent to the instant action reads as follows: "It is expressly understood and agreed by and between the parties hereto, that in event of failure of Owner to make the cash payments and deliver the certificates of beneficial interest provided to be paid and delivered in Paragraph V of this contract, contractor may, at his option, suspend drilling operations until such time as the failure of owner is remedied, and such suspension of operations shall not be deemed to be a breach by contractor of this contract. It is further understood and agreed that if by reason of such default contractor shall suspend drilling operations, owner agrees to pay contractor upon the termination of such suspension period, the sum of $288 per day as liquidated damages for the period of such suspension. In the event that owner fails to remedy his default within a period of 90 days, then in that event, any time after such period of 90 days contractor may, at his option, and without further notice to owner, deem the same to be a permanent and definite default and breach of contract and treat the same in accordance therewith, without further or any notice whatsoever to said owner. It is further agreed that the contractor at all times shall be the sole owner of the said machinery and drilling equipment, and nothing herein shall be construed to be a transfer of any portion of the interest and ownership of said contractor in and to said equipment and machinery, and said machinery and equipment shall be subject to removal by said contractor upon completion of said well or before as hereinbefore provided." Payments under the contract were not made and appellant availed itself of the above-quoted terms and instituted the present action to recover damages sustained by reason of the alleged breach of the contract and for loss of profits as a result thereof.

At the trial appellant, in addition to the contract, set forth as an exhibit attached to the complaint, proposed to introduce evidence with reference to the knowledge by respondents of appellant's financial condition, and with reference to an alleged agreement that the provision above quoted would constitute a condition precedent to further performance by the contractor, which evidence consisted of oral conversations and agreements by and between the appellant and respondents not reduced to writing. Objection to appellant's offer of proof thereon was sustained, and an objection to appellant's offer to prove all the allegations of its complaint was likewise sustained. Appellant thereupon rested and the court subsequently granted respondents' separate motions for nonsuit. Appellant here takes exception to the rulings of the trial court upon its offers of proof.

The questions here raised by appellant which require consideration are: (a) Were the payments under the contract conditions precedent to further performance on the part of the contractor; and (b) May the contractor sue upon the contract or is he confined to a suit in quantum meruit for the reasonable value of the work actually done by him? As may be seen hereinafter, the answer to the second question depends upon the answer to the first.

It is respondents' contention that under a contract of the nature of the one in question a contractor is limited to a suit for the reasonable value of the work actually done. Respondents base their contention upon the series of cases concerned with a suit for damages for breach of the contract for the construction of the Western Pacific Railroad from San Jose to Sacramento, which cases may for convenience be denominated the Cox cases (Cox v. Western Pacific R. R. Co., 44 Cal. 18; Id., 47 Cal. 87; Cox v. McLaughlin, 52 Cal. 590; Id., 54 Cal. 605; Id., 63 Cal. 196; Id., 76 Cal. 60, 18 P. 100, 9 Am.St.Rep. 164; 10 Pac.C.L.J. 263). It is true that these cases hold generally that mere failure to make installment payments under a construction contract does not prevent the contractor from continuing with the work and does not authorize him to abandon the contract and sue for all benefits he would have received upon full performance, (Cox v. McLaughlin, 52 Cal. 590; Id., 54 Cal. 605); but that he may recover in quantum meruit for the reasonable value of the work actually done. Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am.St.Rep. 164. However, it should be pointed out that certain situations are excepted from the rule laid down by the Cox cases, namely, those in which the contractor is prevented by the breach from further performance, or where the condition breached is expressly made precedent to further performance. In Cox v. McLaughlin, 54 Cal. 605, it is stated at page 606: "Where an entire contract is *terminated* by the employer against the will of the contractor, the latter is not confined to the actual value of the work done, but may prosecute his action for the breach of the agreement, and may recover as damages the profits he would have made had he been allowed to complete the work. The contract is thus terminated where the employer *prevents* or prohibits the completion of the work—the contractor being ready and willing to complete the work." (Italics included.) And in the same case, at page 609, it is said (quoting with approval from Palm et al. v. Ohio & Mississippi Railroad Co., 18 Ill. 217): "'A contract, no doubt, may be so drawn as to make the payment of a part of the consideration, by installments as the work progresses, or at stated times independently of the progress of the work, a condition precedent to the further prosecution of the work, and make its non-payment such a substantial violation of the contract as to authorize the other party to abandon the work and sue upon it, as for having been prevented from completing it by the act of the party who had thus failed to perform such condition precedent. But the law cannot infer such a consequence from the ordinary obligation to pay money at a particular time, or upon a completion of a specified part of the work.'"

Respondents, of course, contend that the instant contract provides for no more than the ordinary obligation to pay money in installments at a particular time and that the rule of the Cox cases applies. However, the quotations above set forth clearly indicate that if in the instant case the installment payments were by the terms of the contract made conditions precedent to further prosecution of the work by the contractor the rule stated in the Cox cases is not applicable, and, upon the authorities hereinafter cited, appellant would be entitled to the damages sought if his cause of action were proven.

[1] It should be pointed out that the approved language quoted from the case of Palm et al. v. Ohio & Mississippi Railroad Company, supra, must be taken to mean that where continuance of work under a contract is made to depend upon payments due, failure to make such payments constitutes "prevention" of performance. In other words, where payment is a condition precedent to performance, breach of that condition in itself may be held to be a prevention of further performance and the contractor may sue for damages as if he had actually been prevented from continuing with the work. This is borne out by the language employed in Fountain v. Semi-Tropic Land & Water Co., 99 Cal. 677, at pages 680, 681, 34 P. 497, at page 498: "If one party to a contract refuses to perform a covenant which is a condition precedent or concurrent, with [*sic*] the consent of the other party, the first consideration is whether it is such a breach as will justify a rescission. If the covenant be of minor importance, not going to the root of the matter, and one that can be readily compensated in damages, the party injured cannot rescind, but must perform his part of the contract, and seek compensation in damages. If, however, the breach be of a covenant, the nonperformance of which will render it impossible for the other party to perform, *or will frustrate the whole purpose of the contract on his part,* he still has two courses open to him, provided performance has not proceeded so far that it is impossible to place the opposite party pretty nearly in the position he was in before the contract was entered into. He may, acting promptly, rescind and recover moneys laid out and expended or paid, and the value of labor performed and materials furnished, under the contract, or he may decline to proceed in performance and sue for damages, in which case he may recover all loss occasioned by the breach, including profits he would have made if the contract had been performed, subject to the rule, of course, that remote and speculative damages cannot be recovered." (Italics added.) It is obvious that if performance is made to depend upon payment default in payment will frustrate the whole purpose of the contract.

[2] To the theory of "prevention" of performance there should also be added that

of repudiation or renunciation of the contract by the opposite party, entitling the contractor to sue upon the contract for damages as for an entire breach. See Hale v. Trout, 35 Cal. 229. Both these theories were recognized in Barris v. Atlas Rock Co., 118 Cal.App. 606, at page 610, 5 P.2d 670, at page 672, wherein it is said: "The rule laid down in Cox v. McLaughlin, supra, is that, *in the absence of outright renunciation* (e. g., Hale v. Trout, supra), *or contractual language making further and continued performance conditional and dependent upon punctual payment,* mere nonpayment of an installment by one party, before the completion of the work, does not constitute prevention of further performance by the other; further, that such failure is a breach justifying an action upon a quantum meruit (for the reasonable value of the work actually done), but it does not give rise to a cause of action on the contract for damages." (Italics added.) In passing, it should be stated that the quotation last above given appears to state correctly the present existing rule in California as drawn from the Cox cases.

[3] The language quoted from Fountain v. Semi-Tropic L. & W. Co., supra, calls attention to an additional factor for consideration in the case of a breach of an executory contract, namely, whether the breach is of a covenant going to the root of the matter, which in turn brings up the question of the nature of the contract under consideration, whether the terms thereof are entire or severable. In the instant case the contract is by its terms clearly entire and not severable, calling as it does for the drilling of an oil well to a specified depth for a stated compensation.

The language of the Fountain case also indicates an inconsistency with respect to the rule of the Cox cases, since it is stated that where the covenant breached is of minor importance the party injured cannot rescind but must continue to perform his part of the contract, but if the breach be of a covenant, nonperformance of which will render further work impossible, or will frustrate the purpose of the contract, the injured party may elect either to rescind and sue in quantum meruit or decline further performance and sue for damages. But in the Cox cases it has been held that while mere failure to make an installment payment is not such a breach as to warrant an action upon the contract for damages it will nevertheless entitle the injured party to rescind and sue for the reasonable value of the services already performed. This appears to create an anomalous situation. Were it not for the holding in the Cox cases it might be said that if failure to make a payment under a contract was of sufficient importance to warrant abandonment of the contract and a suit in quantum meruit, by the same token the breach might be of sufficient import to warrant a suit for damages upon the contract. It has been held so in other jurisdictions, with respect to construction contracts. See Guerini Stone Co. v. P. J. Carlin Construction Co., 248 U. S. 334, 39 S.Ct. 102, 63 L.Ed. 275. However, as will hereinafter appear, reconciliation of the apparent inconsistency is not necessary to a decision in the present case.

[4] It is to be noted from the provisions of the contract hereinabove set out that if a default in an installment payment continued for 90 days the contractor was expressly authorized to consider such default a "permanent and definite" breach of the contract and to "treat the same in accordance therewith" without further notice. It is also to be noted that under the terms of the contract the contractor could already have suspended operations as soon as the owner failed to make the payment and that the drilling equipment and machinery was "subject to removal by said contractor upon completion of said well or before" as provided in the contract. Such terms plainly mean that in such event the contractor could abandon drilling operations and proceed as upon a material breach of the entire contract and, further, that continued performance by the contractor depended upon payment of installments within 90 days of the due date. In short, such payment was expressly made a condition precedent to further work on the part of the contractor. Respondents argue that the provision in question was merely a recital of the ordinary legal consequences of a default in a progress payment, except that the contractor had agreed to postpone for 90 days its right to sue for the installment or to rescind for such a default and sue in quantum meruit for the work done. The argument overlooks the fact that by the terms here considered performance of the work and payment of installments were definitely related, continuation of the former was made to depend upon the latter and a default in payment was to be considered a permanent and definite breach and to be treated ac-

cordingly. Only one logical and reasonable construction may be given to such terms, namely, that further and continued performance was dependent upon punctual payment. The instant case is therefore not within the rule of the Cox cases as propounded in Barris v. Atlas Rock Co., supra, nor as originally set forth in Cox v. McLaughlin, supra. Upon either theory above mentioned, that of "prevention" of performance or that of renunciation of the contract, the plain terms expressed in the written agreement entitled appellant to bring suit upon the contract for damages sustained through the breach, including loss of profits in the transaction. Hale v. Trout, supra; Fountain v. Semi-Tropic Land & Water Co., supra; McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L.R.A.,N.S., 1171; Alderson v. Houston, 154 Cal. 1, 3, 96 P. 884; Walsh v. Standart, 174 Cal. 807, 164 P. 795; Woodruff Co. v. Exchange Realty Co., 21 Cal.App. 607, 132 P. 598; King Features, etc., v. KMTR, etc., 29 Cal.App.2d 247, 84 P.2d 322.

Care should be taken to distinguish cases like the present one, where the action is brought upon the contract, from those in which the plaintiff has elected to rescind the contract and sue in quantum meruit for the reasonable value of services rendered, as in Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146; San Francisco Bridge Co. v. Dumbarton L. & I. Co., 119 Cal. 272, 51 P. 335; and Carlson v. Sheehan, 157 Cal. 692, 109 P. 29. The relief granted depends upon the remedy elected, and the fact that the plaintiff's right to sue in quantum meruit was upheld in the cases last cited does not mean that the plaintiff would not also have been entitled to recover damages in a suit upon the contract, had he elected to pursue such a remedy.

[5] As may be seen above, the provisions of the contract here involved permit a reasonable interpretation thereof with out resort to extrinsic evidence. The terms as expressed are clear in themselves and the court did not err in rejecting appellant's offer of parol evidence as an aid to interpretation. Nor did the court err in rejecting proof of any contemporary oral contract. The contract as written is clearly complete in itself and embodies the entire agreement of the parties. However, for the reasons above set forth, the court did commit prejudicial error in refusing to permit appellant to prove the contract itself and the liability of the respondents thereunder and in granting respondents' motions for nonsuit.

For the foregoing reasons the judgments of nonsuit are reversed.

We concur: YORK, P. J.; WHITE, J.

44 Cal.App.2d 61

STRATFORD IRR. DIST. v. EMPIRE WATER CO. et al.

Civ. 2611.

District Court of Appeal, Fourth District, California.

April 5, 1941.

Hearing Denied May 29, 1941.

1. Appeal and error 🔑856(2)

In reviewing on appeal an order sustaining a demurrer to a complaint, an appellate court is not limited to the grounds of demurrer on which it was sustained by the court below, but if the complaint is insufficient on any ground properly specified in the demurrer, the order must be sustained.

2. Eminent domain 🔑1, 191(3)

"Eminent domain" is the right of the people or government to take private property for public use, and the complaint in an eminent domain proceeding must show that the use for which the property is to be taken is a public use so declared by the Legislature.

See Words and Phrases, Permanent Edition, for all other definitions of "Eminent Domain".

3. Eminent domain 🔑29, 317(1)
Waters and water courses 🔑228½

An irrigation district may acquire by condemnation a system of canals and waterworks and may purchase or condemn an existing water system under statute, but it takes an existing water system subject to the rights of existing consumers, whether such rights exist by virtue of a contract or dedication of the system for use in connection with certain lands. Gen.Laws 1937, Act 3854, §§ 15, 17, 61b.

4. Eminent domain 🔑67

Where the Legislature declares a particular use of property a public use, the presumption is in favor of its declaration, and the courts will not interfere therewith, unless the use is clearly and manifestly of a private character.

5. Eminent domain 🔑14, 67

The character of the use of property and not its extent determines the question of public use, and the mere declaration by the Legislature of a purpose for which property may be taken for a public use is not conclusive and does not preclude a person whose land is being condemned from showing on the trial that as a matter of fact the use sought to be subserved is a private one, or from assailing the complaint on the ground that it so appears therefrom. Code Civ. Proc. § 1241, subd. 2.

6. Eminent domain 🔑191(3)

A complaint alleging that plaintiff was an irrigation district and brought condemnation action on behalf of landowners within its boundaries, that board of directors of district had passed statutory resolution finding that a public interest and necessity required the acquisition of property sought to be condemned, and that irrigating of lands described within boundaries and acquiring of rights of way, ditches, and structures were for a public use and benefit, and describing property sought to be condemned stated a cause of action, in so far as it affirmatively showed that the property sought was for a public use. Code Civ.Proc. § 1241; Gen. Laws 1937, Act 3854, §§ 15, 17, 61b.

7. Pleading 🔑6

Though a demurrer raises no question of fact but assumes the correctness and truth of the facts in the pleadings to which the demurrer was interposed, the court may read such pleadings as if they contained a statement of all matters of which the court is required to take judicial notice, even when they contain an express allegation to the contrary.

8. Eminent domain 🔑193

The trial court in ruling on demurrers to irrigation district's complaint in condemnation action was not required to take judicial notice of and take into consideration a contract which defendants contended was referred to in a deed incidentally referred to in the complaint as being on record in the recorder's office, since matters of substance must not be alleged by way of reference.

9. Eminent domain 🔑193

Where defendants demurred to irrigation district's complaint in condemnation action, among other grounds, on ground that county records would show that all lands in district were sold and conveyed to present owners or their predecessors in interest subject to covenants and conditions of a certain recorded contract and deed allegedly pleaded by reference to the deed in the complaint, though contract and deed might furnish evidentiary support for defendants' contention under proper pleadings, the reference was insufficient to overcome the allegation of district's complaint that the property sought was for a public use. Code Civ.Proc. § 1241; Gen.Laws 1937, Act 3854, §§ 15, 17, 61b.

10. Eminent domain 🔑177

An irrigation district's complaint in condemnation action alleging that defendant water company owned property sought to be condemned and showing that defendant bank as pledgee of certain stock was the only other party having any interest in property was sufficient under statute and was not demurrable for nonjoinder of parties defendant because of the existence of a certain contract and deed, where no attempt was made to plead deed or contract, and nothing in complaint invited judicial notice of contract. Code Civ.Proc. § 1244, subd. 2.

11. Pleading 🔑214(1)

A demurrer admits all material allegations of a complaint but does not change or enlarge those allegations, and it certainly cannot insert into a complaint allegations which do not appear therein.

12. Eminent domain 🔑178

Persons, if any, not made defendants in irrigation district's condemnation action, but claiming an interest in property sought to be condemned, could be permitted to appear and defend the action or they could be brought into the action and their rights litigated under statutes. Code Civ.Proc. §§ 387, 389, 1246.

◆

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action in condemnation by the Stratford Irrigation District against the Empire Water Company and another. From a judgment for defendants, plaintiff appeals.

Judgment reversed, with directions.

Harris, Willey & Harris, Ronald B. Harris, and Everett G. Harris, all of Fresno, for appellant.

H. Scott Jacobs, of Hanford, for respondent Empire Water Co.

Dearing & Jertberg, of Fresno, for respondent Security-First Nat. Bank of Los Angeles.

GRIFFIN, Justice.

Plaintiff and appellant brought this action in condemnation. Defendants and respondents demurred generally and specially to the complaint. Their demurrers, identical in form, were sustained. Plaintiff failed to amend. Judgment was entered for defendants. From this judgment plaintiff appealed.

The complaint alleges generally that the plaintiff is an irrigation district and that it brings the action on behalf of the landowners within its boundaries; alleges the corporate existence of the two defendants; describes the location and boundaries of the district; alleges that the defendant Empire Water Company (hereinafter called the company) is the owner of the water distribution system which serves the lands within the district; that standing in the name of the company is 8⅝ shares of the capital stock of the Lemoore Canal and Irrigation Company, whose lands and water are appurtenant to the lands within the district; that the stock was pledged to the respondent bank for the debt of another; and that there was a resolution of the board of directors of the district in compliance with section 1241 of the Code of Civil Procedure. A map showing the boundaries of the district and the distribution system of the company was made a part of the complaint by reference, and then followed a description of the property sought to be condemned, i. e., all the right, title and interest of the company in and to the 8⅝ shares of the Lemoore Canal and Irrigation Company stock hereinabove described; the upper Stratford weir, located on the Kings river; the lower Stratford weir; described canals, laterals and rights of way thereof; a strip of land 40 feet in width on each side of the Kings river from the north line of the Empire Ranch as per recorded maps of said ranch and as described in the recorded deed dated January 8, 1906, from the Empire Investment Company to the Empire Water Company; a strip of land along both sides of Kings river, from the north line of the Empire Ranch as per recorded maps, together with all buildings and improvements thereon and all appurtenances, water, and water rights thereunto belonging, including that proportion of the waters of Kings river to which the 18,712-acre tract owned by said grantor (Empire Investment Company) is entitled as being riparian to said river; all the interest, if any, of the Empire Water Company in and to the bed and banks of the Kings river lying south of the north line of section 19, township 20 south, range 20 east, M. D. B. & M., and north of the south line of section 32, township 20 south, range 20 east, M. D. B. & M.; together with all structures of any kind and description located upon or used in connection with the properties hereinabove described.

Plaintiff prays for judgment taking and condemning the several properties as described, and that the court ascertain and assess the value of the property sought to be condemned pertaining to the realty, and of each and every estate or interest therein, for the public uses hereinabove set forth.

The grounds of demurrer are (1) that the court has no jurisdiction of defendants or of the subject of the action for the reason that the property sought to be condemned is not sought to be condemned for a public use but that the use for which said property is sought to be condemned is a private use; (2) that the records of Kings county will show that all of the lands in the Stratford Irrigation District were sold and conveyed to the present owners of said lands or their predecessors in interest by the Empire Investment Company, subject to all the covenants and conditions of a certain recorded contract and deed claimed to have been pleaded by reference to the deed in the complaint. (The terms of the contract and deed are not set forth in the complaint. They are set out in Stratton v. Railroad Commission, 186 Cal. 119, 198 P. 1051; Braley v. Empire Water Co., 130 Cal.App. 532, 20 P.2d 75; and Quist v. Empire Water Co., 204 Cal. 646, 269 P. 533; (3) that the complaint does not state facts sufficient to constitute a cause of action; (4) that the complaint is uncertain, ambiguous and unintelligible; (5) that there is a defect or misjoinder of parties defendant in that all the landowners of the Empire Ranch west of Kings river in the Stratford Irrigation District are proper and necessary parties for the reason that the purpose of the action is broad enough to cover all the water rights of each and all of the landowners who are successors in interest of the company in said contract and whose lands are riparian to said Kings river; and (6) that none of the landowners on the entire Empire Ranch east of Kings river, are made parties defendant in the action.

The trial court sustained each of the demurrers on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Respondents contend that the other grounds set forth in their demurrers to the complaint should have been sustained by the lower court and may be properly considered by this court on appeal; that if this court determines that the demurrers should have been sustained on any other grounds rather than the failure to state a cause of action, this court can properly affirm the judgment.

[1] In reviewing upon appeal an order sustaining a demurrer to a complaint, an appellate court is not limited to the grounds of demurrer upon which it was sustained by the court below, but if the complaint is insufficient upon any ground properly specified in the demurrer, the order must be sustained. Johnson v. Fletcher, 97 Cal. App. 153, 274 P. 1001; Burke v. Maguire, 154 Cal. 456, 98 P. 21.

Respondents argue that should the appellant be successful in securing a decree of condemnation, it would merely step "into the shoes of the Empire Water Company" under the decision in Bent v. Second Extension Water Co., 51 Cal.App. 648, 197 P. 657; that the fact that the irrigation district becomes the owner of the water contract in the place of the Empire Water Company, a private corporation, does not change the private character of the water contract and the rights of the landowners; that the landowners still have the right to have their water furnished them for $1 per acre per annum under the contract which, under the decision of Stratton v. Railroad Commission, supra, it is claimed is a private use and not a public use; that the only possible escape from this situation would be for the appellant to acquire by purchase or condemnation, all of the water rights of the landowners on the east side of Kings river on the Empire Ranch; that if the water contract were retired and cancelled by such proceeding, then the district would own the water rights now belonging to the company and the landowners; that until the water agreement and the rights of the landowners therein are taken over by the irrigation district the use is, and will continue to be, private and not public. In support of respondents' argument it is contended that the trial court, as well as this court, in considering the merits of the pleadings under consideration, must and should take judicial notice of the status of the water rights of the Empire Water Company and the landowners as determined by the recorded contract and deed and by the Supreme and Appellate Courts of this state in construing them. Citing Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987; Southern Pacific Railroad Co. v. Painter, 113 Cal. 247, 45 P. 320; and sec. 1875, subds. 2 and 3, Code Civ. Proc. It was apparently on the theory that the property sought to be taken was not being taken for a public use that the court sustained respondents' demurrers. Therefore we will first discuss this theory.

[2, 3] Eminent domain is the right of the people or government to take private property for public use, and the complaint must show that the use for which the property is to be taken is a public use, so declared by the legislature. Northern Light, etc., Co. v. Stacher, 13 Cal.App. 404, 109 P. 896; 10 Cal.Jur., p. 397, sec. 99. The legislature has declared in section 61b, Act 3854, Deering's General Laws 1937, volume 1, page 1843, that "* * * irrigation districts may acquire, by * * * condemnation, the irrigation system, canals and works through which lands in such districts have been or may be supplied with water for irrigation, or other property necessary or proper for the purposes of the district * * * or for the capital stock of any corporation owning such system or other property * * * subject to any liens, encumbrances or obligations thereon * * *." See, also, sec. 15 of said act.

It is therefore the general rule that an irrigation district may acquire by condemnation a system of canals and water works and may purchase or condemn an existing water system, in which case it takes subject to the rights of existing consumers, whether such rights exist by virtue of a contract or dedication of the system for use in connection with certain lands. 26 Cal.Jur., p. 404, sec. 632; Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co., 111 Cal.App. 688, 296 P. 933.

[4] Section 17 of the act provides that "The use of all water required for the irrigation of the lands of any district formed under the provisions of this act * * * for * * * beneficial uses, within such district, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act is hereby declared to be a *public use* * * *." (Italics ours.) It has been held that where the legislature declares a particular use to be a public use the presumption is in favor of its declaration and the courts will not interfere therewith unless the use is clearly and manifestly of a private character. County of San Mateo v. Coburn, 130 Cal. 631, 63 P. 78, 621; Contra Costa Coal Mines Railroad Co. v. Moss, 23 Cal. 323; 20 C.J., p. 551, sec. 38.

Section 1241, subdivision 2 of the Code of Civil Procedure provides that before property can be taken it must appear that the taking is necessary to a use authorized by law, and it is further provided that when the board of directors of an irrigation district shall by resolution have found and determined that a public interest and necessity require the acquisition and that the property described in such resolution is necessary therefor, such resolution shall be conclusive evidence of the public necessity, except in the case of the taking of property located outside of the territorial limits thereof. County of Los Angeles v. Rindge Co., 53 Cal.App. 166, 200 P. 27; San Benito County v. Copper Mountain Mining Co., 7 Cal.App.2d 82, 45 P.2d 428.

[5] However, the mere declaration by the legislature of a purpose for which property may be taken for a public use is not conclusive and does not preclude a person whose land is being condemned from showing upon the trial that, as a matter of fact, the use sought to be subserved is a private one, or from assailing the complaint on the ground that it so appears therefrom. The character of the use and not its extent, determines the question of public use.

[6] In addition to the general allegations above related in the complaint, it particularly alleges that "the irrigating of the lands described within the boundaries of plaintiff and the acquiring of rights of way and the construction of ditches and gates and the acquiring of existing rights of way for ditches and structures appurtenant thereto, as hereinbefore set forth, are for a public use and benefit".

Respondents concede that if all the landowners were joined and their rights under the contract, together with their water rights, were condemned along with the distributing system, a cause of action in all probability could be stated. In other words, it is argued that the district can take the whole but it cannot take any part of the lands. The legislature, however, has provided that an irrigation district may take less than the whole. Sec. 61b, California Irrigation District Act, supra, p. 1843; Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 277 P. 487; Bent v. Second Extension Water Co., supra; 10 R.C.L. 88.

Considering the nature of the district and the allegations of the complaint, we are convinced that a cause of action was stated in so far as it affirmatively shows thereby that the property sought was for a *public use*. Northern Light, etc., Co. v. Stacher, supra; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 P. 484; Cummings v. Peters, 56 Cal. 593.

[7, 8] While we recognize the general rule that a demurrer raises no question of fact but assumes the correctness and truth of the facts in the pleadings to which the demurrer was interposed, the court is permitted to read such pleadings as if it contained a statement of all matters of which the court is required to take judicial notice even when the pleadings contain an express allegation to the contrary. Livermore v. Beal, supra. This case, however, refers to land office records. The authorities cited would not support a holding that the trial court in the instant case, in ruling on the demurrers, must take judicial notice of and take into consideration the contract which respondents claim is referred to in the deed, incidentally referred to in the complaint as being on record in the recorder's office. It is a general rule that matters of substance must not be alleged by way of reference. Burkett v. Griffith, 90 Cal. 532, 27 P. 527, 13 L.R.A. 707, 25 Am.St.Rep. 151; Hibernia S. & L. Society v. Thornton, 117 Cal. 481, 49 P. 573; Ahlers v. Smiley, 11 Cal.App. 343, 104 P. 997.

Even if it may be assumed that the contract, as explained in the case of Stratton v. Railroad Commission, supra, may be rightfully considered in determining the issues before us, that action was instituted to determine the character of the relationship between the water company and the landowners, as to whether that relationship was that of a public utility and consumer for the purpose of fixing rates under the jurisdiction of the commission. The court held that such relationship did not exist. This determination is not necessarily a determination of the issues here presented on the demurrers. Hewitt v. San Jacinto, etc., Irr. Dist., 124 Cal. 186, 56 P. 893; Henderson v. Oroville-Wyandotte Irr. Dist., supra.

[9] The contract and deed above referred to may furnish evidentiary support for respondents' contention under proper pleadings, but we are unable to hold that this reference is sufficient to overcome the allegations of appellant's complaint on the question of public use. Kansaburo Ohsaki v. Ahern, 61 Cal.App. 787, 790, 215 P. 714; Munson v. Bowen, 80 Cal. 572, 22 P. 253; Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209, 77 P. 933; Whiteman v. Anderson-Cottonwood Irr. Dist., 60 Cal. App. 234, 241, 212 P. 706; El Camino Irr. Dist. v. El Camino Land Corp., 12 Cal.2d 378, 85 P.2d 123; Anderson-Cottonwood Irr. Dist. v. Klukkert, 13 Cal.2d 191, 88 P.2d 685.

[10] The only remaining point of merit presented and argued in the briefs pertains to the claimed defect or misjoinder of parties defendant. It is argued that all of the landowners on the Empire Ranch east of Kings river and in the Stratford Irrigation District are proper and necessary parties to this action for the reason that the purpose of the action is broad enough to cover all of the water rights of each and all of the landowners who are successors in interest of the Empire Investment Company in the contract above referred to and whose properties are riparian to the Kings river. Respondents cite section 1244 of the Code of Civil Procedure, subdivision 2, which provides that the complaint must contain "the names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants".

Plaintiff has alleged that the Empire Water Company is the owner of the property sought to be condemned. There is nothing in the pleading to suggest that any other person or corporation has any interest in the property except the defendant Security-First National Bank of Los Angeles, the pledgee of the stock. These allegations satisfy the requirements of the section.

[11] A demurrer admits all the material allegations of a complaint but does not change or enlarge those allegations. It certainly cannot insert allegations in a complaint that do not appear in it.

There is not the slightest reference in the complaint to the contract upon the terms of which defendants rest their argument of nonjoinder of necessary parties defendant. Casual reference is made to a deed from the Empire Investment Company to the Empire Water Company which defendants maintain refers to this contract. No attempt is made to plead either the deed or contract by stating its substance, by attaching copies as exhibits or by reference to the book where the contract is recorded, assuming that this might be done, which is open to considerable doubt. See People v. De La Guerra, 24 Cal. 73; Ralphs v. Hensler, 97 Cal. 296, 32 P. 243. There is nothing in the complaint to invite judicial notice to the contract, again assuming that judicial notice of it could be taken.

[12] If there are persons who are not defendants who claim any interest in the property sought to be condemned, they may be permitted to appear and defend the action, sec. 1246, Code Civ. Proc., or, they may be brought into the action and their rights litigated. Secs. 387 and 389, Code Civ. Proc.

The question of nonjoinder of parties defendant as presented at this time cannot be raised by demurrer to the complaint. Kreling v. Kreling, 118 Cal. 413, 420, 50 P. 546; 1 Cal.Jur., secs. 24 and 25, pp. 45 to 47; 21 Cal.Jur., p. 94, sec. 61. That defect, if it be a defect, does not appear from the allegations of the pleading under consideration.

For the reasons expressed the demurrers should have been overruled.

Judgment reversed, with directions to the trial court to overrule the demurrers and allow defendants a reasonable time within which to answer.

We concur: BARNARD, P. J.; MARKS, J.

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LOS ANGELES COUNTY v. HURLBUT.

Civ. 12915.

District Court of Appeal, Second District, Division 2, California.

April 8, 1941.

1. Constitutional law 🔑243
Paupers 🔑2

The section of Welfare and Institutions Code, providing for proceedings against kindred of aged person receiving aid where kindred filed income tax return, did not create "privileges" or "discriminations" as inhibited by Fourteenth Amendment to Federal Constitution, and did not lack "uniformity of operation" required by California Constitution, where filing of income tax return was merely sufficient basis for continued investigation. St.1937, p. 1094; U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Discrimination", "Privilege", and "Uniformity of Operation".

2. Paupers 🔑37(1)

The purpose behind statutory scheme of proceeding against those filing income tax returns was to abbreviate labors of those investigating pecuniary ability of kindred of recipients of old age payments, and financial ability of recipient's adult child is first matter to be determined by court; his liability being already fixed by law. St.1937, p. 1094; Civ.Code, § 206; Pen.Code, § 270c.

3. Constitutional law 🔑70(3)

Determination of Legislature that it was a public advantage to cease investigation of liable kindred of recipient of old age payments with ascertainment that kindred did or did not file income tax return was not "arbitrary" and could not be avoided by court. St.1937, p. 1094; U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Arbitrary".

4. Constitutional law 🔑243
Paupers 🔑2

If legislative intent of section of Welfare and Institutions Code relating to proceedings against kindred of recipient of old age payments was to proceed only against those filing income tax returns, such was a natural "classification" which Legislature had right to designate as first element in proof of financial ability. St.1937, p. 1094; U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Classification".

5. Constitutional law 🔑48

Every presumption favors the legislative classification. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 11.

6. Constitutional law 🔑70(3)

The Legislature's judgment on question whether particular provision shall be made for any class of cases and as to classification thereof is not to be interfered with except for very grave causes, and where it is clear beyond a reasonable doubt that no sound reason for legislative classification, and for the different provisions regarding the same, exists. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 11.

7. Constitutional law 🔑70(3)

The Legislature's discretion is not subject to judicial review unless it clearly appears to have been exercised arbitrarily and without any show of good reason.

8. Constitutional law 🔑70(3)

A law involving legislative classification cannot be held invalid solely because court might conceive some general law that would have accomplished purpose aimed at by section under consideration. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 11.

9. Constitutional law 🔑48

If Legislature acted on any conceivably reasonable ground, courts must assume that Legislature acted on such ground.

10. Statutes 🔑72

The section of Welfare and Institutions Code providing for proceedings against kindred of recipient of old age payments who filed income tax return is not a "special law" merely because it does not include all classes of kindred whose spouses or parents have been recipients of state's bounty, since it meets requirements of constitution if it relates to and operates uniformly upon all those of class lawfully selected. St.1937, p. 1094; Const.Cal. art. 1, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Law".

11. Statutes 🔑72

A "general law" is one which operates upon all persons to whom it applies and applies equally to all persons in the same category. Const.Cal. art. 1, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law".

12. Statutes 🔑121(7)

The amendatory act of 1937 relating to proceedings against kindred of recipients of old age payments was not void by reason of omission from title of purpose of Legislature to make adult child liable for support of his indigent parents, since such provision did not treat of a "new subject." St.1937, p. 1094; Const. art. 4, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "New Subject".

13. Statutes 🔑109

It is not necessary that the title of an act should embrace an abstract or catalogue of its contents. Const. art. 4, § 24.

14. Statutes 🔑109

So long as provisions of statute are germane to subject matter of title, no violence is done to Constitution in omitting from title index of all of such provisions, and every provision of an act which is closely allied to the subject expressed in the title is "germane" thereto. Const. art. 4, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Germane".

15. Statutes 🔑109

The purpose of the constitutional provision requiring the subject of an act to be expressed in its title is merely to prevent legislators or public from being misled by titles to bills whereby legislation relating to one subject might be obtained under title of another subject. Const. art. 4, § 24.

16. Statutes 🔑109

It is customary to state subject of an act in the fewest possible words, and such custom was known to the framers of the constitution. Const. art. 4, § 24.

17. Statutes 🔑109

The Legislature should not be held to technical nicety in entitling proposed legislation under penalty of having the enactment fail at the hands of a too critical court. Const. art. 4, § 24.

18. Statutes 🔑109

A reference in the title of the amendatory act to the general subject is sufficient. Const. art. 4, § 24.

19. Statutes 🔑109

A code section may be amended by number.

20. Statutes 🔑105(1)

The limitation of constitutional provision requiring that the subject of an act be expressed in the title must be liberally construed, in that it requires but a reasonably intelligent reference to subject to which legislation of act is to be addressed. Const. art. 4, § 24.

21. Statutes 🔑121(7)

The 1939 and 1940 amendments to section of Welfare and Institutions Code, relating to proceedings against children of recipients of old age payments who filed income tax returns, did not violate constitutional provision requiring that the subject of an act be expressed in its title. St.1939, pp. 2238, 2239, and p. 2244, § 2224; St.1940, Sp. Sess., c. 11, § 2224; Const. art. 4, § 24.

22. Paupers 🔑37(2)

A complaint, alleging that county had made old age payments to defendant's mother and that mother would in future be entitled to such payments, that mother had no spouse, and that defendant was her only adult child who had filed income tax return, that board of supervisors had determined that defendant had filed an income tax return and had pecuniary ability to support or contribute to support of his mother, and that defendant had such pecuniary ability, stated a cause of action under Welfare and Institutions Code. St.1937, p. 1094.

23. Paupers 🔑37(2)

By enactment of section of Welfare and Institutions Code, relating to proceedings against children of recipients of old age payments who filed income tax returns, Superior Court was authorized to determine whether defendant was able to support or contribute to support of his mother. St.1937, p. 1094.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the County of Los Angeles against Harry C. Hurlbut for reimbursement of old age payments made by plaintiff to defendant's mother. From a judgment dismissing the action, plaintiff appeals.

Reversed with directions.

J. H. O'Connor, Co. Counsel, and Gerald G. Kelly, Deputy Co. Counsel, both of Los Angeles, for appellant.

Alford P. Olmstead and Arthur B. Armstrong, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment dismissing the action following the court's order sustaining an objection to the introduction of any evidence on the ground that the amended complaint failed to state a cause of action.

The action was brought under section 2224 of the Welfare and Institutions Code, St.1937, p. 1094. By its pleading plaintiff alleged that, commencing July, 1936, and continuing until the time of filing the action, plaintiff had paid in monthly installments the total sum of $1,515 to Cora E. Hurlbut, the mother of defendant; that Cora E. Hurlbut as the recipient of said moneys is now entitled, and will in the future be entitled, to old age payments pursuant to the Welfare and Institutions Code; that Cora E. Hurlbut has no spouse and that defendant is her only adult child who has filed an income tax return under the Personal Income Tax Act, St.1935, p. 1090, for the year 1939; that the board of supervisors has determined that defendant has filed an income tax return for 1939 and that he has the pecuniary ability to support or contribute to the support of his mother; "that defendant has the pecuniary ability to support or contribute to the support of Cora E. Hurlbut in that he had a steady income of approximately $331.56 per month and other property".

The court sustained the general objection to any evidence and ordered the dismissal of the action upon the theory that section 2224 of the Welfare and Institutions Code, by limiting actions for reimbursement to those cases wherein defendant filed an income tax return was discriminatory and class legislation.

On this appeal, respondent makes three affirmative contentions: (1) that section 2224 created a discrimination against those filing income tax returns; (2) that the amendments to section 2224 of 1937, 1939, and of 1940 are unconstitutional and void because of failure to include in the title the subject covered; (3) that the complaint fails to allege a cause of action in that it does not allege the ability of the defendant to pay any portion of the aid granted.

[1-3] (1) Respondent contends that section 2224 is violative of the inhibition contained in the fourteenth amendment to the federal Constitution which guarantees equal protection under the law to any person within its jurisdiction. He argues that the filing of one's income tax return cannot be a reasonable test of one's ability to support, or to contribute to the support of, his parent; that the section, therefore, creates a discrimination against him and a privilege in favor of those equally able financially to pay for the support of their indigent parents. Section 2224 did not create privileges or discriminations, as inhibited by the fourteenth amendment to the federal Constitution. Neither does it lack uniformity of operation as required by section 11, article I of the Constitution of California. The entire purpose behind the scheme of proceeding against those filing income tax returns was to abbreviate the labors of those investigating the pecuniary ability of the kindred of a recipient. The financial ability of the recipient's adult child is the first matter to be determined by a court. His liability is already fixed by law. § 206, Civ.Code; § 270c, Pen.Code. The final determination of the court is not whether the child filed an income tax return but whether he has the ability to pay for the support of an indigent parent. Filing of the return is an incident that concerns the board of supervisors in their administration of the Old Age Security law. The fact of the filing of an income tax return has primarily to do with public economy. The legislature determined that it is a public advantage to cease an investigation of the "liable" kindred with the ascertainment that the latter did nor did not file an income tax return. Such determination cannot be avoided by the courts unless it is palpably arbitrary. In re Weisberg, 215 Cal. 624, 629, 12 P.2d 446. We find nothing arbitrary in the provision.

The determination by the board of supervisors that the spouse or adult child of the recipient did not file an income tax return was calculated to avoid the necessity of further investigation. But the determination by the board that the adult child or spouse had filed a return was deemed by the legislature to be a sufficient basis for the board to continue its investigation. In the case of one who files a return, the board must then proceed to "determine whether such spouse or adult child is pecuniarily able to support or contribute to the support of such person". The ultimate responsibility of the adult child is not to be determined by the board. Their only power ultimately affecting one who is legally liable is to request the proper civil legal officer to proceed against such adult child. Not even the board has authority to institute the action. It has only the authority to request the proper counsel to "proceed against the kindred in the order of their responsibility to support". If counsel charged with the duty of instituting such proceeding is convinced that he should act, the duty devolves upon him then to institute an action and to convince the court that the defendant named is pecuniarily able to support or contribute to the support of his indigent spouse or parent.

[4-9] But conceding for the sake of the argument that the legislative intent was to proceed only against those filing income tax returns, in view of its obvious purpose, this is a natural classification which the legislature, in the exercise of its discretion had the right to designate as the first element in the proof of financial ability. Every presumption favors the legislative classification. In re Cardinal, 170 Cal. 519, 521, 150 P. 348, L.R.A.1915F, 850; Cohen v. City of Alameda, 168 Cal. 265, 142 P. 885. "If the classification is reasonable, including all that may fairly be said to be similarly situated and affecting alike all of those, there is no forbidden discrimination. The question of classification is primarily one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements. The presumption in the courts is in favor of the fairness and correctness of the determination by the legislative department, and the courts are not privileged to overturn that determination unless they can plainly see that the same was without warrant in the facts." In re Cardinal, supra, 170 Cal. page 521, 150 P. page 349, L.R.A. 1915F, 850. The legislature's judgment "on the question whether or not a particular provision shall be made for any class of cases, and as to the classification thereof, is not to be interfered with, except for very grave causes, and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists". Cohen v. City of Alameda, supra, 168 Cal. page 267, 142 P. page 886. The legislature's discretion is not subject to judicial review unless it clearly appears to have been exercised arbitrarily and without any show of good reason. In re Martin, 157 Cal. 51, 57, 106 P. 235, 26 L.R.A., N.S., 242. Such a law cannot be held invalid solely because this court might conceive some general law that would have accomplished the purpose aimed at by the section under consideration. Mintzer v. Schilling, 117 Cal. 361, 363, 49 P. 209; Argyle Dredging Co. v. Chambers, 40 Cal. App. 332, 342, 181 P. 84. If the legislature acted upon any conceivably reasonable ground, the courts must assume that the legislature acted upon that ground. We submit that the suggestions above made as to the aim and purpose of the legislature are conceivably reasonable. County of San Luis Obsipo v. Murphy, 162 Cal. 588, 123 P. 808, Ann.Cas.1913D, 712.

[10, 11] It follows that if the legislature acted upon either the theory that the public economy would be conserved or upon the hypothesis that it would best promote the public welfare to require only him who has filed an income tax return to contribute to the support of his indigent spouse or parent, then this act must be upheld as an exercise of constitutional power. Furthermore, the section is not a special law merely because it does not include all classes of kindred whose spouses or parents have been the recipients of the state's bounty. It meets the requirements of the Constitution if it relates to, and operates uniformly upon, all those of the class lawfully selected. City of Los Angeles v. Lankershim, 160 Cal. 800, 118 P. 215; In re Martin, 157 Cal. 57, 106 P. 235, 26 L.R. A.,N.S., 242. A general law is one which operates upon all persons to whom it applied and applies equally to all persons in the same category. McDonald v. Conniff, 99 Cal. 386, 34 P. 71; Cody v. Murphey, 89 Cal. 522, 26 P. 1081.

(2) Respondent contends that the inclusion within the amendments to section 2224, enacted in 1937, 1939 and 1940, of the provision that actions shall be authorized by the board of supervisors only in the case of that spouse or adult child who has filed a return under the Personal Income Tax Act, is unconstitutional for the reason that there was nothing in the title of any of the three amendments to indicate that action should be taken against the kindred

of the recipient of the relief. In order to avoid misunderstanding the observations hereafter to be made, we shall trace briefly the origin of the section under consideration.

The legislature of 1929 enacted a statute whose title reads as follows:

"An act to provide for the protection, welfare and *assistance of aged persons in need* and resident in the State of California, providing the method therefor, making an appropriation therefor and prescribing penalties for the violation of the provisions of this act."

This statute prescribes the qualifications of those aged persons entitled to assistance; requires the transfer of any property of the applicant to the board of supervisors; makes the decision of the board as to the amount allowable final; provides for appeal and makes other provisions which are necessary to the administration of the act. Stats. of California, 1929, chap. 530, p. 914. This act was the initial step taken for the protection, welfare and assistance of aged persons outside of institutional aid.

In 1931 the legislature enacted an amendment to the act of 1929, and its title reads as follows: "An act to amend sections 2, 4, 5, 13, 14, 16, 22 and 23, and to repeal section 24 of chapter 530, statutes of 1929, entitled 'An act to provide for the protection, welfare and assistance of aged persons in need and resident in the State of California, providing the method therefor, making an appropriation therefor, and prescribing penalties for the violation of the provisions of this act,' approved May 28, 1929, and to add thereto new sections to be numbered 2½ and 18½, relating to the *protection, welfare and assistance of aged persons in need,* and resident in the State of California." Approved by the Governor June 5, 1931. In effect August 14, 1931, Stats.1931, chap. 608, p. 1310.

The practical effect of the new act was to improve the workability of the Old Age Security law by modifying its procedure.

In 1935 the legislature enacted a statute whose title reads as follows: "An act to amend sections 2, 2½, 3, 4, 10, 13, 14, 15, 18½ and 21, to add section 24, and to repeal sections 5 and 9 of the Old Age Security Act of the State of California, *relating to aid to the aged.*"

In the body of the act is found the following language: "Aid granted to any person under the provisions of this act shall constitute a *debt of such person,* to the amount of such aid, to the State of California and the county * * *. Recovery may be had upon such debt out of any property of the recipient not exempt from execution." Stats. of Calif., 1935, chap. 633, p. 1767.

In 1937 the legislature enacted the Welfare and Institutions Code "revising the law relating to and providing for *protection, care, and assistance" to aged persons* and others in need. Approved May 25, 1937, Stats. of 1937, chap. 369, p. 1005. Section 2224 of that code reads as follows:

"If the person receiving aid has within the State a spouse or adult child pecuniarily able to support said person, the board of supervisors shall request the district attorney or other civil legal officer of the county granting such aid to proceed against the kindred in the order of their responsibility to support. Upon such demand the district attorney or other civil legal officer of the county granting aid shall, on behalf of said county, maintain an action, in the superior court of the county granting such aid, against said relatives, in the order named, to recover for said county such portion of the aid granted as said relative is able to pay. Any sum so recovered shall be credited by the county to the county and to the State in proportion to the contributions of the county and State respectively.

"The granting of or continued receipt of aid shall not be contingent upon such recovery." Stats. of 1937, chap. 369, pp. 1005, 1094.

Later in the same session another act was adopted, whose title reads as follows: "An act to amend sections 2, 2½, 3, 4, 14, 15, 16, 17, 18, 18½ and 24, to add sections 3.5, 5, and 25, and to repeal section 8 of the Old Age Security Act of the State of California, or to amend sections 2020, 2024, 2140, 2160, 2162, 2163, 2181, 2182, 2183, 2185, 2186, 2187, 2188, 2189, 2200, 2221, 2224 and 2225 of, to add sections 2009 and 2025 to, and to repeal sections 2143, 2226 and 2227 of the Welfare and Institutions Code, *relating to aid to the aged.*" Stats. 1937, chap. 405, as amended, p. 1343.

Section 5 of that act is substantially identical with section 2224 of the Welfare and Institutions Code quoted above. That section 5 was to become effective only (p. 1351, § 37) in the event of a failure to enact the Welfare and Institutions Code. Since that code was then adopted, we have only to observe the identity of the two sections and to emphasize the language contained in the last-quoted title, to-wit: *relating to aid to the aged.*

In 1939, the legislature enacted a statute whose title reads as follows: "An act to amend sections 2007, * * * 2224 and 2225 of, and to add sections 2160.5 * * * to, the Welfare and Institutions Code, *relating to aid to the aged.*" Stats.1937, amended, p. 2238, 2239, chap. 719.

By section 8 of that act, section 2224 of the Welfare and Institutions Code, was amended to read as follows:

"2224. If the person receiving aid has within the State a spouse or *adult child filing a return under The Personal Income Tax Act of 1935* and pecuniarily able to support said person, the board of supervisors shall request the district attorney or other civil legal officer of the county granting such aid to proceed against the kindred in the order of their responsibility to support. Upon such demand the district attorney or other civil legal officer of the county granting aid shall, on behalf of said county, maintain an action, in the superior court of the county granting such aid, against said relatives, in the order named, to recover for said county such portion of the aid granted as said relative is able to pay, and to secure an order requiring the payment of any sums which may become due in the future for which the relative may be liable. Any sum so recovered shall be credited by the county to the county, to the State and to the Federal Government in proportion to the contributions of each respectively, or in the manner prescribed by the State Department of Social Welfare.

"The granting of or continued receipt of aid shall not be contingent upon such recovery.

"Notwithstanding any of the provisions of The Personal Income Tax Act of 1935, the Franchise Tax Commissioner shall upon the written request of the board of supervisors or the State Department of Social Welfare, verify the fact of whether or not the spouse or adult child of a recipient of aid under this chapter has filed an income tax return under The Personal Income Tax Act of 1935."

The legislature at its special session in February, 1940, amended section 2224 by an act, the title of which reads as follows: "Act to amend sections 2224 and 2227 of, and to repeal sections 2226 and 2229 of the Welfare and Institutions Code relating to aid to the aged, and providing for the cancellation and release of certain agreements affecting real property, heretofore required of recipients of *aid to the aged* and their heirs, declaring the urgency thereof and providing that this Act shall take effect immediately."

The body of section 2224 as amended in 1940 reads as follows:

"2224. The board of supervisors shall determine if the person receiving aid has within the State a spouse or adult child filing a return under The Personal Income Tax Act. If the board of supervisors finds that the spouse or adult child of the recipient of aid has not filed an income tax return under The Personal Income Tax Act, the board shall not further investigate the financial resources of such spouse or adult child. If, however, the board of supervisors finds that the recipient of aid does have a spouse or adult child filing such a return, the board shall determine whether such spouse or adult child is pecuniarily able to support or contribute to the support of such person. If in the opinion of the board of supervisors the spouse or adult child who has filed such a return is pecuniarily able to support or contribute to the support of the recipient of aid, the board of supervisors shall request the district attorney or other civil legal officer of the county granting such aid to proceed against such kindred in the order of their responsibility to support. Upon such demand the district attorney or other civil legal officer of the county granting aid shall, on behalf of said county, maintain an action, in the superior court of the county granting such aid, against said relative, in the order named, to recover for said county such portion of the aid granted as said relative is able to pay, and to secure an order requiring the payment of any sums which may become due in the future for which the relative may be liable. Any sum so recovered shall be credited by the county to the county, to the State and to the Federal Government in proportion to the contributions of each respectively, or in the manner prescribed by the State Department of Social Welfare.

"The granting of or continued receipt of aid shall not be contingent upon such recovery.

"Notwithstanding any of the provisions of The Personal Income Tax Act, the Franchise Tax Commissioner shall upon the written request of the board of supervisors or the State Department of Social Welfare, verify the fact of whether or not the spouse or adult child of a recipient of aid under this chapter has filed an income tax return under The Personal Income Tax Act.

"Any person who uses or discloses for any purpose whatsoever any information obtained from the Franchise Tax Commissioner other than as may be necessary in carrying out the provisions of this section shall be guilty of a misdemeanor. (Added by Stats.1937, Ch. 375; amended by Stats. 1937, Ch. 405, by Stats.1939, Ch. 719, and by Stats.1940, Ch. 11.)"

It will be observed at this point and henceforth borne in mind that the body of the section as amended in 1940 made no substantial alteration in the section as amended in 1939 or as it stood following its amendment in 1937. The changes in both acts, of 1939 and 1940, were with reference to subsidiary and procedural matters. The sole purpose of the changes in the section was to lighten the burden of the board of supervisors by terminating its investigation upon ascertaining that the kindred had not filed a personal income tax return.

In addition to the point that the acts of 1939 and 1940 authorized action to be taken only against those who have filed income tax returns, respondent attacks the act of 1937 upon the ground that it did not contain in its title any indication of the legislative intention to make the moneys furnished the recipient of relief a debt of the kindred. The attack, therefore, made upon all three amendatory acts is that the intention to hold the kindred responsible for money furnished (1937) and the intention to sue only such kindred as may have filed income tax returns (1939–1940) was not included in any title. It has already been observed that in the incipient act of 1929, the purpose of the legislation was to provide for assistance to the needy aged. This was repeated in the amendatory act of 1931. Then the act of 1935 created the Old Age Security Act by using a part of the statutes of 1929 and 1931 above quoted. The title of the 1935 act indicated that it related to the *aid to the aged*. The title of each subsequent act contains that identical phrase which truly indicates the subject treated in the body of each act. So far as the failure to indicate a change of the debtor from the recipient to his kindred (1937) and the addition of the provision to pursue only those kindred who may have filed personal income tax returns (1939–1940)—all may be treated under the same heading so far as the alleged invalidity of the statute is concerned by reason of the failure of the title to indicate the purpose of the act.

[12] We shall first consider whether the act of 1937 is void by reason of the omission from the title of the purpose of the legislature to make an adult child liable for the support of his indigent parent. The language of the Constitution is that if any subject embraced in an act is not expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title. Art. IV, sec. 24. We cannot agree with the contention of respondent for the reason that the *subject* of each amendatory act is expressed in its title and each treats of the same subject as that of the act of 1929.

Long prior to the creation of the Old Age Security Act, it was obligatory upon every adult person to provide, if pecuniarily able, for the support of his necessitous parent. Section 206 of the Civil Code, enacted in 1872, makes it the duty of a child to support his indigent parent to the extent of his ability. But before the Constitution of this state was written and from time immemorial in most of the civilized states of the earth, it had been considered the obligation of every person to protect his enfeebled and indigent parent against want. To do so was an obligation of each adult child, pecuniarily able to contribute to such support. No judicial proceeding was ever necessary to determine liability. That was fixed by the statutes hereafter cited. Therefore, in reading the title of the act of 1937, which indicates that the act relates to *aid to the aged*, it was unnecessary to sound an alarm or to invoke the aid of a legal scholar for any literate person to ascertain that the adult children of the indigent aged have an interest in the statute which is about to follow such title.

[13-17] It is not necessary that the title of an act should embrace an abstract or catalogue of its contents. Abeel v. Clark, 84 Cal. 226, 229, 24 P. 383. So long as the provisions of a statute are germane to the subject matter of the title, no violence is done to the Constitution in omitting from the title an index of all of such provisions. Ex parte Hallawell, 155 Cal. 112, 114, 99 P. 490. Every provision of an act which is closely allied to the subject expressed in the title is germane to it. Utah State Fair Ass'n v. Green, 68 Utah

251, 249 P. 1016. The purpose of the constitutional provision is merely to prevent legislators or the public from being misled by titles to bills whereby legislation relating to one subject might be obtained under the title of another subject. Abeel v. Clark, supra. In that case the title of the act related to vaccination in general but the body of the act related only to pupils attending public schools. If the title contains a reasonable intimation of the matters considered by the legislature the public is not misled. It is customary to state the subject of an act in the fewest possible words and this custom was known to the framers of the Constitution. Ex parte Liddell, 93 Cal. 633, 29 P. 251. The legislature should not be held to technical nicety in entitling proposed legislation under penalty of having the enactment fail at the hands of a too critical court. Estate of Elliott, 165 Cal. 339, 344, 132 P. 439. Where a title indicated a proposed regulation of examination of applicants for those who sought licenses to treat injuries and deformities, it was sufficiently comprehensive to cover the regulation of business of those engaged in healing or treating the sick. People v. Jordan, 172 Cal. 391, 156 P. 451. An act by whose title the act was to define and regulate the business of banking was held sufficient to cover provisions relating to trust companies and the appointment of such companies as executors of estates, which subjects are germane to the banking business. Estate of Wellings, 192 Cal. 506, 221 P. 628.

Where an act provides for the posting of a bond by one who engaged in a cleaning, dyeing and pressing shop, the statute is not void because its title made no specific mention of the bond requirements, but referred only to the regulation of such establishments and "providing ways and means for enforcement", etc. St.1931, p. 972; In re Weisberg, supra. Where the original act relating to the organization and management of county water districts provided by section 12, subd. 6 of the act, St. 1913, p. 1059, that the district should have power "to store water for the benefit of the district; and to conserve water for future use * * * to sue * * * in the name of the district * * * involving the ownership of waters * * * or of any of the lands situated therein", an amendment to the section, St.1923, p. 312, giving the district additional powers to maintain actions to prevent interference with or diminution of the natural flow of any stream or subterranean supply of waters used for any purpose and to prevent interference with such waters was not violative of the Constitution because there was no mention in the title to the amendatory act of any of the new powers conferred. Such powers are incidental to the general purposes of the act. Coachella Valley County Water District v. Stevens, 206 Cal. 400, 406, 409, 274 P. 538. Likewise, where the general purpose of the original act was to grant aid to the aged in need, any additional powers conferred for the purpose of altering the procedure of the agency which administers such aid do not treat of a new subject. Hence a reference in the title of the amendatory act to the general subject and to the number of the code section amended or a reference to the chapter and sections of the statutes containing the act amended is sufficient compliance with the constitutional requirements of section 24, article IV.

[18] A title which reads: "An Act to add another section to the Code of Civil Procedure of the State of California, relating to incompetent persons", St.1891, p. 68, is not obnoxious to the constitutional inhibition where the body of the proposed section provides that "The phrase 'incompetent,' 'mentally incompetent,' and 'incapable,' as used in this chapter, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons". Matter of Coburn, 165 Cal. 202, 131 P. 352. A reference in the title of the amendatory act to the general subject is sufficient. Ibid.

The title of an act which read "An Act to amend section sixty-one of the Civil Code, relating to the granting of divorces", St. 1897, p. 34, is not invalid because it relates to prohibitions upon marriage and not to granting of divorce. Estate of Elliott, 165 Cal. 339, 132 P. 439, 441. In the Elliott case, it was held that the title of an act would have been sufficient if it had read simply an "act to amend section sixty-one of the Civil Code". Where the title of an act read: "An act to amend section six hundred twenty-nine of the Penal Code, relative to the placing and maintaining of screens over the inlets of pipes * * * taking water from any river * * * in which fish have been placed or may exist", St.1915, p. 696, did not violate the Constitution because the body of the act conferred upon the fish and game commission power to hold hearings and determine facts incidental to the regulation of fish and game and to the granting of permission to take and use fish. People v. Glenn-Colusa Irrigation District, 127 Cal.App. 30, 15 P.2d 549.

[19,20] From the foregoing and numerous other cases, it appears to be the established law of this state that the title of an act need not embrace a catalogue of the provisions of the statute; that a code section may be amended by number; and that any part of a statute may be so supplemented as long as the provisions of the body of the amendatory act are germane to the subject expressed in its title. It is well settled that the limitation of section 24, article IV of the Constitution must be liberally construed in that it requires but a "reasonably intelligent reference to the subject to which the legislation of the act is to be addressed". Estate of Elliott, supra, 165 Cal. page 344, 132 P. page 441.

The duty of maintaining the indigent aged is instinctive. The obligation resting upon the spouse, the parent and the child has been reciprocal under custom from time immemorial. It is now expressed in the numerous statutes of this state. Sections of the Welfare and Institutions Code emphasize that duty in the responsibility of kindred for the support of indigents (secs. 2576–2579); of relatives for the support of the blind (sec. 3008); of relatives for cost of maintenance of those mentally disordered (sec. 5077) and of insane and feeble minded persons (secs. 5105.5, 5105.6, 6650–6664, 5150–5152, 5260); of narcotic addicts (sec. 5356); of sexual psycopaths (sec. 5515); of psycopathic delinquents (sec. 7060); of inebriates (sec. 7106). Moreover, the obligation to one's parents is recognized by the law of this state as contained in Civil Code section 206, adopted in 1872. Finally, as though to make the aged needy parent secure against his thoughtless or unnatural child, the lawmakers imposed criminal sanctions whereby the failure of every adult, pecuniarily able to do so, to support his parent, is made a misdemeanor. Pen.Code, sec. 270c. In view of the legal obligations thus imposed, we are unable to conceive that either a member of the legislature or a member of the general public could be misled by the title of the act of 1937, which specified certain sections of the Old Age Security Act and of the Welfare and Institutions Code "relating to aid to the aged" to be added or amended, merely because the body of the act makes those persons who are liable for such support debtors of the state to the extent of the support rendered. A title "relating to aid to the aged" must be a pointer to any person interested in an aged indigent parent, who is receiving aid from the state.

The imposition of responsibility upon the kindred was not fatal to the act of 1937. The purpose of the section as it stood following the amendment of 1937 was to establish responsibility on the part of certain relatives for moneys paid by the county as relief to the aged. Prior to that time, the recipient himself was made responsible to the extent of his property not exempt from execution.

Section 2224 is found in division III of the Welfare and Institutions Code as enacted in 1937. That division relates to "aged persons". It is a part of article 7 which relates to "Repayment of Aid". Deering. By the act amending the section in 1937, it was not altered so as to treat of a new subject. It still aimed at the repayment of moneys furnished the aged in need and attempted to establish methods for determining which of those legally liable should be required, by judgment after judicial inquiry, to contribute to the repayment of moneys paid for relief to the parent or spouse of the defendant in such judgment.

The amendatory act of 1937 did not treat of a new subject. Responsibility for the money furnished to "aid the aged" was still the subject of the section and at all times it continued to be the subject. By the substantive portions of the section as amended in 1937, the legislature directed the board of supervisors to seek repayment of moneys furnished to the needy aged from responsible kindred. Thereby no new subject was interpolated by the change in the procedure whereby a method was added to facilitate the determination of him who is responsible, because he is pecuniarily able to pay. Directions therein to the board of supervisors to proceed against the kindred in the order of their pecuniary ability were merely a change in the mode of enforcing the repayment of relief by those relatives who are responsible. The general scope of the section, to-wit: "aid to the aged" having been embraced in the statutes of 1935, the act of 1937 was not rendered invalid because of a subordinate and procedural provision for collecting from those legally liable for the repayment of sums advanced. People v. Jordan, 172 Cal. 391, 156 P. 451; Estate of Wellings, 192 Cal. 506, 221 P. 628; People v. Glenn-Colusa Irr. District, supra; In re Bear, 216 Cal. 536, 15 P.2d 489, 83 A.L.R. 1402.

[21] Having demonstrated that the act of 1937 in no sense is contrary to the constitutional inhibition of section 24 of article IV, it will not be necessary to indulge in extended discussion to establish the validity of the amendments of 1939 and 1940.

The amendment of 1939 related to "aid to the aged". Neither did the general scope or subject of the act vary from that of 1937. But all clauses of the section as amended in 1939 related to the responsibility for aid to the aged except those mechanical or procedural aids for the use of the board of supervisors in their attempts to determine the pecuniary ability of the recipient's kindred. That act went so far only as to authorize the institution of an action against an adult child when it has been ascertained by the supervisors: (1) that such child filed a personal income tax return, and (2) that he is pecuniarily able to contribute to the support of his parent. Again there is no change in the subject of responsibility for "aid to the aged". Obviously, in order to economize on the expense of making such investigations the board was authorized to proceed only where the kindred had earned sufficient to necessitate his filing a personal income tax return.

In 1940 again there was no change in the subject of the action. It is still responsibility for "aid to the aged". The subject indicated by the title was "aid to the aged". Again the legislature undertook further to abbreviate the labors and the expense on the part of the board of supervisors in proceeding to determine the identity of those who possess sufficient financial resources to justify instituting an action to compel them to repay the relief money so furnished. It went one step further by providing that in those cases where an income tax return has not been filed by the kindred the "board shall not further investigate the financial resources of such kindred". It appears, therefore, that by none of the amendments to the Old Age Security Act, or to the Welfare and Institutions Code, was the subject as suggested by each of the titles ever changed but in each instance purely mechanical contrivances were added to the act in the interest of what the legislature conceived to be an attempt to do justice in such cases and at the same time to conserve and promote the public economy. Such concept and its enactment were properly within the legislative domain.

[22, 23] 3. The complaint does state a cause of action. It alleges all the inducive matters which are necessary to the allegation of the primary fact, to-wit: defendant's pecuniary ability to support or contribute to the support of his mother. By referring to the résumé of the amended complaint in the fore part of this opinion, it will be observed that nothing is absent that is necessary to state a cause of action. By the enactment of section 2224 of the Welfare and Institutions Code, the superior court was authorized to determine whether the defendant was able to support, or contribute to the support of his mother. County of Lake v. Forbes, 42 Cal.App.2d ——, 109 P.2d 972. It was not intended that the complaint should do more than state such facts as would warrant a judicial inquiry in order to determine one thing, to-wit: defendant's ability to pay for, or to contribute to, the support of his mother. It does state such facts.

Judgment is reversed, with directions to the trial court to proceed in accordance with the foregoing opinion.

I concur: WOOD, J.

McCOMB, Justice (dissenting).

I dissent. In my opinion the statute in question violates the Fourteenth Amendment of the Constitution of the United States, and as a result the judgment of the superior court should be affirmed.

44 Cal.App.2d 20

RAWLINS v. LORY et al.

Civ. 11458.

District Court of Appeal, First District
Division 2, California.

April 4, 1941.

1. Appeal and error 🔑931(1)

On appeal from judgment for plaintiff by court sitting without a jury in personal injury action, the District Court of Appeal was required to consider the evidence most favorable to plaintiff together with all legitimate inferences therefrom.

2. Automobiles 🔑181(7)

All circumstances including speed at which motorist was driving may be considered in determining whether he was guilty of "wilful misconduct" within automobile guest statute, though speed of itself alone may not warrant finding of such misconduct. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Wilful Misconduct".

3. Automobiles 🔑181(1)

"Wilful misconduct" within automobile guest statute is intentionally doing something in operation of automobile which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or implied, that injury to guest will be probable result, though there is no deliberate intention to injure the guest. Vehicle Code, § 403, St.1935, p. 154.

4. Automobiles 🔑181(1)

Whether a motorist can be charged with knowledge that his act or failure to act would probably result in injury to guest depends on whether probability of injury would have been an apparent consequence to a man of ordinary prudence and intelligence. Vehicle Code, § 403, St.1935, p. 154.

5. Automobiles 🔑181(1)

"Skylarking" in operation of automobile, without regard to probability of injury to a guest, means indulging in antics or the cutting of capers with such automobile. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Skylarking".

6. Evidence 🔑14

It is common knowledge that "skylarking" at high rates of speed is engaged in at times by automobile drivers and particularly by youthful drivers, merely for sake of thrill which it produces and with reckless indifference to consequences. Vehicle Code, § 403, St.1935, p. 154.

7. Automobiles 🔑181(1, 7)

An automobile driver who engages in "skylarking" at high rates of speed is charged with implied knowledge of the probability of injury to a guest. Vehicle Code, § 403, St.1935, p. 154.

8. Automobiles 🔑181(1, 7), 244(20)

"Wilful misconduct" within automobile guest statute includes "skylarking" at high rates of speed, and whenever testimony shows directly or by legitimate inference that driver was engaged in such conduct, such evidence will support a finding of "wilful misconduct." Vehicle Code, § 403, St.1935, p. 154.

9. Automobiles 🔑244(20)

Evidence that motorist was intentionally driving at excessive speed with knowledge that brakes were not working properly and after ignoring guest's request that she be allowed to leave automobile, that motorist was racing to overtake another and was engaging in what might be termed "skylarking" in "hanging the corner" as he made left turn, supported finding of "wilful misconduct" as basis for recovery of damages for guest's injury. Vehicle Code § 403, St.1935, p. 154.

10. Automobiles 🔑200

Where parents of automobile driver had signed and verified his application for operator's license, alleged insufficiency of evidence to support finding that driver was operating automobile with consent of parents was immaterial, since the parents were jointly and severally liable with driver for his misconduct, regardless of their consent, express or implied, to driving of the automobile. Vehicle Code, §§ 352(a, b), 403, St. 1935, pp. 145, 154.

11. Damages 🔑177

In action for injuries sustained by minor automobile guest, where bill for medical expenses was made in name of minor and bill had not been paid, and mother who had been appointed guardian ad litem caused such expenses to be included as elements of minor's claim for damages, evidence of such special damage was properly admitted on theory of "waiver" operating in the nature of an emancipation which conferred on minor the right to recover such expenses. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

12. Appeal and error ⚷1122(1)
Trial ⚷397(1)

Where automobile guest alleged general and special damage, trial court's failure to make specific finding on issue of special damage was error, but where the special damages alleged and proved were reasonable in amount and necessarily incurred, and it appeared that trial court intended to award both general and special damages in the judgment entered, the District Court of Appeal in affirming judgment would make additional finding on amount awarded as special damage, in absence of claim that total award was excessive.

◆

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Minnie Rawlins, etc., against Martin W. Lory and others, to recover damages for injuries sustained while riding as a guest in an automobile driven by the named defendant. Judgment for plaintiff, and defendants appeal.

Affirmed.

D. W. Brobst, of Oakland, for appellants.

Phillips & Munck and Felton L. Watson, all of Oakland, for respondent.

SPENCE, Justice.

Plaintiff sought damages for personal injuries alleged to have been caused by the wilful misconduct of defendant Martin W. Lory. The cause was tried by the court sitting without a jury and plaintiff had judgment against defendant Martin W. Lory and the parents of said defendant in the sum of $1,750. Defendants appeal from said judgment.

[1] Defendants' main contention on this appeal is that the evidence was insufficient to show wilful misconduct on the part of defendant Martin W. Lory. We find no merit in this contention. There was some conflict in the evidence but considering, as we must, the evidence most favorable to plaintiff together with all legitimate inferences therefrom, the trial court was justified in determining that the following were the circumstances under which the accident occurred.

Plaintiff and defendant Martin W. Lory were school companions of the ages of 14 and 15 years, respectively. Plaintiff was riding as a guest of said defendant at the time the accident occurred. Another school companion, who was driving another automobile, passed said defendant on Racine street in the city of Oakland shortly before the accident occurred. Said defendant followed the other car at a high rate of speed, turned sharply to the left into North street and ran into the far curb on North street and overturned.

Racine street was but 36 feet wide between curbs and North street was but 32 feet wide between curbs. There was no other traffic in the vicinity at the time. As said defendant traveled along Racine street, he was first traveling at a speed of about 30 miles per hour. Said defendant then stated to plaintiff that the brakes were not working properly and plaintiff asked to be let out of the car. Said defendant did not heed her request but continued on increasing his speed to between 40 and 45 miles per hour after the other car had passed him. Defendant was going at that speed when he attempted to negotiate the turn into North street.

The trial court found that said defendant was guilty of wilful misconduct in that (1) he intentionally operated the automobile at a speed of 40 to 45 miles per hour, which speed was excessive at the time and place; (2) he deliberately disregarded the protest of plaintiff and her request to allow her to leave the automobile; (3) he proceeded at said excessive speed, and intending to "hang the corner", turned abruptly to the left into North street; and (4) he suddenly applied the brakes which were defective and known to him to be defective. The trial court further found that said acts of wilful misconduct were done by defendant in reckless disregard of the safety of plaintiff, well knowing that injury to plaintiff would probably result therefrom and that said wilful misconduct caused the automobile to overturn thereby injuring plaintiff.

[2] Defendants concede that defendant Martin W. Lory was traveling too fast but they state that "speed, of itself alone, is not

wilful misconduct". This may be conceded for the purposes of this discussion but all of the circumstances, including the speed at which said defendant was driving, may be considered when determining the question of whether he was guilty of wilful misconduct within the meaning of the statute. Vehicle Code, § 403, St.1935, p. 154. Haas v. Jones, 29 Cal.App.2d 650, 85 P.2d 579; Francesconi v. Belluomini, 28 Cal.App.2d 701, 83 P.2d 298; Chandler v. Quinlan, 25 Cal.App.2d 646, 78 P.2d 235; Wright v. Sellers, 25 Cal.App.2d 603, 78 P.2d 209; Candini v. Hiatt, 9 Cal.App.2d 679, 50 P.2d 843; Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172.

[3, 4] The term "wilful misconduct" has been frequently defined and the language of the court in Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.2d 988, has been consistently followed and approved. The court there said at page 626 of 134 Cal.App., at page 990 of 25 P.2d, "'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." It is not necessary that there be a deliberate intention on the part of the driver to injure the guest, but it is essential that there be an intentional act or omission on his part under circumstances disclosing the requisite knowledge, express or implied, of the probability of injury to the guest. In determining whether the circumstances are sufficient to disclose implied knowledge of such probability, an external standard is applied. In Stacey v. Hayes, 31 Cal.App.2d 422, 88 P. 2d 165, one of the authorities relied on by defendants, the court said at page 426 of 31 Cal.App.2d, at page 167 of 88 P.2d, "The probability of injury to the guest from such act or omission must have been an apparent consequence to a man of ordinary prudence and intelligence."

[5-9] It is entirely clear in the present case that the defendant driver intentionally did certain acts which he should not have done. It is conceded that he was intentionally driving at an excessive speed and accepting, as did the trial court, the testimony most favorable to plaintiff, it appears that he was intentionally traveling at such excessive speed with knowledge that the brakes were not working properly and after ignoring plaintiff's request that she be allowed to leave the car. It is also a legitimate inference from the testimony that the defendant driver was racing to overtake the other car and that he was engaging in what may be termed skylarking in "hanging the corner" into North street. By the term "skylarking" we mean the indulging in antics or the cutting of capers with such automobile. See Webster's New International Dictionary, second edition. It is a matter of common knowledge that such skylarking at high rates of speed is engaged in at times by drivers, and particularly by youthful drivers, merely for the sake of the thrill which it produces and with reckless indifference to consequences. A driver who engages in such conduct is "knowingly flirting with danger" without necessity compelling him to take the chance. See Francesconi v. Belluomini, 28 Cal.App.2d 701, 705, 83 P.2d 298; Chandler v. Quinlan, 25 Cal. App.2d 646, 648, 78 P.2d 235. The probability of injury to a guest from such conduct is an apparent consequence to any person of ordinary prudence and, applying the external standard above mentioned, any driver engaging in such conduct is charged with implied knowledge of the probability of such injury. The type of conduct which we have termed skylarking appears to be the precise type of conduct, or at least one of the types of conduct, which the legislature had in mind when it used the term "wilful misconduct" in the so-called guest statute and whenever the testimony shows, directly or by legitimate inference, that a driver was engaging in such conduct, such evidence is sufficient to show wilful misconduct and to support a finding thereof. As above indicated, we are of the view that such was a legitimate inference from the testimony in this case.

[10] Defendants further contend that the evidence was insufficient to support the finding to the effect that the defendant driver was operating the automobile with the consent of his parents. Plaintiff concedes that there was no evidence to support this finding, it appearing that said parents did not own said automobile or know of its existence. In this connection, it may be stated that the defendant driver and his companion who was driving the other car above mentioned had temporarily exchanged cars shortly before the accident. But the above-mentioned finding

was an immaterial finding here for it was alleged in the amended complaint, admitted by the answer and found by the trial court that the parents of the defendant driver had signed and verified the application of the defendant driver for his operator's license. This last-mentioned finding was admittedly correct and the parents were therefore jointly and severally liable with the defendant driver under the provisions of subdivision (a) of section 352 of the Vehicle Code, St.1935, p. 145. The liability imposed by said subdivision (a) is in no way dependent upon the consent, express or implied, of his parents to the driving of the automobile as is the liability imposed by subdivision (b) of said section.

[11] Defendants further contend that "the findings are prejudicially erroneous in that damages are awarded in one sum with no finding as to special damage". The amended complaint alleged general damage in the sum of $10,000 and special damage, including expenses incurred for physicians, medicines and hospitalization, in the sum of $311.50. These allegations were denied by the answer. Evidence was offered in support of the allegations of special damage and objection was made thereto upon the ground that the parents of the plaintiff were the ones primarily liable for the expenses incurred and that said parents were not parties to the action. McManus v. Arnold Taxi Corp., 82 Cal.App. 215, 255 P. 755. The objection was overruled and the evidence was admitted. The trial court found that "As proximate results of the said wilful misconduct of the defendant Martin W. Lory, the plaintiff suffered injuries to her person consisting of a fracture of the right wrist, extensive lacerations of the wrist, a laceration in the region of the right elbow, and pain, suffering and shock, and the plaintiff was compelled to and did incur expenses for medicines and hospitalization, to her damage in the sum of $1,750.00."

Before considering the failure of the trial court to make a specific finding on the issue of special damage, it is appropriate to consider whether the evidence of the expenses necessarily incurred was properly admitted in this action. The bill covering said expenses was made out in the name of the plaintiff and said bill had not been paid. Anna Rawlins, the mother of the plaintiff, was appointed guardian ad litem and she caused these expenses to be included as elements of plaintiff's claim for damages in this action. Under these circumstances, we believe that evidence of such special damage was properly admitted and that plaintiff was entitled to recover such special damages in this action under the doctrine of waiver, "such waiver operating in the nature of an emancipation, and conferring upon the child the right to recover said * * * expenses." See McManus v. Arnold Taxi Corp., 82 Cal.App. 215, 224, 255 P. 755, 759; and authorities cited. Unlike the situation presented in the McManus case, there was no claim made here that there was any negligence on the part of the parents of plaintiff which would affect the right of plaintiff or her parents to recover such special damages.

[12] Having concluded that plaintiff was entitled to recover said special damages, we turn to the question of whether the failure of the trial court to make a finding on that issue constituted prejudicial error. It may be conceded that the failure to make such finding constituted error (James v. Haley, 212 Cal. 142, 297 P. 920; Scoville v. Keglor, 27 Cal.App.2d 17, 80 P.2d 162), but as was said in the last-mentioned case at page 30 of 27 Cal.App.2d, at page 168 of 80 P.2d, "It does not in all cases follow that errors of this description are prejudicial to the losing party." The only special damages alleged and proved were the expenses incurred in the sum of $311.50. The uncontradicted evidence showed that the amounts charged for the various services were reasonable and that said expenses were necessarily incurred. It further appears from the quoted finding that the trial court intended to award general damages and also special damages covering said expenses in the total sum of $1,750. The evidence shows that said total award was entirely reasonable and defendants make no claim that it was excessive. While we believe that the judgment might be affirmed without additional findings upon the ground that said error was not prejudicial, it appears that this is an appropriate case for this court, in affirming the judgment, to make additional findings. Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555; Hodges v. Gonzales, 5 Cal.App.2d 86, 42 P.2d 359. We therefore find that as proximate results of the wilful misconduct of defendant Martin W. Lory, plaintiff suffered special damage in the sum of $311.50 and general damage

in the sum of $1,438.50, making a total of $1,750.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

44 Cal.App.2d 71

CRAIG v. CITY OF LOS ANGELES et al.

Civ. 12274.

District Court of Appeal, Second District, Division 1, California.

April 7, 1941.

1. Courts 🔑91(1)

Although decision of the Supreme Court in disciplinary proceeding against attorney based on conduct of attorney in an action for conspiracy to defraud was not "res judicata" on the issues involved in the conspiracy action, the law as declared in the Supreme Court decision was controlling on District Court of Appeal on subsequent appeal from judgment entered in the conspiracy action.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Pleading 🔑193(1, 6)

Complaint which attempted to state numerous causes of action in very loose manner without any attempt at separately stating them was demurrable on ground that several causes of action were improperly united and not separately stated, and on ground of unintelligibility. Code Civ.Proc. § 430, subd. 5.

3. Pleading 🔑225(1)

Where trial court sustained demurrer and plaintiff failed to amend her complaint, within time fixed by court, and instead of doing so filed what was denominated a "judgment" signed by original attorney for complainant, the trial court's action in entering judgment of dismissal was proper.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Irma A. Craig against the City of Los Angeles for conspiracy to defraud. From unspecified decrees, and orders plaintiff attempts to appeal and from judgment of dismissal rendered against plaintiff, the plaintiff appeals.

Attempted appeal from unspecified orders and decrees dismissed and judgment of dismissal affirmed.

A. D. Ericksen, of Oakland, substituted in the place and stead of E. H. Woodard, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Herbert L. Iasigi and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondents.

YORK, Presiding Justice.

This appeal is prosecuted from "all decrees, orders and the judgment of dismissal rendered against plaintiff and for defendants" in an action for damages for conspiracy to defraud.

In order to state the contentions of appellant, it will be necessary to quote verbatim her so-called "statement of questions involved", because of the involved and confused manner in which such contentions are stated in her brief, to-wit:

"(a) The trial court erred in refusing to overrule the 'Joint General Demurrer' by all defendants.

"(b) The trial court erred by denying plaintiff's certified cross-motion for the same final judgment demanded by defendants' uncertified joint general demurrer against plaintiff's verified complaint as this High Court ruled that 'Plaintiff has a right to judgment * * * when defendant files an unverified answer to his verified complaint'. (21 Cal.Jur. 237.) 'No credit is given to unsworn answers—In judicio non creditur nisi juratis. * * *' Code of Civil Procedure 446, 1962.

"(c) The trial court erred by vacating the default judgment against defendant Beardsley, or any other defendant, all of whom were served personally, in their individual capacity, and charged with a continuing conspiracy which estops the statute of limitations ever starting to run as proved by their fear to answer and deny the charges under oath, which forced them to default.

"(d) The trial court erred by dismissing this cause against any defendant, all of whom were personally served in their individual capacity and refused to answer under oath as required by law. Code of Civil Procedure 446, etc."

[1] Although the case of E. H. Woodard v. State Bar of California, 16 Cal.2d 755, 108 P.2d 407, decided by the Supreme Court on December 20, 1940, is, of course, not res judicata, nevertheless, the law as declared therein has the same force and effect as a ruling by that court in any other case, and this court is bound by the law as therein stated. A full statement of the procedure followed by the original attorney for the plaintiff herein is set forth in the said decision and it is not necessary to here repeat the facts there stated, for the reason that we adopt as our own the statements made therein with reference to this case. The attorney now appearing before this court on behalf of appellant is not the original attorney who filed the complaint and perfected the instant appeal, but is one A. D. Ericksen, who was substituted at the request of the appellant on February 21, 1941, pursuant to the procedure outlined by section 286 of the Code of Civil Procedure.

[2] The only question before this court can be determined by answering paragraph (a) of the "Statement of questions involved", hereinbefore set forth in full. The complaint filed herein is most unusual in form, and it is at once apparent that it is subject to the demurrer of respondents on the ground that it does not comply with subdivision 5, section 430, of the Code of Civil Procedure. It is also subject to demurrer on the grounds of uncertainty and unintelligibility, as it attempts to state numerous causes of action in a very loose and rambling manner without any attempt at separately stating them.

The only allegation with regard to the falsity of any of the statements alleged to have been made by any of the respondents is contained in paragraph VII of the complaint, where it is alleged in respect to a certain letter, not set out but therein referred to, that "all of the subject matter of which letter, derogatory to Plaintiff, was false, fraudulent and a part of a collusion and secret understanding between these defendants to deprive Plaintiff of her position and the benefits derived therefrom." The complaint contains no definite specification as to the particular statement therein alleged to be false, and the allegation in said paragraph VII is the only allegation of falsity we can find in the complaint, unless we assume that that is what is meant by allegations charging the assignment to appellant of mistakes made by other employees. However, there is no direct allegation that appellant did not participate in the very proceedings which it is charged were improper.

The complaint is framed in such a disjointed and incoherent manner that the only course open to respondents was that of interposing a demurrer raising the questions of misjoinder of causes of action, uncertainty, ambiguity and unintelligibility.

[3] The court having sustained such demurrer and appellant having failed to amend her complaint within the time fixed by the court, but instead of doing so having filed what is denominated a judgment signed by the original attorney for appellant, the court's action in entering a judgment of dismissal will necessarily have to be sustained.

Paragraph (b) of the statement of questions involved is disposed of by the law as stated in the case of Woodard **v.** State Bar, supra.

Paragraph (c) of said statement is impossible of interpretation, except that it is an attempted objection to the vacation of a default judgment entered against the respondent Beardsley. The action of said respondent in moving to set aside the so-called judgment was apparently deemed necessary because of an attempted execution against his salary issued upon the said void judgment.

Paragraph (d) of said statement of questions involved is a most peculiar statement by which appellant apparently claims that a demurrer is always improperly interposed to a verified complaint, and that in all cases an answer under oath is required by law to be filed. Further, that the filing of a demurrer by respondents would not constitute an appearance. If that is the contention of appellant, it is answered by the case of Woodard v. State Bar, supra.

The attempted appeal from the unspecified decrees and orders of the trial court is dismissed. The judgment of dismissal is affirmed.

We concur: DORAN, J.; WHITE, J.

44 Cal.App.2d Supp. 939

BRANDTJEN & KLUGE, Inc., v. FINCHER.

SAME v. ATKINSON.

Civ. A4837, A4838.

Appellate Department, Superior Court,
Los Angeles County, California.
April 2, 1941.

1. Licenses 🔑1, 7(1)

The use tax imposed by statute assessing an excise tax on the storage, use, or other consumption of tangible personal property is not a "property tax", but is an "excise tax", and is valid. St.1935, p. 1297 et seq., § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Excise Tax" and "Property Tax".

2. Licenses 🔑15(1)

The Use Tax Act assessing an excise tax on the storage, use, or other consumption of tangible personal property is complementary to the Retail Sales Tax Act, and one of the purposes of the Use Tax Act is to help retailers in state who are subject to sales tax, to compete on terms of equality with retailers out of the state who are exempt from sales tax. St.1933, p. 2599 et seq., § 1 et seq.; St.1935, p. 1297 et seq., § 1 et seq.

3. Licenses 🔑15(1), 28

The Retail Sales Tax Act imposes a direct liability on retailer for privilege of selling, and not on the consumer, and is limited by terms thereof in sales made in the state. St.1933, pp. 2599 et seq., 2600, §§ 1 et seq., 3.

4. Licenses 🔑28

Under Use Tax Act assessing an excise tax on the storage, use, or other consumption of tangible personal property, liability of buyer to pay tax imposed is the primary liability, and liability of retailer is only secondary. St.1935, pp. 1297 et seq., 1298, 1299, §§ 1 et seq., 3, 4.

5. Licenses 🔑7(1), 28, 32(2)

Provisions of Use Tax Act requiring retailer, in certain cases where he can be reached, to collect tax and pay it over to state are valid, and set up a statutory scheme making retailer an agent of state for collection, but such provisions do not shift direct burden of tax from buyer to retailer, nor do they relieve buyer from primary liability cast on him under act unless he pays tax to retailer. St.1935, pp. 1297 et seq., 1298, 1300, 1307, 1308, §§ 1 et seq., 3, 6, 21, 22.

6. Money paid 🔑1

One compelled to pay, or owning property liable for debt which another in good conscience should pay, may recover amount paid from latter.

7. Taxation 🔑531(1)

A person involuntarily paying taxes for which another person is legally or equitably bound may recover amount paid from latter.

8. Taxation 🔑531(1)

In order to entitle one who involuntarily pays taxes for which another is legally or equitably bound, to recover from latter, it is not necessary that he pay tax under duress of person or property, or by compulsion of legal procedure, but it is sufficient if he does so to relieve himself from legal liability for tax paid.

9. Taxation 🔑531(1)

Where one involuntarily pays taxes, for which another is legally or equitably bound, the liability of one who is legally or equitably bound to pay tax to one who has paid tax is not upon the tax, but is implied by law, and is similar in such respect to liability of a principal to a surety who has paid debt of the principal.

10. Limitation of actions 🔑49(1)

Buyers' liability to retailer for amount of use tax paid by retailer did not arise at time of sale, but at time retailer paid tax, and hence buyers' plea of statutes of limitation was not well taken, where time elapsing between retailer's payment and bringing of action was only 14 days, which was less than that allowed by any of the statutes pleaded. St.1935, pp. 1297 et seq., 1310, and p. 1305, §§ 1 et seq., 28, and § 20, as amended by St.1939, p. 2162, § 10.

11. Limitation of actions 🔑182(2)

Whether retailer paid use tax after state's proceedings to collect tax were barred by limitations, so that retailer should not be entitled to recover tax from buyers, would not be considered, where buyers' answers failed to plead such facts as a defense.. St. 1935, pp. 1297 et seq., 1310, and p. 1305, §§ 1 et seq., 28, and § 20, as amended by St. 1939, p. 2162, § 10.

12. Licenses ⚷28, 32(1)

Fact that retailer failed to collect use tax from buyers as required by Use Tax Act, so that retailer was at fault equally with buyers in nonpayment of tax when due, did not release buyers from liability for tax or cast primary liability on retailer, and hence did not afford a complete defense to retailer's action to recover from buyers amount of use tax retailer was compelled to pay. St.1935, p. 1297 et seq., § 1 et seq.

◆

Appeals from Justice's Court, San Antonio Township; Stanley J. Moffatt, Judge.

Suit by Brandtjen & Kluge, Incorporated, against C. F. Fincher, doing business as Fincher Printing Company, consolidated with suit by same plaintiff against James L. Atkinson, doing business as Vernon Stationery & Printing Company, to recover amount of use tax plaintiff was compelled to pay on articles sold by it to defendants. From a judgment in each case for defendant, the plaintiff appeals.

Judgment in each case reversed and cause remanded with directions.

Catlin & Catlin, of Los Angeles, for appellant.

Nixon A. Lange, of Huntington Park, for respondent C. F. Fincher, etc.

Arch G. McLay, of Huntington Park, for respondent James L. Atkinson, etc.

SHAW, Presiding Judge.

In each of these cases the plaintiff appeals from a judgment entered against it after a demurrer to its amended complaint had been sustained without leave to amend. The complaints are identical except for names of defendants, dates and amounts of interest and penalties, and statements of facts hereinafter made must be understood as applying to both cases. In each complaint it is alleged, in substance, that the plaintiff, being a retailer maintaining a place of business in this state, in 1936 sold a printing press to the defendant at St. Paul, Minnesota, for use in this state, at a price on which the use tax would be $60.72, that the defendant has not paid the use tax, and that the plaintiff, by virtue of a judgment obtained against it by the state, has been compelled to pay to the state said tax, with interest and penalties, all of which plaintiff seeks to recover.

The use tax is provided for by a statute of 1935, designated as the "Use Tax Act of 1935," Stats. 1935, p. 1297; Deering's Gen.Laws, 1935 Supp.Act. 8495a. It has since been amended, but as this case arose before the amendments they are not material, except as hereinafter stated. The act provides: "An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property. Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State". Section 3. Detailed provisions for enforcing this liability are made by various sections. Section 6 provides that "Every retailer maintaining a place of business in this State * * * shall at the time of making such sales collect the tax imposed by this act" and "The tax herein required to be collected by the retailer shall constitute a debt owed by the retailer to this State." Section 7 requires every such retailer to pay such tax to the state within a certain time limit and, with other sections, sets up a procedure for compelling him to do so. In behalf of the defendants it is contended that, by reason of the provisions of section 6, the plaintiff merely discharged its own debt when it made the payment to the state and hence there is no basis for a recovery by it from defendants of the amount so paid.

[1-4] The use tax is not a property tax, but an excise tax, as it purports to be, and is valid. Douglas Aircraft Co., Inc., v. Johnson, 1939, 13 Cal.2d 545, 90 P.2d 572; Southern Pac. Co. v. Gallagher, 1939, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586. The use tax act is complementary to the "Retail Sales Tax Act of 1933" (Stats.1933, p. 2599; Deering's Gen.Laws, 1933 Supp., Act 8493). Douglas Aircraft Co. Inc. v. Johnson, supra; Southern Pacific Co. v. Gallagher, supra. The sales tax act imposes a tax directly on the retailer for the privilege of selling, and not on the consumer (Western L. Co. v. State Board of Equalization, 1938, 11 Cal.2d 156, 162, 78 P.2d 731, 117 A.L.R. 838; De Aryan v. Akers, 1939, 12 Cal.2d 781, 783, 87 P.2d 695, and is limited by the terms of section 3 thereof to sales made in this state. While the use tax act, in the terms of section 3 thereof above quoted, imposes a tax on the use etc. of all property

purchased from a retailer for use in this state, section 4 thereof exempts from the use tax all sales which are subject to the sales tax, that is, all sales made in this state, so that the use tax act in reality affects only property purchased out of the state. One of the purposes of the use tax act is to help retailers in the state, who are subject to the sales tax, to compete on terms of equality with retailers out of the state who are exempt from the sales tax. Douglas Aircraft Co. Inc., v. Johnson, supra, 13 Cal.2d 545, 549, 90 P.2d 572. This purpose could not be fully accomplished by imposing the direct liability for the use tax on the retailer, who would in many cases be outside of the state and not subject to its laws at all. It can be carried out by levying the tax on the purchaser who brings the property into this state for use. Accordingly section 3 of the use tax act imposes the tax, not on "the privilege of selling tangible personal property", as does the sales tax act, but on the "storage, use or other consumption" of such property in the state, and makes the purchaser, not the seller, liable for the tax. Being the only liability which would be effective in all cases, this liability of the purchaser is necessarily the primary liability.

[5] While the provisions which require the retailer, in certain cases where he can be reached, to collect the tax and pay it over to the state are valid and set up a statutory scheme making the retailer an agent of the state for collection (Felt & Tarrant Mfg. Co. v. Gallagher, 1939, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488), they do not shift the direct burden of the tax from the purchaser to the retailer, nor do they relieve the purchaser from the primary liability cast on him by section 3 unless he pays the tax to the retailer. The provision of section 6 making the tax a debt of the retailer to the state, where he is required to collect it, is a part of this statutory scheme, and its effect, where such collection is not made, is merely to hold the collection agent liable for his default in the performance of his duty as such. In such a case the unpaid tax may yet be collected by the state from the purchaser under sections 21 and 22, which provide proceedings looking to such collection.

[6-8] Since the liability of the plaintiff here, as retailer, was only secondary and that of the defendants was primary, it follows that the tax should have been paid by defendants rather than plaintiff, and plaintiff stands in a position analogous to that of a surety for defendants. This brings into operation the rule thus stated in Page v. Podol, 1935, 4 Cal.App.2d 229, 231, 41 P.2d 167, 168: "one who is compelled to pay a debt or whose property is made liable for a debt which another in good conscience ought to pay is entitled to recover against that other the amount so paid. * * * A person who, not acting voluntarily, pays taxes for which another is legally or equitably bound is entitled to recover upon this principle." To same effect, see Fresno Inv. Co. v. Brandon, 1926, 79 Cal.App. 387, 389, 249 P. 548; San Gabriel, etc., Co. v. Witmer, etc., Co., 1892, 96 Cal. 623, 635, 29 P. 500, 31 P. 588, 18 L.R.A. 465, 470; McMillan v. O'Brien, 1934, 219 Cal. 775, 780, 29 P.2d 183, 91 A.L.R. 383; 41 C.J. 14, 15. In order to entitle one to recover in such a case it is not necessary that he pay the tax under duress of person or property, or by compulsion of legal proceedings. It is sufficient if he does so to relieve himself from legal liability for the tax paid. Page v. Podol, supra, 4 Cal.App.2d 229, 232, 41 P.2d 167; Miller & Lux, Inc., v. Sparkman, 1932, 128 Cal.App. 449, 453, 454, 17 P.2d 772; 41 C.J. 13; see also Weaver v. Fickett, 1927, 82 Cal.App. 116, 120, 121, 255 P. 257.

[9] The fact that defendant's liability for the tax was extinguished when plaintiff paid it to the state, as indicated in section 3 of the act, does not prevent the application of the rule just stated to the case. Such a result is assumed in the very statement of that rule, which calls for a payment of the tax. The liability of defendant to plaintiff is not upon the tax, but is implied by law from the circumstances of the case, and arises only when plaintiff has paid the tax. It is similar in this respect to the liability of a principal to a surety who has paid the debt of the principal. See Yule v. Bishop, 1901, 133 Cal. 574, 62 P. 68, 65 P. 1094; Merner Lumber Co. v. Brown, 1933, 218 Cal. 136, 140, 21 P.2d 590.

[10] Since defendant's liability here sued on arose when plaintiff paid the tax (Loewenthal v. Coonan, 1902, 135 Cal. 381, 67 P. 324, 1033, 68 P. 303, 87 Am.St.Rep. 115), none of the pleas of statutes of limitation is well taken. The time elapsing between plaintiff's payment and the bringing of this action was only 14 days, which is less than that allowed by any of the statutes pleaded.

[11] The use tax act, in section 28, authorizes a suit by the state for collection of

the tax from one in the situation of plaintiff here to be brought within three years after the delinquency of the tax. Section 20 provides for a summary proceeding against such a person, in which a judgment may be entered without litigation, which by the 1939 amendment of section 20, Stats. 1939, p. 2162, must be commenced within three years after the amount is due. We assume, without deciding, that this limitation of time, first introduced into section 20 in 1939, is applicable to the liability of plaintiff to the state. The complaint here does not show under which of these sections proceedings by the state to compel plaintiff to pay the tax were taken nor when such proceedings were begun; but it does appear therefrom that the judgment was rendered more than three years after the time for taking such proceedings began to run. Defendants argue that the state's proceeding may have been barred, and that if it was no liability to reimburse plaintiff was placed on defendants by plaintiff's payment. It may be that the same rule should be applied here as in case of an ordinary surety, who, it is said, cannot recover from his principal if he pays a debt which is barred as to the surety by the statute of limitations and which he is under no legal obligation to pay (See Ryland v. Commercial, etc., Bank, 1900, 127 Cal. 525, 527, 59 P. 989), and that the rule should be extended to cover cases where the surety is compelled by legal proceedings to pay a barred claim only because he has neglected to set up the bar of the statute. But the facts from which such a defense, if it be a defense, could arise do not appear in the complaint. If defendant desires to present such facts as a defense, they must be pleaded by answer.

[12] Since defendant did not pay the tax, obviously plaintiff did not collect it, although the latter fact is not directly alleged. The plaintiff is therefore at fault equally with defendant in the non-payment of the tax when due, but this fact did not release the defendant from liability for the tax or cast the primary liability on plaintiff, and hence does not afford a complete defense to the action. Possibly it may, as defendant contends, defeat plaintiff's claim for the interest and penalties it was required to pay to the state, since the rule under which plaintiff can recover here is based on equitable principles; but we make no decision on this point, for if well taken it affords no ground for sustaining the demurrer.

In each case the judgment is reversed and the cause is remanded to the Justice's Court with directions to overrule the demurrer to the amended complaint and permit defendant to answer, each appellant to recover its costs of appeal.

We concur: BISHOP, J.; FOX, J.

CALIFORNIA REPORTER

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SECOND SERIES

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17 Cal.2d 718

KAMPER v. WALDON et al.

L. A. 17035.

Supreme Court of California.

April 16, 1941.

1. Parent and child 🔑3(1)

Though in absence of agreement to the contrary, a parent is released from legal duty of support upon complete emancipation of a minor child, as by its lawful marriage, an obligation of support otherwise voluntarily assumed is not limited thereby. Civ.Code, § 204, subd. 2.

2. Parent and child 🔑3(1)

Upon sufficient consideration a parent may agree and be bound to do more for child than statute requires, so long as the additional obligation is not contrary to nor inconsistent with the statutory provisions. Civ.Code, § 204, subd. 2.

3. Parent and child 🔑3(1)

In property settlement agreement between separated husband and wife, consideration for husband's promise to pay for children's support until youngest child should reach age of 21 was sufficient, and such promise was enforceable, notwithstanding marriage of youngest child at age of 17. Civ.Code, §§ 159, 160, 204, subd. 2.

4. Husband and wife 🔑278(1)

The statutes governing separation agreements, though in terms applicable only to agreements for immediate separation, are equally applicable to agreements for support entered into after separation has taken place. Civ.Code, §§ 159, 160.

5. Parent and child 🔑3(1)

It may not be assumed, as a matter of law, that marriage of 17 year old daughter caused her need for support to disappear, as affecting father's liability for support under separation agreement. Civ.Code, § 204, subd. 2.

6. Parent and child 🔑3(1)

The law does not prevent a parent from contracting to support a child, minor or adult, married or unmarried, and when agreement to support is founded upon sufficient consideration, the obligation is not measured by legal duties otherwise imposed. Civ.Code, § 204, subd. 2.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Henry L. Kamper against Evalyn Kamper Waldon and others for declaratory relief to determine obligations under property settlement agreement. From a judgment for defendants, plaintiff appeals.

Affirmed.

I. Henry Harris, of Los Angeles (John K. Ford, of Los Angeles, of counsel), for appellant.

Caryl Warner, of Los Angeles, for respondents.

SHENK, Justice.

This is an appeal from a judgment for the defendant in an action for declaratory relief.

On October 27, 1934, the plaintiff and the defendant, then husband and wife living in a state of separation, entered into a property settlement agreement. In consideration of the mutual covenants therein contained, it was agreed that the custody of the four minor children of the parties be given to the defendant wife; that the plaintiff husband pay the defendant the sum of $30 a month for the support and maintenance of said minor children, such payments to commence immediately and to continue as long as the youngest child, Edith, "should live and be under the age of twenty one years"; that each party release all interest and claim to any and all property of the other; and that the defendant relinquish any claim to alimony.

Subsequently the defendant obtained a divorce from the plaintiff. Neither the interlocutory nor the final decree made any reference to the aforesaid agreement and no provision was made in either decree for the support of the minor children nor for alimony payments to respondent.

The plaintiff made the monthly payments required under the agreement until December 23, 1937. At that time three of the children had reached their majority, and Edith, though but seventeen years of age, had been lawfully married for a period of one month. Thereupon the plaintiff notified the defendant that he would no longer pay the specified amount because of Edith's marriage. On April 30, 1938, the defendant filed suit in the justice court for money allegedly due under the agreement. The plaintiff then commenced the present action in the superior court for declaratory relief and obtained a preliminary injunction restraining the respondent from prosecuting the action in the justice's court pending the determination of this matter in the trial court. Upon the trial, the preliminary injunction was dissolved and judgment went for the defendant. The appeal is from the judgment.

[1, 2] It is urged by the plaintiff that the lawful marriage of Edith resulted in her emancipation from parental control and operated to relieve him from his legal duty to support her. In support of this contention the plaintiff relies upon decisions of other jurisdictions and on section 204(2) of the Civil Code, which provides: "The authority of a parent ceases * * * upon the marriage of the child." It is then argued that the cited section became part of and abrogated the agreement in so far as its terms purported to impress an obligation of support after Edith's marriage. This conclusion follows, so the plaintiff asserts, from an application of the rule that laws in existence when an agreement is made enter into and form a part of the agreement as fully as if expressly incorporated therein. It may be assumed, in the absence of an agreement to the contrary, that a parent is released from the legal duty of support upon the complete emancipation of a minor child, as by its lawful marriage. See Perkins v. Westcoat, 3 Colo.App. 338, 33 P. 139; Texas Employers' Ins. Ass'n v. Birdwell, Tex.Civ. App., 39 S.W.2d 159; Going v. Going, 8 Tenn.App. 690. But neither the cases nor the Code section relied upon purport to limit the obligation of support otherwise voluntarily assumed. Upon sufficient consideration the parent may agree and be bound to do more than the statute requires, so long as the additional obligation is not contrary to nor inconsistent with the statutory provision.

[3, 4] The plaintiff contends that inasmuch as a father is required by statute to support his minor children, his agreement of support was without consideration for the reason that he there promised to do no more than he was already legally bound to do. The contention assumes that the statute is the measure of his right to contract. The assumption may not be indulged. There is no such limitation in the statute or otherwise in the law. There are numerous respects in which the consideration for the plaintiff's promise was legally sufficient. Section 159 of the Civil Code recognizes the right of husband and wife to agree to an immediate separation and make provision for the support of "their children during such separation". Section 160 of the same Code then provides: "The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section." Under these Code sections the agreement of separation in question is in and of itself a sufficient consideration for the plaintiff's promise. The fact that a separation had taken place prior to the execution of the contract presents no difficulty. It has been held that the provisions of the foregoing Code sections which, in terms, apply only to agreements for immediate separation, are equally applicable to agreements for support entered into after a separation has taken place. Brown v. Brown, 83 Cal.App. 74, 256 P. 595.

[5, 6] The promise of the defendant to release all of her interest and claim in and to the property of the plaintiff and to relinquish all claim against the plaintiff for alimony in the event of a divorce likewise affords sufficient consideration for the plaintiff's promise. Even if material to the controversy, a point we do not decide, there was no showing that the daughter Edith, though married, was not in need of support, and it may not be assumed, as a matter of law, that the marriage caused her need for support to disappear. The record shows and the trial court found that the defendant has continued to assist in the support of the daughter since her marriage. There is nothing in the law

to prevent a parent from contracting to support a child, minor or adult, married or unmarried. And when the agreement, as here, is founded upon sufficient consideration, the contractual obligation is not measured by legal duties otherwise imposed. No principle of public policy intervenes to prevent such a contract and the courts have no right by a process of interpretation to release one of the contracting parties from disadvantageous terms actually agreed upon.

No sound reason has been advanced why plaintiff should be relieved from the provisions of his agreement and the judgment of the trial court should not be disturbed.

The judgment is affirmed.

We concur: GIBSON, C. J.; CARTER, J.; CURTIS, J.; EDMONDS, J.; TRAYNOR, J.

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17 Cal.2d 722

FITZPATRICK v. UNDERWOOD.

L. A. 17752.

Supreme Court of California.

April 16, 1941.

Rehearing Denied May 15, 1941.

1. Trial 🔑395(5), 398

A trial court must find ultimate rather than probative or evidentiary facts, and findings of probative facts will not control the finding of ultimate facts or tend to establish that the ultimate facts were found against the evidence, unless the ultimate findings are necessarily based on the probative findings and are completely overcome.

2. Trial 🔑398

Where ultimate facts found which are sufficient in themselves to support the judgment entered, the mere fact that the trial court also made findings in which probative facts are incorporated which indicate that the ultimate facts are not sufficiently proved and an appeal is made upon the judgment roll alone, the probative facts set forth in the finding must be disregarded.

3. Trial 🔑395(1), 404(2)

Ultimate findings that broker did not produce a purchaser ready, willing or able to purchase property for $53,000 cash, or any other sum, on terms satisfactory to owner, produced by broker were sufficient to support judgment for owner, and were not "conclusions of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusions of Law".

4. Trial 🔑404(2)

Where findings negatived identical allegations in broker's complaint necessary to statements of a cause of action, broker was in no position to claim that findings were "legal conclusions".

See Words and Phrases, Permanent Edition, for all other definitions of "Legal Conclusions".

5. Appeal and error 🔑931(1)

All intendments are in favor of judgment appealed from.

6. Brokers 🔑54

Where a broker procures a purchaser ready, willing and able to make a purchase, he is not deprived of commission merely because owner completes transaction without broker's assistance, unless broker's authorization provides otherwise.

7. Brokers 🔑46

An agent may recover damages for breach of exclusive agency contract even though he has not produced a purchaser ready, willing and able to purchase, where breach by principal consists of preventing agent from selling the property by selling it himself before agency contract has expired.

8. Brokers 🔑46

Where broker did not have exclusive right to sell property, owner had right to sell it, and a commission was payable only if broker was the procuring cause of the sale.

9. Brokers 🔑88(14)

Probative facts found by court that broker without exclusive agency did not do anything except to call property to purchaser's attention and to show it to him, that broker did not notify owner of exhibition of property even after purchaser advised broker he was negotiating with owner who had informed purchaser no commission would be paid to broker, that broker told purchaser to continue negotiations with owner, and that broker would protect himself in case of sale by owner, that sale was consummated be-

tween owner and purchaser and that broker was not the procuring cause of sale, supported judgment for owner.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by W. T. Fitzpatrick, etc. against Susan B. Underwood for commissions claimed to have been earned by plaintiff in connection with the sale of defendant's property. From a judgment for defendant, the plaintiff appeals.

Judgment affirmed.

Prior opinion, 105 P.2d 632.

Courtney A. Teel, of Los Angeles, for appellant.

Stephen Monteleone, of Los Angeles, for respondent.

CARTER, Justice.

This is an appeal by plaintiff, a licensed real estate broker, from a judgment for defendant rendered by the court sitting without a jury in an action for commissions claimed to have been earned by plaintiff in connection with the sale of defendant's property. The appeal is on the judgment roll alone, plaintiff contending that the findings do not support the judgment, but on the contrary he is entitled to judgment thereon.

Defendant was the owner of an apartment house known as Underwood Manor, situated in the city of Los Angeles. On February 19, 1938, defendant gave plaintiff an exclusive authorization in writing to sell Underwood Manor for $55,000, "for cash and terms satisfactory" to defendant, and under which plaintiff was to receive a commission of 5 per cent of the selling price. The life of the authorization was six months. It provided in part:

"In consideration of the services of W. T. Fitzpatrick Company, hereinafter called the agent, I hereby list with said agent, exclusively and irrevocably, for a period of six months (6), from date hereof, * * * Underwood Manor, excepting the furniture therein. And I hereby grant said Agent the exclusive and irrevocable right to sell the same within said time for the sum of * * * ($55,000.00) Dollars, for cash and terms satisfactory to me.

"I hereby agree to pay said Agent, as commission * * * (5%) of the selling price.

"In case a sale is made within thirty (30) days after the termination of this listing to parties with whom said agent negotiated during its life and said agent notifies me personally or by mail, in writing, of such negotiation within five days after the termination of this contract, I agree to pay the said agent the commission hereinabove provided."

On April 24, 1938, the plaintiff and defendant, by mutual agreement, modified said authorization by inserting a paragraph therein in writing which provided that if a sale was not made in six months, the authorization would not be exclusive thereafter, but would be authority for an indefinite length of time to sell the property. The authorization, as modified was never revoked. The property was sold by defendant to Isador Shafer on February 7, 1939. Certain events purportedly leading up to the sale appear from the court's findings on probative facts hereinafter quoted. The court, following the pleadings, found the ultimate facts as follows:

"It is not true that after February 19, 1938, or pursuant to the terms of said listing or said employment of plaintiff, said plaintiff produced to or for defendant a purchaser ready or willing or able to purchase said property for cash or terms satisfactory to defendant; it is not true that plaintiff produced a purchaser for defendant's said property ready or willing or able to purchase same for the sum of Fifty-three Thousand Dollars ($53,000.00) or for any sum; it is not true that defendant actually sold said property to any purchaser produced by said plaintiff.

"It is not true that plaintiff has performed all things upon his part to have been performed pursuant to the terms of said agreement (the authorization); it is true that defendant refused to pay plaintiff the sum of Two Thousand Six Hundred Fifty Dollars ($2,650.00) or any part thereof, but the court finds, in that respect, that plaintiff is not entitled to any commission; the court further finds that neither said sum of Two Thousand Six Hundred and Fifty Dollars ($2,650.00) or any part thereof is due or owing plaintiff from said defendant."

The court then proceeded to make the following findings on probative or evidentiary facts.

"On December 19, 1938, plaintiff in the course of his operations as a real estate broker exhibited to one Isador Shafer a number of his apartment house properties, including the aforesaid Underwood Manor; that the first information the said Isador Shafer had that said Underwood Manor was at that time for sale was when he was taken to said property by plaintiff on December 19, 1938; that on December 19, 1938, plaintiff and said Isador Shafer viewed said property from the street only. That on December 20, 1938, one Otho Reed Hill, now deceased, a salesman in the employ of plaintiff, took said Isador Shafer through Underwood Manor and exhibited same to him; that plaintiff did not inform defendant that said Underwood Manor had been exhibited to said Isador Shafer by said plaintiff or by said Otho Reed Hill and that defendant had no knowledge thereof until a date subsequent to the 7th day of February, 1939, and after she had sold said Underwood Manor to said Isador Shafer. That defendant left Los Angeles on or about December 1, 1938, for a visit in the east, returning to Los Angeles about December 21, 1938; that plaintiff did not know of the defendant's return to Los Angeles until on or about January 4, 1939, when she came to plaintiff's office with said Isador Shafer, whom she had casually met at 7th and Witmer Streets; that on the said 4th day of January, 1939, at plaintiff's office the purchase of said Underwood Manor by defendant Isador Shafer was discussed between plaintiff, defendant and said Isador Shafer, but that the parties left plaintiff's office without having come to any agreement as to either price or terms; that defendant, her son, and said Isador Shafer had gone to the office of plaintiff for the purpose of procuring a document in plaintiff's possession belonging to defendant relative to property of defendant other than said Underwood Manor and that said defendant at that time and place received said document from said plaintiff and receipted to him therefor.

"That said defendant had known said Isador Shafer for approximately twenty years and, prior to the 19th day of December, 1938, said Isador Shafer had been the guest of defendant at said Underwood Manor on several occasions and knew, prior to said 19th day of December, 1938, that defendant was the owner thereof, and, prior to the 19th day of February, 1938, said Isador Shafer had stated to defendant that if he should ever become financially able, he desired to purchase said Underwood Manor.

"That following said 4th day of January, 1939, and for a period of approximately one month, defendant and said Isador Shafer carried on discussions in reference to the sale of Underwood Manor, and, on or about the 7th day of February, 1939, through defendant's own independent efforts and without any assistance from said plaintiff, defendant arrived at satisfactory terms of sale and went into escrow with said Isador Shafer for the sale of said Underwood Manor at a price of $51,000.00 for the real property, plus $2,000.00 for defendant's equity in the furniture and furnishings within said Underwood Manor, and that said Underwood Manor was thereupon sold for the above consideration.

"That shortly subsequent to the said January 4, 1939, and to wit: within one or two days thereafter, plaintiff discussed the proposed sale with Isador Shafer over the telephone, and was advised by the said Isador Shafer that defendant had proposed to said Shafer that she, personally, sell her property direct to said Isador Shafer with the stated purpose of avoiding the payment of a broker's commission, so that both buyer and seller might benefit by this item of saving. That plaintiff was then and there informed by said Isador Shafer that defendant and said Isador Shafer intended to conclude said negotiations without plaintiff's further services. That plaintiff then and there advised said Isador Shafer to continue his negotiations with the owner and that if they got together on terms satisfactory each to the other and concluded a deal resulting in the sale of said property by defendant to said Isador Shafer that plaintiff would try to protect himself in the matter of his commission. That plaintiff thereafter stood by and made no further efforts to effect or conclude any sale of said Underwood Manor, and performed no further services; that said negotiations continued between defendant and said Isador Shafer throughout the month of January."

Thereafter the court found that at all times after January 4, 1939, until the sale was made by defendant on February 7, 1939, plaintiff knew defendant was making independent efforts to sell the property, but did not communicate with defendant in any fashion, and during that time advised the purchaser to deal directly with defendant; and that "no services were rendered by said plaintiff to defendant which were the procuring or inducing cause for the purchase of said Underwood Manor by said Isador Shafer". Pursuant to the findings the court rendered judgment for defendant. Plaintiff bases his appeal on the ground that the above-quoted findings on the probative facts are controlling over the findings on the ultimate facts, and that on the former he is entitled to judgment; he contends that under the circumstances the findings on the ultimate facts were merely conclusions of law.

[1, 2] It is the general rule that it is the duty of the trial court to find ultimate rather that probative or evidentiary facts, and that findings of probative facts will not control, limit or modify the finding of ultimate facts, or tend to establish that the ultimate facts were found against the evidence, unless the ultimate findings are necessarily based on the probative findings and are completely overcome. Perry v. Quackenbush, 105 Cal. 299, 38 P. 740; Commercial Bank of Madera v. Redfield, 122 Cal. 405, 55 P. 160, 772; Brown v. Mutual, etc., Life Ass'n, 137 Cal. 278, 70 P. 187; Enterprise Foundry Co. v. Polly, 73 Cal.App. 225, 238 P. 722; Hammond Lumber Co. v. Barth Inv. Corp., 202 Cal. 606, 262 P. 31. This rule, as applied where the appeal is on the judgment roll alone and the ultimate findings precede the probative findings, cover all the issues in the pleadings, and are complete in themselves to support the judgment, is stated in Enterprise Foundry Co. v. Polly, supra, 73 Cal.App. at page 227, 238 P. at page 722, as follows:

"By findings 1, 2, and 3 the ultimate fact is determined that the defendant was, prior to the time of the trial, at the time of the trial, and at the date of making the findings and entering judgment, the owner of the gasoline engine in controversy. By findings 4 and 5 certain probative facts, which appeared in the case, are set forth, and it is on the ground that these findings, in setting forth probative facts, do not set forth sufficient to establish payment or agency.

"The law is well settled in this state that where ultimate facts are found, which are sufficient in themselves to support the judgment entered, the mere fact that the trial court also makes findings in which probative facts are incorporated, which indicate that the ultimate facts are not sufficiently proven, and an appeal is made upon the judgment roll alone, the probative facts set forth in the findings must be disregarded. In Gill v. Driver, 90 Cal. 72, 27 P. 64, in considering this very question, the Supreme Court held as follows: 'Ultimate facts were found which do support the judgment; and they are not questioned, nor could they be, without bringing up the evidence in a statement or bill of exceptions. The rule has long been settled that "when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the evidence, can overcome the finding of the ultimate fact—"' citing, Smith v. Acker, 52 Cal. 217; Pio Pico v. Cuyas, 47 Cal. 174.

"In the case of Breeze v. International Banking Corp., 25 Cal.App. 437, 143 P. 1066, this court, speaking through Justice Hart, thus decides the same question: 'Where the trial court makes both probative and ultimate findings and the one set is inconsistent with the other, the general rule is as it is declared in the case of Perry v. Quackenbush, 105 Cal. 299, 38 P. 740, as follows: "Findings of probative facts will not, in general, control, limit, or modify the findings of the ultimate fact. The province of the trial court is to find the ultimate facts, and not probative facts. If, from a consideration of the probative facts, this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence did not justify the decision. This, it has been repeatedly held, cannot be done in this mode."'

"And further quoting from the case of Pio Pico v. Cuyas, supra, it is there said: 'It has been repeatedly held that a finding of the court cannot be impeached upon the ground that it is contrary to the evidence, otherwise than by a motion for a new trial, and statement of evidence upon the motion. We can consider, upon appeal from the judgment, only the ultimate facts found by the court, and not the probative facts, which have no proper place in the findings'—citing Smith v. Acker, 52 Cal. 217; Frazier v. Crowell, 52 Cal. 399; Gill v. Driver, 90 Cal. 72, 27 P. 64; Rankin v. Newman, 107 Cal. 602, 40 P. 1024, 41 P. 304; Commercial Bank v. Redfield, 122 Cal. 405, 55 P. 160, 772;

Brown v. Mutual Reserve Fund Life Ass'n, 137 Cal. 278, 70 P. 187." See also, Lamanet v. Lamanet, 18 Cal.App.2d 402, 63 P. 2d 1195; Comer v. Los Angeles Ry. Corp., 95 Cal.App. 545, 546, 272 P. 1100.

[3, 4] In the case at bar the ultimate findings standing alone found adversely to every allegation of the complaint, and entirely negatived plaintiff's claims that he had procured a purchaser for defendant's property and was entitled to a commission as the result of the sale thereof. Obviously, those findings without regard to the probative findings are sufficient to support the judgment. Certainly standing alone they are not conclusions of law. Under those circumstances we most necessarily conclude that those ultimate findings alone disposed of every issue in the case. Plaintiff is in no position to claim that those findings are legal conclusions when they are identical with the allegations in his complaint which were necessary for him to state a cause of action. There is nothing in the findings which indicate that the ultimate findings were conclusions based solely, exclusively or necessarily or at all on the probative findings, nor that the probative findings recited all of the evidence before the court. Plaintiff claims that it was at his "insistence" that the probative findings were made. That being true it is apparent that the court had decided the case and made its ultimate findings before and without regard to the probative findings. If a losing party may persuade a court to find on all the evidence as well as on the ultimate facts, and then obtain a reversal of the judgment merely because some of the evidence was omitted or there is some inconsistency in the ultimate and evidentiary findings, then the salutary rule that the only proper findings are those on ultimate facts will be defeated and there will no longer be any necessity for a transcript of the testimony on appeal. Nevertheless, we will examine plaintiff's contentions in respect to the effect of the probative findings.

[5] Plaintiff takes the position that he was the procuring cause of the sale of the property to Shafer and therefore he is entitled to the commission. The probative findings in that respect are that on December 19, 1938, he exhibited the property to Shafer and that was the first time Shafer knew that the property was for sale at that particular time, and his salesman showed Shafer through the building on December 20, 1938; that thereafter, on January 4, 1939, defendant went to plaintiff's office with Shafer, whom defendant had casually met on the street, to obtain from plaintiff a document dealing with property not here involved, and at that time and place Shafer, defendant and plaintiff discussed the purchase of Underwood Manor but no agreement was made; that thereafter on February 7, 1939, defendant sold the property to Shafer, plaintiff having no part in any of the negotiations after January 4, 1939; that plaintiff did not advise defendant and defendant did not know that plaintiff had exhibited the property to Shafer at any time until after defendant sold it to Shafer on February 7, 1939. In the face of that positive finding and the ultimate findings above quoted it cannot be inferred that plaintiff informed defendant of the exhibition of the property to Shafer at the time of the conversation on January 4, 1939, because from all that appears the conversation may have been chiefly between Shafer and defendant, and Shafer may have asked defendant if the property was for sale and opened negotiations with defendant for the purchase of the property at that time. Any reasonable inferences that may be drawn from these findings can be said to give support to the judgment rather than defeat it. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5. However, it appears from the probative findings that defendant had known Shafer for twenty years, and he knew she owned Underwood Manor, and Shafer had told defendant he wished to buy it when able. This reasonably contains the inference that defendant was willing to sell to Shafer and Shafer knew it. The court found that the sale was "through defendant's own independent efforts and without any assistance from said plaintiff"; that one or two days after January 4, 1939, Shafer told plaintiff that defendant had proposed to him that the sale be conducted without plaintiff to avoid the commission; and Shafer told plaintiff that he and defendant intended to proceed with the deal without plaintiff's assistance, to which plaintiff replied that Shafer should proceed and he would protect his commission; that plaintiff knew defendant was making independent effort to sell the property after January 4, 1939, but plaintiff did not communicate with defendant in

any fashion; that no services were performed by plaintiff which were the procuring or inducing cause of the purchase by Shafer. Plaintiff claims that he had earned his commission on the basis of what had occurred up to and including January 4, 1939. Keeping in mind that the ultimate findings are all contrary to plaintiff's case and that all intendments are in defendant's favor in support of the judgment, the most that may be fairly deduced from the probative findings is that plaintiff obtained an authorization from defendant to sell the property, informed Shafer that it was for sale and exhibited it to him; that the purchase of the property by Shafer was discussed by plaintiff, defendant and Shafer, but what particular deal with relation thereto or of what the discussion consisted is not known; that defendant and Shafer were never brought together on any deal by any introduction of Shafer to defendant, or by any communication by plaintiff to defendant; and that Shafer and defendant consummated a transaction as the result of defendant's independent efforts more than a month after either Shafer or defendant had seen or communicated with plaintiff for a price of $51,000 for the building, $4,000 less than the listed price. We do not believe that under such circumstances the plaintiff became entitled to a commission. The case of Hill v. Knight, 209 Cal. 14, 285 P. 691, 693, is persuasive authority for this conclusion. There the broker had a nonexclusive listing as in the case at bar. Thereafter, there was no communication between the broker and the owner with respect to a purchaser having been found. The broker contacted one Deming in regard to the purchase of the property and discussed the matter with him. The negotiations culminated in an interview in the broker's office with Deming in regard to the purchase of the property but no sale was effected. Five days later Deming purchased the property from the owner. Plaintiff broker secured a judgment for a commission which was reversed by this court. Although the facts in that case are not identical, there is sufficient similarity to the facts of this case to make the rule applied there applicable here. Numerous cases bearing on the proposition here involved are there discussed and the authorities relied upon by defendant in the case at bar are there distinguished. This court in that case said:

"The plaintiff took no means and made no effort to inform the defendants that he had a prospective customer or that he had even mentioned to Richard Deming that the ranch was for sale. The mere fact that the plaintiff called the attention of the property to Richard Deming is not sufficient to enable him to prevail in this action. As said in Naylor v. Ashton, 20 Cal.App. 544, 130 P. 181: 'It must further appear that the broker had performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commissions, even though he made efforts to sell property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner' —[citing cases]. To the same effect is the case of Cone v. Keil, 18 Cal.App. 675, 124 P. 548, where it is said: 'Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and even though a broker opens negotiations for the sale of the property, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual, at the price and upon the terms for which the property was originally offered for sale.' * * *

"In view of the fact that the plaintiff's own testimony shows that he did nothing more than has been held insufficient in the case of Cone v. Keil, supra, which case was affirmed in McCoy v. Zahn, Corp., supra [183 Cal. 191, 191 P. 20]; that he did not consummate any sale of the property referred to in this action; that he did not have any exclusive agency; that he knew the defendants claimed the right to sell the property themselves; that there was no communication between the plaintiff and the defendants for more than two months after the receipt of the letter under which the plaintiff claimed the right to act; that the plaintiff made no effort to inform the defendants, or any of them, that he had endeavored to interest Richard

Deming, Jr., in the purchase of the defendants' property; that the defendants made the sale of the property without any knowledge that the plaintiff had called it to the attention of the purchaser; that the record shows that the defendants acted in entire good faith without any subterfuge, without any attempt to make a sale of the property so as to deprive the plaintiff of commissions; that the record shows no fraud or delay on the part of the defendants; and in further view of the cases which we have cited applicable to the facts involved in this action—we find no escape from the conclusion that the defendants' motion for a nonsuit should have been granted. * * *"

Bad faith on defendant's part does not necessarily follow from the probative finding that one or two days after January 4, 1939, Shafer told plaintiff that defendant said that she intended to deal directly with Shafer and avoid a commission, because that was a finding on an isolated item of evidence that did not purport to be all the evidence on the subject, and in view of the ultimate findings, it is not unreasonable to believe that there may have been evidence directly to the contrary on that issue such as defendant's own testimony. It is not established that plaintiff was the efficient cause of bringing about the sale. He did not bring Shafer and defendant together. True he informed Shafer the property was for sale and exhibited it to him, but when Shafer and defendant went to plaintiff's office they had met casually on the street and not through any effort of or the instrumentality of plaintiff. What transpired at that meeting before they went to plaintiff's office does not appear. It may have been that at that time defendant asked Shafer if he would buy. Nothing was accomplished at the meeting in plaintiff's office and the mere fact that there was a discussion concerning a purchase by Shafer does not necessarily show any activity on plaintiff's part to bring about the sale. It cannot be said that plaintiff did anything which brought the parties together. Defendant and Shafer had been acquainted for many years and defendant knew that Shafer desired to purchase the property whenever he was financially able.

[6-9] We are not unmindful of the rule that where a broker procures a purchaser ready, willing and able to make the purchase, he is not deprived of the right to a commission merely because the owner thereafter completes the transaction without the assistance of the broker unless the broker's authorization provides otherwise. Hill v. McCoy, 1 Cal.App. 159, 81 P. 1015. An agent may recover damages for the breach of an exclusive agency contract by the principal even though he has not produced a purchaser ready, willing and able to purchase, where the breach by the principal consists of preventing the agent from selling the property by selling it himself before the agency contract has expired. Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585. In the instant case the broker not having the exclusive right to sell the property, the owner had the right to sell it, and a commission is payable only if the broker was the procuring cause of the sale. Under the circumstances here presented and particularly in view of the probative facts found by the trial court that plaintiff did not do anything in connection with the sale of the property except to call it to Shafer's attention and to exhibit it to him; that plaintiff did not notify defendant that he had exhibited the property to Shafer even after the latter had advised plaintiff that he was negotiating with defendant for the purchase of the property and that defendant had advised Shafer that she did not intend to pay plaintiff a commission in the event of such sale, we cannot say that plaintiff was the procuring cause of the sale or produced a purchaser ready, willing and able to purchase the property, or perform the terms of his agency agreement to the extent that he was entitled to receive a commission from the defendant for the sale of the property. In our opinion the findings are sufficient to support the judgment, and the judgment is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; SHENK, J.; EDMONDS, J.; TRAYNOR, J.

17 Cal.2d 734

Ex parte MILLER.

Cr. 4357.

Supreme Court of California.

April 17, 1941.

Habeas corpus 🔑120

Where validity of conviction as habitual criminal had been determined in superior court and on appeal and on a prior petition for a writ of habeas corpus and nothing had occurred since that substantially affected the rights of person so convicted, a further petition for writ of habeas corpus would be denied.

In Bank.

Proceeding in the matter of Conrad Miller on habeas corpus.

Petition denied.

Conrad Miller, in pro per.

PER CURIAM.

The petitioner was charged by information filed by the District Attorney of San Joaquin County with the crime of burglary in three counts, with two prior convictions of felonies. He now alleges in his petition for the writ of habeas corpus that he entered pleas of not guilty to the charges of burglary; that he had been tried and convicted of the crime of burglary of the second degree, but "that no verdict or finding of the jury was returned in regard to whether or not petitioner had suffered the alleged prior convictions"; that nevertheless the trial court found that he had suffered the prior convictions and had adjudged him an habitual criminal.

Pursuant to Rule XXII, section 3, of this Court, the proceedings in the Superior Court of San Joaquin County upon the arraignment of the petitioner on said charges have been certified to this Court. From these proceedings it appears that pleas of guilty as to the alleged prior convictions were entered upon his arraignment. The certified copy of said proceedings is filed concurrently herewith.

Basing his motion on this same record, the petitioner applied to the Superior Court to vacate the judgment against him on the ground that in admitting that he had been convicted on the prior charges the provisions of section 1018 of the Penal Code had been violated. On appeal from the order denying the motion the petitioner presented the same and other contentions. The order was affirmed. People v. Conrad Miller, 140 Cal.App. 241, 35 P.2d 229. A petition for hearing in this Court was denied on August 29, 1934.

A prior petition for a writ of habeas corpus was filed in this Court by this petitioner on May 22, 1936, and was based on the same grounds set forth in the present petition. The prior petition was denied on May 25, 1936, and since that time no change in the facts or the law substantially affecting the rights of the petitioner has been disclosed.

The petition is denied.

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17 Cal.2d 707

LOS ANGELES COUNTY et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

S. F. 16293.

Supreme Court of California.

April 16, 1941.

1. **Prohibition** 🔑28

In original prohibition proceeding by county and city to restrain superior court from trying tax refund actions against county without joining city, school districts, and junior college district as additional parties defendant, where no claim of misjoinder or defect of parties was raised by demurrer and no application to intervene was made by city or such districts, sole question is whether such entities are indispensable parties in sense that service on them or their appearance is essential to court's jurisdiction to proceed in such actions, for prohibition will not lie unless procedural defect of parties is jurisdictional. Code Civ.Proc. §§ 387, 389, 430, 434; Pol.Code, § 3804.

2. **Statutes** 🔑219

While a course of administrative procedure or administrative construction of statute does not acquire legal sanction merely because of long usage, it will be accorded great respect by courts and upheld, if not clearly erroneous.

3. **Taxation** 🔑543(5)

The statute empowering county treasurer, by order of board of supervisors, to make refunds of erroneously or illegally collected taxes from moneys in his possession, belonging to appropriate funds of political entities for which taxes were levied, authorizes county to appear in and defend suits for tax refunds on behalf of other entities whose taxing functions have been transferred to and consolidated with those of county. Pol.Code, § 3804; Const. art. 11, § 6.

4. Constitutional law 🔑63(3)
Taxation 🔑28

Construction of statute, empowering county treasurer to make refunds of erroneously or illegally collected taxes from moneys in his possession belonging to appropriate funds of political entities for which taxes were levied, as authorizing county to defend suits for such refunds on behalf of other entities whose taxing functions have been consolidated with those of county, does not render it unconstitutional as delegating power to levy taxes or perform municipal functions. Pol.Code, § 3804; Const. art. 11, §§ 6, 8, 13.

5. Municipal corporations 🔑977

A city, availing itself of constitutional privilege of consolidating its taxing function with county tax system, delegated to county, by virtue of statute, city's right to appear and defend tax refund suits, regardless of whether city as such had power to delegate such right. Pol.Code, § 3804; Const. art. 11, § 6.

6. Municipal corporations 🔑62

One governmental agency, such as county, may properly be empowered by statute to perform functions for another such agency, such as city.

7. Municipal corporations 🔑977

A city ordinance, requiring that all suits for refund of city taxes be brought against city and defended by city attorney and revoking prior transfer of city's taxing power or function to county, did not withdraw statutory delegation to county of right to defend suits for refunds with respect to tax collections and tax years prior to effective date of ordinance. Pol.Code, § 3804.

8. Municipal corporations 🔑956(1)

A transfer to, and assumption by, county of city taxing functions, pursuant to city ordinance and charter provisions authorized by constitution, imports full consolidation of such functions with, and city's acceptance of, statutory scheme setting up and regulating county tax system. Const. art. 11, § 6.

9. Municipal corporations 🔑956(1)

A city transferring its taxing functions to county by ordinance and charter provisions, as authorized by Constitution, should not be permitted to limit county's powers and duties in relation to taxpayers by other such provisions. Const. art. 11, § 6.

10. Municipal corporations 🔑971(1), 977, 978(1)

A city adopting tax system of county, officers of which assumed city tax functions, must be held to have accepted such system charged with all incidents created by valid statutory and constitutional provisions applicable to county assessment, collection, and refund of taxes, including county's rights to make refunds in proper cases without city's approval and to defend refund suits, pay judgments, and secure reimbursement under statutory recoupment provisions. Pol.Code, § 3804; Const. art. 11, § 6.

11. Officers 🔑30

Where a public officer is declared by law to be also, ex officio, incumbent of another public office, the two offices are distinct and separate.

12. Officers 🔑30

The fact that two offices, held by public officer declared by law to be ex officio incumbent of the other office, are separate and distinct, does not bar such officer from acting in dual capacity and representing more than one political entity at same time, as where taxing functions are delegated to county officers by city and other political entities. Const. art. 11, § 6.

13. Counties 🔑193, 194, 195

In consolidation of taxing functions of city and other political entities with county tax system, county officers do not lose their identity as such by holding, ex officio, other public offices, but act in dual capacity, and, through them, county becomes bailee or trustee of other entities tax funds deposited in county treasury. Const. art. 11, § 6.

14. Taxation 🔑535, 543(5), 913(1)

A county, with tax system of which taxing functions of city and other political entities have been consolidated, is empowered by statute, through its board of supervisors and treasurer, to make tax refunds from moneys in his possession belonging to other entities, recoup from such entities, and defend actions for refunds. Pol.Code, § 3804; Const. art. 11, § 6.

15. Taxation ⚷543(8)

In actions against county for refunds of taxes collected by it for city and other political entities consolidating their taxing functions with county tax system, statutory provisions for recoupment of moneys refunded from such entities merge in and become part of judgments allowing refunds, regardless of whether language of judgments is general in scope or expressly incorporates terms of statute. Pol.Code, § 3804; Const. art. 11, § 6.

16. Taxation ⚷543(5)

The statute, empowering county treasurer, by order of board of supervisors, to make refunds of erroneously or illegally collected taxes from any moneys in his possession, belonging to appropriate funds of political entities for which taxes were levied, and recoup from such entities, simply authorizes county, with tax system of which taxing functions of other political entities have been consolidated, to defend tax refund actions, both on its own behalf and as alter ego of entities affected by refunding claims, so that such entities are not "indispensable parties" defendant in such actions. Code Civ.Proc. § 389; Pol.Code, § 3804; Const. art. 11, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Parties".

◆

In Bank.

Original proceeding by the County of Los Angeles and the City of Los Angeles for a writ of prohibition, restraining the Superior Court in and for the County of Los Angeles from trying certain tax refund actions against such county without first joining the City of Los Angeles and others as additional parties defendant.

Alternative writ discharged, and peremptory writ denied.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles, for petitioner Los Angeles County.

Ray L. Chesebro, City Atty., Leon T. David, Asst. City Atty., and Franklin W. Peck, Deputy City Atty., all of Los Angeles, for petitioner City of Los Angeles.

Holbrook & Tarr, of Los Angeles, for respondent.

CARTER, Justice.

By this proceeding in prohibition, petitioners County of Los Angeles and City of Los Angeles seek to restrain respondent Superior Court from trying 100 or more tax actions wherein the county is named as sole defendant, without first joining as additional parties defendant, the City of Los Angeles, the Los Angeles City School District, Los Angeles City High School District, and Los Angeles City Junior College District.

The actions were brought under section 3804 of the Political Code by respective claimants numbering upwards of 1,500, to procure the refund of an aggregate amount of approximately $4,000,000, representing taxes alleged to have been erroneously levied for the fiscal or tax years 1933-1934, 1934-1935, and 1935-1936, as a result of improper budgeting practices on the part of the named entities. Three of the causes, typical of all of them except for variations as to year, rates, figures, and items of tax, were set for trial, and the remaining cases were grouped according to years, and consolidated for trial in such manner that all cases involving taxes for the same fiscal year would be heard together. All of the taxes had been collected by county officers and had long since been paid over to the respective entities entitled to receive the same.

Prior to the date set for trial of the first three causes, defendant county moved the court in each of the actions for an order to bring in the City of Los Angeles and other named entities as parties defendant. The ground of the motions was that a complete determination of the controversy could not be had without the presence of said entities and without prejudice to their rights. On August 4, 1939, each and all of the motions were denied. This proceeding followed.

[1] At the outset it may be noted that the problem presented is purely one of compulsory and not of permissive joinder. Sec. 389, Code Civ.Proc. Concededly the absent parties are interested in the issues and subject matter of the actions and might properly have been joined as defendants therein (Brill v. County of Los Angeles, 16 Cal.2d 726, 108 P.2d 443), but no claim of misjoinder or defect of parties was raised by demurrer (sec. 430, 434, Code Civ.Proc.), nor was application to intervene made by any of said entities (sec. 387, Code Civ. Proc.). The sole question, therefore, is

whether those entities are "indispensable parties" in the sense that service upon them or their appearance is essential to the jurisdiction of the court to proceed in the actions, for unless the procedural defect of parties is jurisdictional, prohibition will not lie. Ambassador Pet. Co. v. Superior Court, 208 Cal. 667, 284 P. 445; Morrow v. Superior Court, 9 Cal.App.2d 16, 26, 48 P. 2d 188, 50 P.2d 66; Bank of California v. Superior Court, Cal.Sup., 106 P.2d 879. Reference may be had to the case last cited for a full discussion of the distinction between proper parties, necessary parties, and those persons coming within a special classification of necessary parties, to which the term "indispensable" is appropriate.

Many years prior to the period of this litigation the county officers had been entrusted with the duty of assessing and collecting taxes for the city and other entities. By appropriate ordinance and charter provisions, as sanctioned by section 6 of article XI of the state Constitution, the taxing functions of the city had been transferred to and consolidated with the county system. Brill v. County of Los Angeles, supra. City Ordinance 40302, as amended by ordinance 45027, approved November 14, 1922, among other things provided: "Any taxes, together with any penalties thereon heretofore or hereafter paid for the use of or on behalf of the City of Los Angeles may be refunded by the County Auditor in all cases where a refund of county taxes and penalties thereon is provided for under the provisions of Part III, Title IX of the Political Code of the State of California."

Part III, title IX of the Political Code contained section 3804 (now sec. 5096 et seq., Revenue and Taxation Code, St.1939, p. 1370 et seq.) pursuant to which the tax actions here involved were instituted. That statute empowered the county treasurer, by order of the board of supervisors, to make refunds of erroneously or illegally collected taxes from any moneys in his possession belonging to appropriate funds of the entities on whose behalf the taxes had been levied. A similar and concurrent remedy was afforded by section 3819, also found in part III, title IX of the Political Code. Section 3819 expressly names the county as the party against whom the refund action should be brought, and the implication of section 3804 was to the same effect. Although section 3819 was amended in 1937 (Stats.1937, chap. 185, p. 480; see, also, sec. 5138, Revenue and Taxation Code, St.1939, p. 1372) to require the joinder of other entities as parties to the refund suit, during the period here involved neither statute provided for such joinder, and concededly there was no other statute expressly authorizing the maintenance of a suit for refund directly against said entities.

For a period of over twenty years it had been an accepted administrative procedure for the county, without reference to or joinder of the other entities concerned, to prosecute suits for the recovery of taxes levied on behalf of said entities, and also to make refunds of taxes illegally exacted by them, to defend suits for refund, pay judgments, and offset such payments against moneys due the entities from appropriate funds in the possession of the county treasurer. As early as 1893, a suit for the recovery of state and county taxes was brought under section 3804, as it then read, against the county as sole defendant. This court, noting that there was no allegation in the complaint that the state had received any portion of the tax, declined to uphold the contention, raised by demurrer, that the state was a necessary party. Hayes v. Los Angeles County, 99 Cal. 74, 33 P. 766. Illustrative of a suit under special statute brought by the county as sole party plaintiff to recover unsecured personal property taxes levied on its own behalf and that of the city and school districts, is County of Los Angeles v. Los Angeles Junk Co., 8 Cal.App.2d 136, 47 P.2d 309. In County of San Diego v. Croghan, 2 Cal. App.2d 494, 38 P.2d 474, where taxes collected for several entities by county officials had been embezzled by a county officer, it was held that the county, without joining the other entities concerned, might properly sue the defaulting officer and his bondsman. Apparently no difficulty was experienced in bringing these past controversies to a complete determination with the county as sole party plaintiff or defendant. So far as refunds are concerned, if the absent entities suffered prejudice by this long established procedure, they were strangely lax in pressing the point.

[2-4] While a course of administrative procedure, or an administrative construction of a statute, does not acquire legal sanction merely by reason of long usage, it will be accorded great respect by the courts, and will be upheld, if not clearly erroneous. Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 109 P.2d 935; Carter v. Comm. on Qualifications etc.,

14 Cal.2d 179, 185, 93 P.2d 140, and cases cited. Here the administrative conception of section 3804 as contemplating a defense by the county of actions for tax refunds is clearly correct. While, as above noted, the statute does not expressly designate who shall be the party or parties defendant to such an action, its provisions as a whole, setting up a complete system for the handling and payment of refunds by county officers, and for recoupment from appropriate funds of other entities, admit of no other construction than that the county is thereby authorized to appear and defend suits for refund on behalf of those other entities whose taxing functions have been transferred to and consolidated with those of the county, and whose adoption of the county system has included the assessment and collection of taxes and the refund procedure. There is nothing in this construction of the statute which renders it unconstitutional under section 13 of article XI of the Constitution of this state particularly when that section is read in the light of sections 6 and 8 of the same article.

[5, 6] The city argues that even if it be conceded that in adopting the county tax system, it also adopted the county refund procedure, it did not and constitutionally could not have delegated to the county its right to appear and defend itself against suit. The answer to this argument is that regardless of whether the city, as a city, would have had power to delegate its right, the delegation was in fact made, either directly or impliedly, by virtue of the terms of the statute, at the time the city availed itself of the privilege of consolidating its taxing function with the county system. One governmental agency may properly be so empowered to perform functions for another. Such a joint exercise of powers was upheld in the late case of City of Oakland v. Williams, 15 Cal.2d 542, 103 P.2d 168.

[7] But, even so, the city contends, the scope of the delegation is defined by pertinent ordinance and charter provisions and it cannot exceed the limits thus specified. Therefore, citing section 342 of the charter, which in part declares, "*Until otherwise provided by ordinance,* the city shall continue to use" the county system, the city points out that on December 5, 1936, there became effective Ordinance 77,155, which expressly provided that all suits for the refund of city taxes should be "brought against the city" and "be defended by the city attorney", and that the prior transfer, if any, to the county of any such power or function was revoked. Even if it be conceded, says the city, that in 1925, when the charter was adopted, charter sections 342 and 2(11)t adopted Political Code section 3804 in its entirety, and ordinances passed pursuant thereto effected a complete transfer of the taxing function, then by the same token and under the same charter sections, the scope of the transfer was limited and the delegation previously made, if any, of the right to appear and defend refund suits was withdrawn by the enactment of ordinance 77,155. It will be noted that the ordinance took effect subsequent to the tax collections and tax years here involved, without retroactive operation which would affect the status of the parties to the tax actions here in question. Moreover, it is extremely doubtful that the remedy afforded by section 3804 can validly be curtailed by city ordinance.

[8-10] No authority is cited which would sanction a partial consolidation and partial acceptance by the city of the county taxing system, permitting the city to avail itself of all advantages of the transfer and at the same time, if it so elects, to reject all disadvantages and relieve itself of all burdens not to its liking. The transfer to and assumption by the county of the city taxing functions imports a full consolidation and an acceptance by the city of the statutory scheme setting up and regulating the county system. Any other method would hamper the county officers in their execution of city functions. It would also lead to confusion and injustice in dealings with taxpayers, who are confronted with a combined tax roll calling for payment of a single sum covering both county, city and school district taxes, without any inkling of varying rights and regulations of the several entities concerned. The city therefore should not be permitted, by charter and ordinance provisions, to limit the powers and duties of the county in relation to taxpayers. When the city adopted the county system, and the county officers assumed the city functions, the city must be held to have necessarily accepted the county system, charged with all the incidents thereof created by valid statutory and constitutional provisions applicable to county assessment, collection, and refund of taxes, including the right on the part of the county to make refunds in proper cases without approval of the city, and to defend refund suits, pay judgments, and secure reimbursement under the recoupment provisions incorporated in section 3804.

[11, 12] The contention is made by petitioners, and argued under five or more subdivisions of their joint brief, that the county is without interest in the litigation because the only delegation of functions authorized by the constitutional, statutory, charter, and ordinance provisions, is a delegation to "county officers", as distinguished from the "county" as an entity. For example, article XI, section 6 of the Constitution authorizes the performance by "county officers" of transferred municipal functions, and section 3804 provides for refunds and recoupment by the county treasurer on order of the board of supervisors. In executing the delegated functions, it is said, the county officers do not represent the county, but act solely as ex officio officers of the city or other entity which has made the transfer, and they are subject to its charter, ordinance, and regulatory enactments. Therefore, according to petitioners, the county is not a necessary party defendant to a refund suit; neither are the collecting officers who have paid over the tax funds to the entity on whose behalf they were collected, i. e., county officers acting as ex officio officers of the city or other entity (Sheehan v. Board of Police Com'rs, 188 Cal. 525, 206 P. 70; Hartford Fire Ins. Co. v. Jordan, 168 Cal. 270, 142 P. 839; Craig v. Boone, 146 Cal. 718, 81 P. 22; Spencer v. City of Los Angeles, 180 Cal. 103, 179 P. 163; Elberg v. San Luis Obispo, 112 Cal. 316, 41 P. 475, 44 P. 572; Pacific, etc., Co. v. County of San Diego, 112 Cal. 314, 41 P. 423, 44 P. 571; Madary v. City of Fresno, 20 Cal.App. 91, 128 P. 340); but the only proper and indispensable parties are the taxing entities.

True it has been held that where a public officer is declared by law by virtue of his office to be also, ex officio, the incumbent of another public office, the two offices are distinct and separate (Union Bank & Trust Co. v. Los Angeles County, 2 Cal.App.2d 600, 38 P.2d 442), and it was declared in the early case of Madary v. City of Fresno, supra [20 Cal.App. 91, 128 P. 342], that in discharging taxing functions for other entities, county officers "become or are ex officiis officers" of the respective entities. The fact, however, that the offices so held are separate and distinct does not bar the officers from acting in a dual capacity, and, if such is the case, from representing more than the one entity at the same time. That such a dual representation occurs where taxing functions are delegated to county officers was brought out clearly in the cases of Pomona City School Dist. v. Payne, 9 Cal.App.2d 510, 50 P.2d 822, and City of Fullerton v. County of Orange, 140 Cal. App. 464, 35 P.2d 397, 400.

In the latter case the city sued the county for the recovery of certain funds representing tax penalties and interest collected by county officers exercising delegated city taxing functions, which funds had been diverted by the officers to the county treasury, without remittance to the city. In discussing the status of the officers and the funds, and the applicability of the statute of limitations, the court said: "In some states the duty of collecting taxes for municipalities of certain classes is performed by county officers. When the county officers act in this capacity for a city they are ex officiis officers of that city. Madary v. City of Fresno, 20 Cal.App. 91, 128 P. 340. They become, by law, the agents of the city to collect the taxes for the city. *They do not lose their identity as county officers. Although they act for the city, they are county officers, performing a county function imposed upon them by law.* The trial court in the case of City of Centerville v. Turner County, 23 S.D. 424, 122 N.W. 350, 351, found, upon facts quite similar to the instant case, that the defendant county 'is made by law the agent of the plaintiff to collect, and enforce the collection of, the said taxes, and the relationship existing between the plaintiff and defendant is a fiduciary one, and the said taxes when so collected by the county became, and is, a trust fund in the possession of the said county acting as a trustee of an express trust.' * * * The primary object of the statute, which authorized the defendant county to collect the taxes for the city of Fullerton and other cities, is to provide a means whereby the work and expense of collecting taxes by city officers may be eliminated. Moore v. City of San Diego, 90 Cal.App. 242, 265 P. 864. The work done by the county officers is paid for by the city, not to the officers performing the services, but to the county itself. The county officers, when performing under the provisions of the statute are, as we have indicated, performing a county function for which the county receives payment from the city. The relationship existing between the county and city is an implied or constructive trust, an involuntary trust arising by operation of law, and the county is entitled to claim the benefit of the statute of limitations."

In Pomona City School Dist. v. Payne, supra, plaintiff school district sought a writ of mandate commanding the Los Angeles county auditor and treasurer to allow it credit for bank interest earned by district funds in the custody of the county treasury. Directing entry of a judgment for plaintiff, the court said [9 Cal.App.2d 510, 50 P.2d 824]: "Defendants emphasize the language of the statute that the interest earned shall belong to and shall be paid into the fund of the public body 'represented by the officer making such deposit.' The money is deposited by the county treasurer. It is pointed out, therefore, that the interest belongs to the county, being the public body 'represented by' the county treasurer who made the deposit. This is too narrow a construction of the words 'represented by.' Certainly the county treasurer, as custodian of school funds, 'represents,' i. e., 'exercises power derived from another' (Davis v. Davis, 26 Cal. 23, 85 Am.Dec. 157), the school district whose funds are in his care, and acts as its agent, and is ex officio treasurer for the school district. * * * The reasonable and equitable rule is that the county is simply the agent of the school district, the bailee or trustee of the funds deposited in its care, and as such bailee and trustee it cannot allocate to itself, nor enrich its own coffers with, the interest increments upon the money placed in its custody by its bailor and trustor."

[13, 14] The above authorities not only answer completely petitioners' contention that when county officers take on the role of ex officio officers of another entity, they shed their status as representatives of the county, but also petitioners' further contention that under section 3804 no recoupment is provided to the "county" as such, and the funds of the entities are never actually in possession of the "county", but only of the "county officers". In the consolidation of taxing functions, the county officers do not lose their identity as such by holding, ex officio, the other public offices thrust upon them, but they act in a dual capacity, and through them the county becomes the bailee or trustee of tax funds of other entities deposited in its treasury. By the same token the county, through its said officers, is empowered by section 3804 to make refunds, to receive the benefit of the recoupment provisions, and to defend actions for refund.

The cases of Pacific Mutual, etc., v. County of San Diego, 1896, and Elberg v. County of San Luis Obispo, supra, strongly relied upon by petitioners, are not controlling. Those actions for refund were brought pursuant to section 3819, which at the time provided no method by which the county could secure reimbursement for repayments made to taxpayers. Therefore it was held that in such situation it would be manifestly unjust to allow a recovery against the county, and the county was not a proper party defendant. Madary v. City of Fresno, supra, 1912, also cited by petitioners, is not in point. That was a suit for refund brought against the city, not an action under section 3804, supra. The question of whether the plaintiff might have had a right of action against the county or joined the county as a party defendant was not determined.

[15, 16] For purposes of this proceeding, it is only necessary to determine whether a cause of action lies against the county which may be fully determined without the presence of or prejudice to the rights of other entities concerned. Questions respecting the extent of the county's liability, if any, or the claimants' right to proceed directly against the entities, or the latters' right to intervene, are not involved. But nevertheless it may be noted that were it not for the relief sanctioned by section 3804, no suit for refund could be maintained against the county as a collecting agent or representative of the entities, unless such suit were commenced before the remittance to the respective entities of the moneys collected for them, for obviously the county could not be required to pay refunds for the entities out of its own funds. Spencer v. City of Los Angeles, supra, 180 Cal. at page 117, 179 P. 163; Craig v. Boone, supra. It would appear, therefore, that in an action against the county under section 3804, the recoupment provisions merge in and become part of any judgment allowing a refund, regardless of whether the language of the judgment is general in scope or expressly incorporates the terms of the statute. In short, the effect of the statute is simply to authorize the county, where there has been a consolidation of taxing functions, to defend actions for refund both on its own behalf and as the alter ego of the entities affected by the refunding claim. So far as the county is concerned such a controversy may be completely determined without the presence of other entities or prejudice to their rights.

The alternative writ is discharged, and a peremptory writ is denied.

We concur: SHENK, J.; CURTIS, J.; THOMPSON, Justice pro tem.; TUTTLE, Justice pro tem.

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44 Cal.App.2d 932

RUGGIERO v. LARSON.

Civ. 2654.

District Court of Appeal, Fourth District. California.

April 11, 1941.

Appeal and error 🔑787

An appeal would be dismissed where nothing had been filed in District Court of Appeal except papers on motion to dismiss appeal, and certificate of county clerk and affidavit of court reporter filed in connection with motion set forth facts which sufficiently supported granting of motion, and one of attorneys for appellant present at hearing stated in open court that he had no objections to granting of motion.

◆

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Harry Ruggiero against Adolf Larson. From the judgment, the plaintiff appeals.

Appeal dismissed.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for appellant.

Chester O. Hansen, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss this appeal from the judgment. Nothing has been filed in this court except the papers on this motion.

A certificate of the county clerk and an affidavit of the court reporter, which have been filed herein, set forth facts which sufficiently support the granting of the motion. In addition thereto, one of the attorneys for the appellant, who was present at the hearing, stated in open court that he had no objections to offer to the granting of the motion.

The motion is granted, and the appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.

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44 Cal.App.2d 206

POMIN et al. v. SUPERIOR COURT IN AND FOR EL DORADO COUNTY.

Civ. 6550.

District Court of Appeal, Third District, California.

April 14, 1941.

1. Appeal and error 🔑460(2)

A prohibitory injunction is not stayed by an appeal therefrom, whereas an injunction mandatory in character is automatically stayed by appeal.

2. Injunction 🔑4, 5

An injunction is purely "prohibitory" which merely has effect of preserving subject of litigation in statu quo, whereas in general, an injunction is "mandatory" if it has effect of compelling performance of a substantive act and necessarily contemplates change in relative position or rights of parties at time the injunction is granted or the decree entered.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Injunction" and "Prohibitory Injunction".

3. Appeal and error 🔑460(2)

Injunction, issued in suit to quiet title, restraining defendants therein from interfering with plaintiff's and interveners' use of right of way and ordering them to remove obstruction and restraining them from continuing obstruction was "mandatory injunction" and therefore stayed by appeal where, when injunction was entered, right of way could not be used since truck was across it on blocks and there was a fence across it.

4. Contempt ⚷60(3)

A proceeding to punish for constructive contempt being criminal or quasi criminal in nature, guilt of accused must be established by clear and satisfactory evidence, and mere preponderance of evidence is not enough.

5. Injunction ⚷223(1)

Placing by defendants of sign against trespassing on fence across right of way, supplanting sign which had been nailed to tree at side of right of way prior to decree, could not be regarded as intentional disregard of terms of decree, in suit to quiet title, restraining defendants from interfering with plaintiff's use of right of way and continuing obstruction.

6. Contempt ⚷67
Injunction ⚷231

Where injunctive relief against obstruction of right of way was ancillary to suit to quiet title, until merits of case were finally adjudicated, defendants should not, pending appeal, be forced to surrender position which they held prior to commencement of suit, and order adjudging defendants guilty of contempt for violating mandatory injunction pending appeal was annulled.

◆

Writ of review proceeding by Ernest Pomin and others to annul an order of the Superior Court of the State of California, in and for the County of El Dorado, adjudging petitioners guilty of contempt and imposing fine.

Order annulled.

H. J. Kleefisch, of San Francisco, for petitioners.

Thomas Maul, of Placerville, for respondent.

PER CURIAM.

Petitioners seek, by writ of review, to annul an order adjudging them guilty of contempt, and fining each of them in the sum of $75. R. H. Strosnider, as plaintiff, and petitioners as defendants, joined issue in an action to establish the existence of a right of way. On April 24, 1940, a judgment was entered therein, embodying the following injunctive relief:

"It is hereby ordered, adjudged and decreed that the defendants, their attorneys, agents, servants, employees, heirs, executors and assigns do absolutely refrain and desist from encroaching on, or obstructing or otherwise interfering with plaintiff's and interveners' use and enjoyment, and the use and enjoyment of each or any of them, their heirs, successors, or assigns of that forty foot strip or right of way first described hereinabove, and all of the said easements or rights of way described hereinabove, and the said defendants, their said agents, attorneys, employees, servants, heirs, executors, successors and assigns are further ordered to refrain, and are perpetually enjoined and restrained from obstructing or encroaching upon, or otherwise interfering with plaintiff's and interveners' use and benefit, and the use and benefit of their respective heirs, successors or assigns, of any of the rights of way or easements mentioned or described in those certain instruments dated March 13, 1913, and June 9, 1923, and recorded in Books 99 and 81, of Deeds, at pages 361 and 546, respectively, in the office of the Recorder of the County of El Dorado, State of California, and declared in said instruments to be appurtenant to the said N½ of the SW¼ of Section 17, and all of the NW fractional quarter of said Section 17.

"It is further ordered, adjudged and decreed that the said defendants be, and they are hereby ordered to remove all obstructions from the rights of way or easements hereinabove mentioned, and are further restrained from maintaining or continuing any obstructions to any portion of said easement or right of way as hereinabove described and referred to."

An appeal from said judgment was duly taken to the Supreme Court, and is now pending therein.

On June 28, 1940, Strosnider filed an affidavit in the superior court, wherein he charged petitioners with contempt of court, in the following language: "That notwithstanding the aforesaid judgment, and notwithstanding the service of a copy thereon on the said defendants, the said defendants, having notice and knowledge of said judgment and the requirements therein, have wilfully, maliciously and in contemptuous disregard of the orders of this court, failed and refused to comply and abide by the orders of this court, and have failed and refused to cease and desist from interfering with the enjoyment of said right of way and easement by the plaintiff and the interveners, and have failed and refused to comply with the order of this court to remove all obstructions from the right of way or easement, in that the said defendants and each of them have, in contemptuous disregard of the orders of this court, continued to maintain a wire fence across said right of way with a sign containing the following language: 'Private Property, Trespassers will be prosecuted'; that said sign was a new sign freshly painted since the order of the court was made and placed upon said premises; that in addition to said sign and fence, the said defendants have, since the making of the order and judgment in the above entitled case, caused said right of way to be obstructed by blocking the same with an old dilapidated motor vehicle or truck, the same being placed squarely across the traveled portion of said right of way or easement; that all of said acts have been done by the defendants for the sole purpose of preventing the plaintiff and interveners and others from using and enjoying said right of way, and was done in contemptuous disregard of the orders of this court, and in order to thwart and disobey the orders of this court."

An order to show cause why these petitioners should not be adjudged guilty of contempt was issued. Petitioner E. H. Pomin filed an affidavit averring that the truck in question was not placed in said right of way subsequent to the rendition of the said judgment, and that the sign mentioned was defaced, and it was necessary that it be restored to its original condition.

The only oral evidence taken at the hearing was the testimony of Strosnider. We have gone over the record and find that the only change of conditions with reference to the right of way which was observed by him was the fact that the sign referred to in his affidavit had been placed there during the month of May. This sign was placed upon a fence which had been across the right of way before the judgment was entered, and supplanted one which had been nailed to a tree at the side of the right of way prior to the original judgment.

In its order adjudging petitioners guilty of contempt, the court bases its conclusions upon two specific violations of its decree—first, that the sign was placed upon the fence across the right of way, and second, that petitioners "have continued to maintain said wire fence across said right of way since the making of said judgment, decree and injunction".

[1] It is first contended by petitioners that the injunction was mandatory in character; hence, it was stayed by the appeal. The rule governing the situation is as follows: "It is well settled that a prohibition injunction is not stayed by an appeal therefrom while an injunction mandatory in character is automatically stayed by appeal. Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 637, 7 P.2d 706; Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Baar v. Smith, 201 Cal. 87, 255 P. 827. Whether an injunction is prohibitory or mandatory in character is not always easy of determination. What may appear to be negative or prohibitory frequently upon scrutiny proves to be affirmative and mandatory." Byington v. Superior Court, 14 Cal.2d 68-70, 92 P.2d 896, 897.

[2-5] In 14 Cal.Jur. page 179, section 6, it is said: "An injunction is purely prohibitory which merely has the effect of preserving the subject of the litigation in statu quo, while, in general, an injunction is mandatory if it has the effect of compelling the performance of a substantive act and necessarily contemplates a change in the relative position or rights of the parties at the time the injunction is granted or the decree entered. Hence if the injunction compels a party affirmatively to surrender a position which he holds and which upon the facts alleged by him he is entitled to hold, it is mandatory."

At the time the decree containing the injunction was entered, this right of way could not be used for vehicles. The evidence shows that a truck was then placed squarely across it. This truck was not on wheels, but rested upon blocks. In addition, there was a fence across it. Thus, it was in no condition to be used by anyone. The road was completely closed prior to the litigation, and to maintain the status quo, no prohibitory injunction was required, nor could one be enforced pending the appeal, for to do so would change the relative rights of the parties. If the roadway had been clear and open to travel prior to the action, a prohibitory injunction would have been proper, as it would then be in furtherance of preserving the subject of the litigation in statu quo. As we construe the injunction, it is mandatory in character, and was therefore stayed by the appeal. Furthermore, the change of location of the sign which had been upon the right of way prior to the action, could scarcely be regarded as an intentional disregard of the terms of the decree. In 5 Cal.Jur. p. 945, § 41, it is said: "As a proceeding to punish for constructive contempt is criminal or quasi-criminal in its nature, the guilt of the accused must be established by clear and satisfactory evidence to sustain a conviction. A mere preponderance of evidence is not enough."

The other act referred to by the court, relating to the maintaining of the fence, clearly involves the performance of an act—the removal of the fence—which would change the relative rights of the parties, and the prohibition thereof makes the injunction in reality a mandatory one.

We are satisfied, in so far as the acts mentioned are concerned, the injunction is a mandatory one, and the appeal had the effect of staying the injunction in relation thereto.

[6] In conclusion, it may be pointed out that the action here was one to quiet title to the right of way. The injunctive relief was ancillary to the action, and until the merits of the case are finally adjudicated, defendants should not, pending the appeal, be forced to surrender a position which admittedly they held prior to the commencement of the action.

The order is annulled.

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44 Cal.App.2d 164

TIGHE v. AD CHONG et al.

Civ. 11411.

District Court of Appeal, First District, Division 1, California.
April 14, 1941.

1. Appeal and error 🔑930(1)

On appeal, conflicts in the evidence will be resolved in favor of jury's verdict.

2. Master and servant 🔑302(2)

Where delivery boy took employer's vegetables into restaurant, left them there and started to return for another load to employer's truck which was parked across street from restaurant, and just as a pedestrian was passing in front of restaurant delivery boy negligently emerged backwards through the doorway, striking pedestrian, employer was liable for injuries sustained by the pedestrian under the "respondeat superior" doctrine, as against contention that the employer could not be held liable because at time of accident the delivery boy was not using a vehicle or instrumentality owned or controlled or directed by the employer as a means of locomotion. Civ.Code, § 2338.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

3. Master and servant 🔑302(1)

In determining question of "respondeat superior," the real test to be applied is whether, at time employee commits negligent act resulting in injuries to third person, employee is engaged in performing some duty within the scope of his employment. Civ. Code, § 2338.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Mazilla Tighe against Ad Chong and another for injuries sustained allegedly as result of defendant Leong Cheung negligently colliding with the plaintiff on a sidewalk. From an adverse judgment, defendants appeal. The appeal taken by defendant Leong Cheung was abandoned.

Affirmed.

George M. Naus and Donald Seibert, both of San Francisco, for appellant Ad Chong.

Young & Ryan, of Oakland, and Ingemar Hoberg, of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff, Mazilla Tighe, brought this action for damages against Leong Cheung and his employer, Ad Chong, alleging that Leong Cheung negligently collided with her on a sidewalk, as the result of which she sustained personal injuries, and that at the time of the accident he was engaged in performing the duties of his employment. A jury returned a verdict against both defendants for the sum of $2,500, and from the judgment entered thereon they appealed.

[1] The testimony upon which the jury based its verdict was conflicting upon the

issue of whether an impact actually occurred; otherwise there was no dispute as to the facts. Resolving the conflict in favor of the jury's verdict, the circumstances of the case may be stated as follows: The accident occurred about 8:30 o'clock in the morning, in front of a restaurant in the 300 block on Sutter street in San Francisco. Plaintiff at the time was on her way to work in a downtown department store. Ad Chong was a peddler of fresh fruits and vegetables, which he sold and delivered from a motor truck; and Leong Cheung was employed by him as delivery boy. Shortly before the accident happened they parked their truck opposite and across the street from the restaurant and went inside for the purpose of selling some of their produce. Leong Cheung took along a load of vegetables, which he left inside; thereupon he started to return to the truck, empty handed, to fetch another load; and just as plaintiff was passing in front of the restaurant he emerged suddenly through the doorway, backward, and apparently talking with someone inside. He then whirled around quickly and started across the sidewalk toward the truck. In doing so he collided with plaintiff, knocking her down, so she testified, and inflicting the injuries for which she was awarded damages.

The appeal taken in behalf of Leong Cheung was subsequently abandoned. No briefs or arguments were presented in furtherance thereof, nor as to him is a reversal of the judgment sought by his codefendant. On the appeal taken by Ad Chong it is conceded that the evidence, although conflicting upon the point above mentioned, is sufficient to establish that the accident occurred as claimed by plaintiff. Furthermore it is conceded that she sustained personal injuries as a result of the accident, and that her injuries were proximately caused by the negligence of Leong Cheung; also that Leong Cheung was in Ad Chong's employ and at the time of the accident was engaged in performing the duties of his employment. Nevertheless it is contended that the facts so conceded are not legally sufficient to establish liability against Ad Chong under the doctrine of respondeat superior. The theory upon which this contention is based is best summarized in the following instruction proposed by him and which the court refused to give: "I instruct you that as a matter of law, based upon the evidence in this case, you cannot find the defendant Ad Chong liable to the plaintiff and your verdict must accordingly be in favor of the defendant Ad Chong. The evidence shows that the accident occurred upon a public sidewalk and that the sole means of locomotion of Leong Cheung upon and over the sidewalk were his own legs. The use of his legs under the circumstances and his use of a public sidewalk were both uses in his own right. The right of Leong Cheung to use the sidewalk was a right of his own and was not given to him, and could not be given to him, by Ad Chong. In Leong Cheung's locomotion upon and over the sidewalk he did not use any vehicle or instrumentality owned by or in the custody of Ad Chong. It is only when a servant uses a vehicle or animal or instrumentality, owned or controlled or directed by his master, as a means of locomotion upon a public way, that the master can be held liable for the negligence of his servant arising out of and in the course of locomotion by the servant."

We agree with respondent that the trial court was justified in refusing to accept appellant's view of the law as stated by him in the concluding sentence of the foregoing instruction. In the case of Schediwy v. McDermott, 113 Cal.App. 218, 298 P. 107, 108, a factual situation was presented identical with the one here involved, and the judgment against the employers was affirmed under the doctrine of respondeat superior. The delivery man there was employed by a firm selling meat at wholesale. After having made a delivery of meat in a market the delivery man hastened back through the doorway to return to his employer's truck, which was parked opposite the market, and in crossing the sidewalk he collided with and injured a pedestrian. One of the points urged for reversal was that the evidence was insufficient to establish any negligence on the part of the employers, and in disposing of the point the court said: "Souza was an employee and engaged within the scope of the business of the other defendants at the time of the accident. They are therefore liable." It is true, the court did not there elaborate upon the doctrine of respondeat superior, but as will be seen from the decision therein it was under that doctrine alone that the employers were held liable for the accident. Subsequently a petition for hearing before the Supreme Court was denied.

The judgment against Ad Chong finds further support in two cases from other jurisdictions, cited by respondent. One is from New Jersey, and the other from Massachusetts. In the New Jersey case, Price v. Simon, 62 N.J.L. 153, 40 A. 689, 690, an ice delivery man, after delivering ice at a residence, ran out of the yard toward his truck and collided with a child standing on the sidewalk. An action for damages was brought against the employer alone under the doctrine of respondeat superior, and a nonsuit was granted. But on appeal the judgment was reversed, the Supreme Court of that state saying: "The liability of the master for the negligent act of the servant is solved by determining whether the injury was inflicted while the servant was performing an act in the course of his employment by the master. His duty to the master was to deliver ice from the wagon to customers. When he was returning from the customer's house to the wagon with the ice tongs, he was acting in the business of the master, as clearly as he was when he took the ice in, or as when he was driving the wagon. He could not conduct the business in which he was employed without going to the customer's house, and returning to the wagon. In doing these acts, he represented the master, and for his negligence the master is liable." Exactly that situation existed here. Leong Cheung could not conduct his employer's business without going back and forth between the customer's place of business and his employer's truck. In the Massachusetts case, Ryan v. Keane, 211 Mass. 543, 98 N.E. 590, 47 L.R.A.,N.S., 142, an employee of a livery stable collided with the plaintiff therein while the latter was walking across a yard toward a wagon he had hired; and in holding the employer liable for the injuries plaintiff sustained, the court said: "In the act of returning to the stable he [the employee] was doing what he was ordered to do, and his purpose was to perform the work of his employer for which he was engaged. He was none the less acting in the course of his employment because his method of performing his duty was careless; and if in hurrying to do his work at a busy hour in the morning he carelessly or willfully jostled against and injured the plaintiff, the defendants are liable for his act." While the facts of that case are not precisely the same as those here presented, the legal principle involved is the same.

[2, 3] Moreover, and aside from the law as laid down by the decisions, it is clear that a case of respondeat superior was established under the provisions of section 2338 of the Civil Code, which is the basic statutory law in this state upon that subject, and governs in cases of master and servant. Johnson v. Monson, 183 Cal. 149, 190 P. 635; 16 Cal.Jur. 958. That section declares: "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal." As said in California Jurisprudence (vol. 1, page 839) the provisions of the foregoing section are in accord with the letter and the spirit of the common law; they are also in harmony with section 243 of the Restatement of the Law of Agency; and it is to be noted, neither expressly nor by implication does said section 2338 contain any such conditions limiting the liability of the principal as are set forth in the final sentence of the appellant's proposed instruction. Quite to the contrary, the law is well settled that in determining the question of respondeat superior the real test to be applied is whether at the time the employee commits the negligent act resulting in the injuries to the third person, he is engaged in performing some duty within the scope of his employment. 16 Cal.Jur. 1098; 1 Cal.Jur. 839; 2 Am.Jur. 279; 3 C.J.S., Agency, § 231, p. 138.

In support of the legal principle contended for by appellant, as set forth by him in his proposed instruction, he relies on two cases from the state of Missouri, Phillips v. Western Union Telegraph Co., 270 Mo. 676, 195 S.W. 711, L.R.A.1917F, 489, and Ritchey v. Western Union Telegraph Co., 227 Mo.App. 754, 41 S.W.2d 628, and obviously his proposed instruction was based largely on the decision in the Phillips case. For several reasons the rationale of the Missouri cases cannot be followed. The background of the Phillips case is as follows: Mrs. Phillips and her husband were standing on the curb waiting to cross the street with the traffic signal. A messenger boy, employed by the defendant company, came running along the sidewalk, looking backward over his shoulder at a newsboy from whom he had just snatched a paper; and he collided with Mrs. Phillips, knocking her down. At the time of the accident the messenger boy was carrying messages for his employer. Two actions for damages were filed. The one above cited was brought by Mrs. Phillips for the recovery of damages for the personal injuries she sustained as the result of the collision; the other by her husband for the recovery of the hospital and medical fees incurred by him on account of his wife's injuries and for loss of her services. Phillips v. Western Union Telegraph Co., 194 Mo.App. 458, 184 S.W. 958. Each secured a judgment, from which an appeal was taken by the company. The judgment in favor of the husband was for the sum of $2,000; therefore the appeal was taken to the St. Louis Court of Appeals, which affirmed the judgment as against the company under the doctrine of respondeat superior, its decision being based upon the ruling of the Massachusetts court in Ryan v. Keane, supra. In the action brought by Mrs. Phillips, judgment was given in her favor for $10,000. The appeal was therefore taken to the Supreme Court of Missouri, and the judgment against the company was reversed upon the ground that the doctrine of respondeat superior did not apply. The opinion was written by a court commissioner and subsequently adopted by the Supreme Court, one member of the court (Woodson, J.) dissenting. In thus reversing the judgment the Supreme Court refused to follow the decision previously rendered by the St. Louis Court of Appeals in the case of the husband, and ruled out the Massachusetts case of Ryan v. Keane upon the ground that there the accident occurred on the master's premises, and not on a public street. An analysis of the opinion adopted by the majority of the Supreme Court shows that it was based largely upon the ground that the accident resulted from the "rollicking movements" of the messenger in connection with the snatching of the newspaper, rather than from any negligence on his part while performing a service within the scope of his employment. In dissenting from this view, Judge Woodson stated: "The messenger was performing the master's business at the time he injured the plaintiff, and had it not been for that fact he would not have been pursuing the journey which resulted in the injury, and the mere fact that he sidestepped a few feet to gratify some personal desire does not change the rule." [270 Mo. 676, 195 S.W. 713, L.R.A.1917F, 489.] In the other Missouri case, Ritchey v. Western Union Telegraph Co., supra, a messenger boy dashed out of a building with his head down and collided with a pedestrian on the sidewalk. The appeal was taken to the Kansas City Court of Appeals, and the judgment was affirmed upon the authority of the decision rendered in the Mrs. Phillips case, 270 Mo. 676, 195 S.W. 711, L.R.A.1917F, 489. But in affirming the judgment the court said [227 Mo.App. 754, 41 S.W.2d 629]: "Whether the doctrine of the Phillips Case is sound or unsound is not for this court; it is controlling, notwithstanding holdings in other jurisdictions to the contrary."

From the foregoing it will be seen that even in Missouri there appears to be some doubt as to the soundness of the decision in the Mrs. Phillips case, and besides it is conceded that the legal doctrine upon which it is founded is contrary to the one adhered to in other jurisdictions. Furthermore, the present case is essentially different from the Phillips case in two respects: first, because here the accident was not brought about by any "rollicking" on the part of the employee; although careless in his movements, he was attending strictly to the business of his employer. Secondly, as in the Schediwy and Price cases, at the time of the accident he was performing duties in connection with an instrumentality furnished by his employer, namely, a motor truck, which was being operated on the public streets.

Also in support of his position appellant emphasizes certain dictum found in a Pennsylvania case (Wesolowski v. John Hancock Mut. L. Ins. Co., 308 Pa. 117, 162 A. 166, 87 A.L.R. 783), wherein a pedestrian was struck and injured by an automobile owned by the employee, but which at the time of the accident was being used by him in carrying on the business of his employer. It is apparent, however, that the decision therein is of no value here, because on the merits it is based on legal principles contrary to those governing in like cases in this state. See Cook v. Sanger, 110 Cal. App. 90, 293 P. 794.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

44 Cal.App.2d 223

PEOPLES' FINANCE & THRIFT CO. OF PORTERVILLE v. MOON et al.

Civ. 2529.

District Court of Appeal, Fourth District, California.

April 15, 1941.

1. Bills and notes ⚷49

One who executed a joint and several note for accommodation of the other signer was not a mere "surety," but was liable as "maker," notwithstanding that payee knew of accommodation and made no attempt to collect note from the other signer's estate on his death. Civ.Code, § 3110.

See Words and Phrases, Permanent Edition, for all other definitions of "Surety" and "Maker".

2. Bills and notes ⚷49

A joint and several note was not unenforceable for want of consideration against comaker who executed note for accommodation of the other comaker. Civ.Code, § 3110.

3. Appeal and error ⚷1047(2)

In action on note against one of two comakers, wherein complaint designated the other comaker as one "Moon", permitting amendment, at beginning of trial, so as to change such name to "Moore" was not prejudicial, where defendant used the name "Moore" in answer and briefs on appeal, and admitted at trial that "Moore" was proper name of the other maker.

4. Bills and notes ⚷520

Conflicting evidence as to whether accommodation maker executed note in reliance on misrepresentation that it was secured by mortgage and that he himself was incurring no obligation, supported judgment holding accommodation maker liable to payee. Civ.Code, § 3110.

5. Appeal and error ⚷1071(5)

In action on joint and several note, against accommodation maker, that evidence did not sustain finding that payee failed to file claim on note against estate of the accommodated maker, on his death, was immaterial where court found that defendant executed note as a comaker and not as a surety. Civ.Code, § 3110.

◆

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action on a note by the Peoples' Finance & Thrift Company of Porterville against one Van Moore, who was sued as Van Moon, and others. From a judgment for plaintiff, defendant J. D. Arbaugh appeals.

Affirmed.

J. A. Chase, of Visalia, and C. W. Braswell, of Long Beach, for appellant.

Max B. Jamison, of Porterville, for respondent.

BARNARD, Presiding Justice.

This is an action on a promissory note. In 1931, Van Moore, needing funds to meet an obligation, applied to the plaintiff for a loan. At his request, the defendant Arbaugh signed the note which was given to the plaintiff, as a comaker. It is conceded that the plaintiff knew that Arbaugh received no part of the proceeds of the loan. In 1935, Moore and Arbaugh, as comakers, signed a renewal note, which is the basis of this suit, a copy thereof being set forth in the complaint. After the note became due, Moore died. His estate was probated in Tulare County and it appears that the plaintiff filed no claim therein on account of the debt represented by this note. In this action the defendant Arbaugh filed an answer denying the allegations of the complaint and affirmatively alleging, in substance, that he had signed the original note upon the representation that it was secured by a mortgage, and that he himself was incurring no obligation thereon; that when he signed the renewal note in 1935 he "believed that said note was secured"; and that he was merely a surety on the note, that this was known to the plaintiff, and that he was discharged from liability by the failure of the plaintiff to file a claim against Moore's estate.

Apparently, no attempt was made to serve Moore's administrator or representative, and the action was tried upon the issues raised by the complaint and the answer filed by the defendant Arbaugh. The court found in favor of the plaintiff and Arbaugh has appealed from the judgment which followed.

[1, 2] Most of the points raised by the appellant depend upon his contention that since he signed the note for the accommodation of Moore, which fact was known to the respondent, he thereby became a surety on the note rather than a comaker thereof and that as such surety he was released from liability by the failure of the

respondent to collect the amount due from Moore's estate. This contention requires little consideration. This was a joint and several note and the appellant was an accommodation party and accordingly liable as one of the makers thereof. Civil Code, sec. 3110; Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, 64 P.2d 138; First Nat. Bank v. Kinslow, 2 Cal.App.2d 456, 38 P.2d 163. This also disposes of the contention that there was no consideration for this note.

[3] The appellant also contends that the court erred in permitting an amendment to the complaint. In the complaint as filed, Moore's name appeared as "Moon". At the beginning of the trial the respondent moved for permission to amend the complaint on its face by changing the word "Moon", wherever it appeared, to "Moore". This motion was granted over the objection of the appellant, although it does not appear that the change was actually made on the face of the complaint. The appellant used the name "Moore" throughout his answer and in his briefs on this appeal, and at the trial he admitted that he signed the original note, which was produced, and that Mr. Moore signed it at the same time. The amendment, if it be considered as made, was merely a typographical correction in the name of the codefendant and the case was tried on the issues as between the respondent and the appellant, who was the other defendant. No prejudice appears.

[4] It is next contended, with respect to the issues as to misrepresentation raised by the answer, that the evidence of the respondent "was not sufficient to overcome the weight of defendant's evidence". Not only was no issue as to misrepresentation raised in connection with the signing of the renewal note, the one here sued on, but, as the appellant himself indicates, the point as raised in connection with the original note is directed to the weight of the evidence. There is a conflict in the evidence on the matter in question and the court's implied finding thereon cannot be disturbed.

[5] The appellant further contends that the court failed to find on material issues. The findings cover all of the material issues, and the facts which were found made certain other issues immaterial as a result of which findings thereon became unnecessary. It is also urged that the evidence does not sustain a finding to the effect that a claim for the obligation here sued upon had not been presented and filed in Moore's estate. The court made a general finding that all of the allegations of the answer filed by the appellant were untrue. The evidence does not sustain this finding to the extent that it does not appear that such a claim was not filed in Moore's estate. However, this finding is immaterial in view of the court's finding that the appellant executed this note as one of the comakers thereof and since, under the law, the appellant was not a surety as between himself and the payee of the note.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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44 Cal.App.2d 215

WRIGHT v. PONITZ et al.

Civ. 12345.

District Court of Appeal, Second District, Division 1, California.

April 15, 1941.

1. Automobiles 🔑242(2)

That a vehicle has collided with an automobile ahead tends to a conclusion that driver of overtaking vehicle was responsible for the collision.

2. Automobiles 🔑168(4), 170(1, 4)

A motorist driving along a public highway was bound to anticipate that he might meet other automobiles at any point thereon, and, in order to avoid charge of negligence, he was bound to use ordinary care and keep an ordinary careful outlook for such automobiles, and to keep his machine under such control as would enable him to avoid a collision.

3. Automobiles 🔑245(6, 46)

Evidence that plaintiff and another were pushing their automobile after its motor had failed on six-lane highway about 7 o'clock in the evening in slight drizzle, that plaintiff was pushing against spare tire from middle and rear of automobile, that taillight of automobile which plaintiff was pushing was lighted, that plaintiff's position did not obscure defendant motorist's view of taillight, and that defendant, approaching from behind at speed of 20 to 25 miles per hour, did not see automobile which plaintiff was pushing nor plaintiff until too close to avoid striking plaintiff, presented question for jury as to whether defendant was operating his automobile in a careful and prudent manner with due regard to traffic upon highway.

4. **Negligence** 🔑136(9)

The question of contributory negligence is to be withdrawn from jury only where deduction drawn from the evidence is inevitably one way or the other.

5. **Automobiles** 🔑245(72)

Evidence that plaintiff and another were pushing their automobile after its motor had failed on six-lane highway at about 7 o'clock in evening in a slight drizzle, that they were attempting to push it about 300 feet down a grade to a service station, that they were traveling at speed of about 7 or 8 miles an hour, that plaintiff was pushing against spare tire from middle and rear of automobile, and that plaintiff's position did not obscure view of taillight, presented question for jury as to whether plaintiff was guilty of contributory negligence, when struck by automobile approaching from rear.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Thomas E. Wright against Milton Ponitz and another for injuries sustained by plaintiff when struck by defendants' automobile. From a judgment for plaintiff, defendants appeal.

Affirmed.

Kaplan & Kaplan, of Los Angeles, for appellants.

Charles Peckham, of Los Angeles, for respondents.

YORK, Presiding Judge.

This is an appeal from a judgment in favor of respondent, who was injured when struck by an automobile being driven by appellant Milton Ponitz and owned by appellant Harry Ponitz, the former being referred to throughout this opinion as appellant.

The collision which resulted in serious injuries to respondent occurred shortly before 7 o'clock in the evening of February 14, 1936 on La Brea Avenue approximately 150 feet north of its intersection with Venice Boulevard in the city of Los Angeles. La Brea, at the site of the accident, is a six-lane highway with a double white line marking the center, and runs in a generally south and north direction. Appellant turned from Exposition Boulevard into La Brea and drove northerly thereon until he reached Venice Boulevard where he halted for a "stop sign", and then continued for a distance of 150 feet, driving the car 3 or 4 feet to the right or east of the marked center line at speed of 20 miles per hour.

Meanwhile, respondent Wright and his friend, Joseph Fike, were pushing the latter's car northerly on La Brea, 4 or 5 feet to the right or east of the center line thereof, at a speed of 7 or 8 miles per hour. When they reached a point on said street 150 feet north of its intersection with Venice Boulevard, and about 150 feet south of a service station located at the intersection of La Brea and Pico Boulevard, which was their destination, appellant's car struck respondent, who was pushing the Fike car "against the spare tire from the middle and rear of the automobile". The bumper of appellant's car struck respondent from the rear, pinning his legs between the bumpers of the two cars. Mr. Fike was stationed at the left-hand side of his car near the steering wheel, and he was pushing and steering so that he could guide the direction of his automobile.

The night was dark and the street lights were lighting, appellant testifying that it was raining very hard and the visibility was bad; that his vision was intermittently obscured by the glare of headlights of approaching automobiles. Respondent testified testified that the visibility was good and "for a period of at least half an hour before the accident, it was either drizzling slightly, that is raining slightly, or not raining at all, but that very shortly after the accident this became a torrential rain."

Appellant testified that he did not see the taillight of the Fike car nor did he see the Fike car until he was within 10 or 15 feet of it, although his headlights were burning, his windshield-wiper was working and his brakes were in good condition; that he applied his brakes and swerved to the right but could not avoid hitting respondent. Respondent testified that he had no warning before the impact, neither saw nor heard appellant's automobile before it struck him; also that the "taillight on Mr. Fike's automobile was lighted and working; this taillight was located at a point approximately behind the middle of the left fender and was not and could not have been obscured by my position behind the middle of the automobile where I was pushing on the spare tire, which spare tire was affixed to the approximate middle of the turtle-back of Mr. Fike's car."

The witness Fike stated he saw appellant's automobile just before the impact and tried to warn respondent, but had no time to do so; that appellant's car was accelerating almost to the point of collision; that its speed was approximately 25 miles per hour; that the impact was of sufficient force to send the Fike car on an angle diagonally across La Brea in a northeasterly direction; that he "did not notice right after the accident whether the taillight was on, but when I checked it the following day it was in order."

Appellant urges that the evidence is insufficient to support a finding by the trial court that he was guilty of negligence.

Appellant also urges that respondent was guilty of contributory negligence as a matter of law, as well as from all the evidence submitted at the trial. This claim is based upon four acts of alleged negligence on the part of respondent which it is contended by appellant directly and proximately contributed to the collision, namely: (1) the placing of the Fike car on the highway after its motor had failed; (2) pushing said car in the lane nearest the center of La Brea instead of in the lane nearest the curb; (3) pushing the car from the rear instead of from the side; (4) the failure to keep proper lookout for on-coming automobiles.

The situation in which these two young men, respondent Wright and Joseph Fike, found themselves at the time in question was related by respondent as follows: "Prior to the accident we had proceeded south on La Brea Avenue and as we were turning east on the south parkway of Venice Boulevard the motor of the automobile failed. We backed the automobile into the driveway of a service station on the southeast corner of Venice Boulevard and La Brea Avenue, and were told by the service station attendant, who was closing for the night, that we might find a mechanic at the service station located at the southeast (southwest) corner of La Brea Avenue and Pico Boulevard. With the help of the service station attendant, we pushed the car up the grade crossing and on to the Venice Boulevard street car tracks; here we stopped and thanked the attendant who, after giving us an additional push, left us to our own devices. At the time we were on the car tracks I noticed the weather and the visibility—it was drizzling slightly, the street lights were lighted, and from the tracks I could see well beyond Pico Boulevard, Pico Boulevard being three hundred (300) feet more or less from the Venice Boulevard street car tracks.

"As aforesaid, the attendant gave us an additional push and we started down the grade in a northerly direction on La Brea Avenue towards the service station on Pico Boulevard, which was a short block of perhaps three hundred (300) feet ahead of us. The slope of the grade and our efforts increased the momentum and speed of Mr. Fike's automobile to a pace considerably faster than a walk, to approximately, I would say, seven (7) or eight (8) miles per hour which speed we maintained up to the time of the accident. About half way to Pico Boulevard, that is approximately one hundred fifty (150) feet from the street car tracks, and while some four (4) or five (5) feet to the right of the center line, we were overtaken by the automobile driven by Mr. Milton Ponitz."

The following pertinent statement was made by the court in the case of Donahue v. Mazzoli, 27 Cal.App.2d 102 at 105, 80 P.2d 743, 745: "Cases involving rear-end collisions are many. Prima facie each case imports negligence and explanations are in order. Many different situations are presented and in each specific case due consideration becomes necessary to ascertain each pertinent circumstance and then give it due consideration. Although the contention has often been made that the leader alone was guilty of negligence or that the follower alone was guilty of negligence, in general it has been held that the case as made by each party presented a question of fact for the jury and was not solely a question of law for the courts. Wright v. Clausen, 253 Ky. 498, 69 S.W.2d 1062, 104 A.L.R. 480, and extended note, especially page 502."

[1] The fact that a vehicle has collided with a car ahead tends to a conclusion that the driver of the overtaking vehicle was responsible for the collision. 2 Cal.Jur. 10-year Supp. 299, citing Lawton v. Boles, 137 Cal.App. 133, 30 P.2d 81; Ying v. Pickwick Stages System, 117 Cal.App. 312, 3

P.2d 597; Taylor v. Lowenstein, 113 Cal. App. 665, 298 P. 847; Boccalero v. Wadleigh, 113 Cal.App. 376, 298 P. 526; Graves v. Kern County Transp. Corp., 112 Cal.App. 261, 296 P. 902; Linde v. Emmick, 16 Cal. App.2d 676, 61 P.2d 338; Sanford v. McCook, 6 Cal.App.2d 482, 44 P.2d 631.

[2] Appellant was driving his automobile along a public highway and was bound to anticipate that he might meet other cars at any point thereon; consequently, in order to avoid the charge of negligence, he was bound to use ordinary care and to keep an ordinarily careful outlook for such automobiles and to keep his machine under such control as would enable him to avoid a collision. Boccalero v. Wadleigh, 113 Cal.App. 376, 379, 298 P. 526, citing Reaugh v. Cudahy Packing Company, 189 Cal. 335, 340, 208 P. 125.

[3] The evidence presented herein clearly shows that appellant drove his car into the automobile ahead. In the circumstances, the question as to whether he was operating his car in a careful and prudent manner with due regard to the traffic upon La Brea Avenue was a question of fact to be determined by the trial court. The court found that appellant "did so carelessly, negligently, and recklessly drive and operate the said automobile so as to cause the same to collide with, bump into, strike and run upon and over the plaintiff, Thomas E. Wright, who was then and there lawfully upon the said La Brea Avenue"; such finding is conclusive upon this court.

[4, 5] "It is only where the deduction to be drawn from the evidence is inevitably one way or the other, that the question of contributory negligence is to be withdrawn from the jury." Graves v. Kern County Transportation Corp., 112 Cal.App. 261, 267, 296 P. 902, 905, citing Wise v. Maxwell Hardware Co., 94 Cal.App. 765, 271 P. 918.

By reason of the evidence disclosed by the record herein, the finding that respondent was free of contributory negligence is fully sustained. It was a question of fact for the trial court to determine from such evidence whether respondent and Joseph Fike propelled the latter's car along La Brea Avenue as a reasonably prudent man would do under similar circumstances.

For the reasons stated, the judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

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44 Cal.App.2d 211

HALVORSEN v. HALVORSEN.

Civ. 2633.

District Court of Appeal, Fourth District, California.

April 14, 1941.

Appeal and error ⟹891

Where plaintiff testified in action for annulment of Mexican marriage that he and defendant, who also sought annulment, "were married", but there was no testimony concerning what actually took place and no evidence of any facts showing whether requisite things were done to constitute a valid marriage under Mexican laws, no evidence was received relative to Mexican laws relating to validity of marriage or possibility of its annulment, and there were no findings of fact, the reviewing court would not take evidence concerning Mexican laws, but those and the other issues involved were first required to be heard, considered, and determined in the trial court.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by John Halvorsen against Marie Halvorsen, etc., for the annulment of a marriage, wherein defendant filed a cross-complaint for annulment of the marriage. From a judgment denying an annulment, defendant appeals.

Reversed.

Aaron Levinson, of Los Angeles, for appellant.

Harvey D. Taylor, of Los Angeles, for respondent.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and Ned Marr, Deputy Co. Counsel, all of Los Angeles, amicus curiae.

BARNARD, Presiding Justice.

In this action each of the parties sought an annulment of their marriage. The parties, both residents of Los Angeles county, went through a marriage ceremony in Tia Juana, Mexico, on November 1, 1937. The defendant was then of the age of 17 years and seven months, and she did not have the consent of her parents. It appears that they returned immediately to Los Angeles and that they never lived together or cohabited as husband and wife.

The entire proceedings at the trial of the action take up less than three pages of the transcript, all of the testimony being confined to one page. The plaintiff testified that he and the defendant were married in Tia Juana, Mexico; that they never lived together or cohabited as husband and wife; and that they returned to Los Angeles immediately after the marriage. The trial judge then remarked "That is enough". After inquiring as to the defendant's age at the time of the marriage, he then stated that the case of McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163, held "that the validity of the marriage is determined at the place where consummated", referred to two sections of the Mexican Code, and remarked that the law of Mexico is not the same as that of California. He then asked whether the defendant and cross-complainant was represented by counsel and after her attorney replied in the affirmative, he said: "The annulment is denied on the complaint and the annulment is denied on the cross-complaint." A judgment was entered and the defendant and cross-complainant has appealed.

Apparently, these parties went through some kind of a marriage ceremony in Tia Juana, Mexico. Although we are not experts on Mexican law it is our understanding that the taking of a considerable number of steps in a very definite manner is required in order to make a marriage valid under that law. It does not appear whether such requirements were complied with, in this instance, as no evidence in support of the cross-complaint was received. The facts should have been ascertained and, if necessary, the pleadings could have been amended to conform to the proof. While the plaintiff testified that he and the defendant "were married" there is an entire absence of any testimony as to what actually took place on that occasion, and there is no evidence of any facts from which it could possibly be determined whether or not the requisite things were had and done in order to constitute this a valid marriage under the laws of the jurisdiction in which the purported ceremony was performed. In addition, no evidence was received relative to the laws of Mexico upon the subjects here involved, either those relating to the validity of this marriage or to the possibility of its being annulled.

Moreover, there are no findings of fact. While the court drew the conclusions of law that the cross-complaint does not state a cause of action and that the defendant and cross-complainant is not entitled to a decree of annulment, not a single fact of any kind or nature was found in so far as disclosed by the record before us.

An amicus curiae brief in opposition to the appellant's opening brief was filed by the county counsel of Los Angeles county, in which it is suggested that this court, upon its own motion, take evidence "relative to the laws of Mexico upon the subjects herein involved".

In support of his request that this court take evidence as to the laws of Mexico the county counsel has filed the affidavit of an attorney who says he is familiar with those laws, in which he purports to set forth the substance of certain of those laws. This affiant also expressed the opinion that one of those laws, which provides that an action for annulment may be brought only by the party whose consent was necessary, is controlling over another which provides that such an action may be brought by one of the parties to the marriage. The transcript also contains an affidavit in support of a motion for a new trial in which the affiant, after alleging his familiarity with the laws of Mexico, sets forth his views as to the effect of certain of those laws. There is considerable disagreement between the two versions thus presented, relative to the laws of Mexico, in so far as material here.

The cross-complaint states a cause of action if the laws of this state alone were involved. If we were to presume that the laws of Mexico, in so far as material here, are the same as the laws of this state the judgment would have to be reversed. A decision of this case on its merits requires not only the taking of evidence as to the pertinent laws of Mexico but also requires the taking of considerable evidence as to the existing facts. To grant the request that evidence as to the laws of Mexico be taken in this court would naturally lead to and require also the taking of testimony as to the general facts involved. This would result in a complete trial of all of the issues in this court when, as a practical matter, no trial has been had in the trial court. No good reason appears for such a radical departure from the usual and orderly procedure.

In so far as disclosed by the incomplete record before us, it does not appear that the case of McDonald v. McDonald, supra, apparently relied upon by the trial court, is necessarily controlling here. Aside from any other considerations, there would appear to be serious questions as to whether this was a valid marriage under the laws of the place where it was performed, aside from any question of consent; whether it was voidable there because of the absence of consent, as being one of the "impediments" for which a marriage may there be annulled; and, if the marriage was void or voidable there, whether the procedure for procuring an annulment under Mexican law prevails and is controlling over the purely procedural steps provided in that regard by the statutes and rules of law of this state. These and the other questions and issues involved should first be heard, considered and determined in the trial court.

The request that this court take evidence in this cause is denied and the judgment is reversed.

We concur: MARKS, J.; GRIFFIN, J.

44 Cal.App.2d 171

SMITH v. BLISS.

Civ. 11667.

District Court of Appeal, First District, Division 2, California.

April 14, 1941.

1. Frauds, statute of 🔑54½

A contract of employment, which was to continue until employer's death and under the terms of which compensation was to be in the same amount as that which employer should provide by way of joint bank account or will for another employee, could not be performed during lifetime of the employer and hence was within the statute of frauds, since amount of compensation provided for other employees could not be determined until employer's death. Code Civ.Proc. § 1973, subd. 6.

2. Trusts 🔑38

In order to constitute any person a trustee there must be a showing that such trustee accepted the trust. Civ.Code, § 2222.

3. Trusts 🔑38

The delivery to plaintiff by decedent shortly before death, of bank book containing a small joint bank account of plaintiff and decedent, together with dated and signed memorandum "make it joint tenancy 20,000" and promise that decedent and executor of her deceased husband's estate would be trustees until her legacy from husband's estate was ordered distributed when money would be deposited in joint account, was insufficient under statute to establish a valid "trust", where no one having possession of the subject matter thereof was shown to have consented to act as trustee. Civ.Code, §§ 2221, 2222.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

4. Principal and agent 🔑43(1)

Any agency created by memorandum "make it joint tenancy 20,000," written on envelope containing joint bank account bank book and dated and signed by one of joint tenants, was terminated by death of joint tenant who signed memorandum. Civ.Code, § 2356.

5. Trusts 🔑371(2)

Allegations that decedent shortly before death had granted and assigned to plaintiff a joint tenancy interest with right of survivorship in $20,000 held by executor of deceased husband's estate subject to court order of distribution and had promised that if decedent survived operation, when her legacy from husband's estate was received, the $20,000 would be deposited in a specified joint account of decedent and plaintiff and that, if she did not survive, the deposit would be made by decedent's executor, did not state facts sufficient to show a "constructive trust" in decedent's executor. Civ. Code, § 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

6. Trusts 🔑91

A "constructive trust" is one of those designated by statute as involuntary trusts, arising by reason of fact that party sought to be charged with a trust has gained something by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act. Civ.Code, § 2224.

7. Trusts ⟹371(1)

Allegations of complaint, which sought recovery against executor of plaintiff's deceased employer, on theory of a constructive trust, showed that plaintiff had a remedy at law to sue for compensation, and hence equity would not take jurisdiction of the action.

8. Executors and administrators ⟹205(2)

An employee, who admitted that she had received more from employer during employer's lifetime than employee in her complaint alleged that her services were worth, could recover nothing in action in "quantum meruit" against deceased employer's executor for services rendered, since amount of recovery in such action is only the reasonable value of the services rendered regardless of any alleged agreement between employer and employee as to value of the services.

See Words and Phrases, Permanent Edition, for all other definitions of "Quantum Meruit".

◆

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Mable Smith against Charles A. Bliss, etc., to recover a balance due on a contract for personal services. From a judgment of dismissal, plaintiff appeals.

Judgment affirmed.

Sherman & Peters, of San Francisco, for appellant.

Joseph C. Prior, of Oakland, for respondent.

STURTEVANT, Justice.

To the plaintiff's second amended complaint the defendant interposed a demurrer. The demurrer was sustained without leave to amend and from the judgment entered thereon the plaintiff has appealed. Plaintiff's pleading purported to state four different causes of action.

In her brief the plaintiff states that the first cause of action is one in which she seeks to recover the unpaid balance due on a contract for personal services. The first cause of action is very long but the following are its principal allegations: Prior to 1932 A. F. Coffin and Lulu H. Coffin were husband and wife residing in Oakland. Mrs. Coffin had an intimate friend, Irene Martin, for whom she had done and was continuing to do many kind acts. In the latter part of that year Mrs. Coffin approached the plaintiff asking the latter to give up her employment in the millinery business and "* * * devote all her working time to her (Mrs. Coffin's) interests and welfare and to be her lifelong friend. * * *" Mrs. Coffin stated that she would compensate the plaintiff well, would give as bountifully to her as to Irene Martin, and that she would accomplish these things by creating joint bank accounts for plaintiff, or by making provision for plaintiff in her will. Plaintiff accepted said proposition and continued to act thereon until the date of Mrs. Coffin's death. Mr. Coffin died testate on March 5, 1935. Among others he named his wife as one of his legatees. Mr. Harris was appointed executor of that will and proceeded with the probate proceedings. Later Mrs. Coffin stated to Irene Martin and to this plaintiff that she would make only a part provision for them in her will and the greater part of the provision she would create by the said joint bank accounts. In carrying out that statement she created joint bank accounts in favor of Irene Martin in the sum of $62,463.66. She also created joint bank accounts in favor of herself and the plaintiff in the sum of $10,931. Among others was account No. 47534 in the Crocker First National Bank of San Francisco. That account was opened September 1, 1936, and Mrs. Coffin deposited $5 therein. The bank book was inserted in an envelope and was handed over to the decedent. About that time it transpired that Mrs. Coffin's legacy amounted to $27,058.03 but the same had not been declared by an order of distribution. From time to time Mrs. Coffin referred to said legacy and stated to the plaintiff that when it was collected the joint bank account number 47434 would be increased to make it $20,000. In August, 1937, Mrs. Coffin was in poor health and was advised that she must undergo an operation. On August 30, 1937 she executed a formal will. On August 31, 1937, she was informed by her doctor that she must immediately undergo the operation. On the latter day she produced the envelope containing the bank book 47534 and, in the presence of the plaintiff, Mrs. Coffin wrote thereon, "Make it Joint Tenancy 20,000—Aug. 31/1937 Mrs. A. F. Coffin." Having written said words on said envelope

Mrs. Coffin handed the envelope and contents to the plaintiff, stating that Mrs. Coffin and the executor of her husband's estate would be trustees until the money was deposited in the joint bank account and that if Mrs. Coffin did not survive the operation, and if the check was received from her husband's executor after she died, then the plaintiff was to take said writing to Mrs. Coffin's executor (Mr. Bliss) and he would see that the plaintiff received the said $20,000. Mrs. Coffin died September 8, 1937. Down to the date of her death she had not made joint bank accounts with plaintiff in the sum of $62,463.66. In her will Mrs. Coffin did not bequeath to the plaintiff a sum equal to the amount of her promise. She had created joint bank accounts in favor of the plaintiff in the sum of $10,417.13, had made gifts to her in the sum of $1,000, but had failed to the extent of $52,043.53 to keep her promise. After the date of the death of Mrs. Coffin the plaintiff learned of the discrepancy. On October 14, 1937, Mr. Bliss was appointed executor of the will of Mrs. Coffin. In due time the plaintiff filed her claim against the estate. That claim was made out in accordance with the alleged promises hereinabove set forth. Her claim was denied on May 1, 1938, and thereupon she commenced this action. It is further alleged that she made a demand on Mr. Bliss to pay $19,995 into the joint bank account but he refused.

[1] The foregoing is clearly an attempt to plead a contract of employment. By its express terms the contract was to continue from the date it was made in 1932 down to the date of the death of Mrs. Coffin. The amount of the compensation depended on the amount of the accounts in favor of Irene Martin. Until the date of Mrs. Coffin's death that amount could not be known. Hence the amount to be put in a joint bank account in favor of the plaintiff, or the amount to insert in a will, could not be known. Obviously said contract could not be performed during the lifetime of the promisor (Mrs. Coffin). It was therefore clearly within the statute of frauds. Code Civ.Proc. sec. 1973, subd. 6; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562. But the plaintiff argues the defendant is estopped from pleading the statute of frauds. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St.Rep. 154. That authority is not applicable in the instant case. The fraud on which the estoppel rested in that case was the promise to make a written contract and the subsequent failure to carry out that promise (156 Cal. pages 799, 800, 106 P. 88, 134 Am.St.Rep. 154). It follows that the first cause of action failed to state facts sufficient.

Second Cause of Action.

By a direct allegation to that effect the plaintiff adopts all of the allegations in the first cause of action and then alleges as follows: That on the 31st day of August, 1937, Mrs. Coffin, in consideration of services rendered, created a trust in favor of this plaintiff and "* * * that the said Mrs. Coffin declared her intention by her statements, instructions, declarations, and other acts, and by the writing hereinabove alleged and set forth * * *". The corpus of the trust was to be $20,000 "* * * then in the possession of the executor of her husband's estate * * *". Mrs. Coffin would act as trustee during her life, Mr. Bliss would act as trustee thereafter. During her life and prior to obtaining actual physical possession of the said money, Mrs. Coffin retained control as trustee for herself and the plaintiff. Later Mr. Bliss received the legacy from the estate of Mr. Coffin. The plaintiff has never received any part. Of the moneys received from the estate of Mr. Coffin $20,000 was vested and impressed with said trust in favor of this plaintiff. This defendant received said moneys so impressed with said trust and now wrongfully refuses to pay it over to this plaintiff.

[2-4] Taking up all of the allegations of the first cause of action, together with the allegations of the second cause of action, it appears at once that no $20,000, or any other sum, was segregated or designated as the corpus of the trust, or was at any time in the possession of Mrs. Coffin. Assuming that the plaintiff is discussing funds to be received from the estate of Mr. Coffin, it is equally clear that such moneys were never received during the life of Mrs. Coffin. Moreover it is clear that there is not a word to the effect that Mrs. Coffin, either orally or in writing, made any transfer impounding any funds whatever in a trust or assigned her rights in any moneys in favor of anyone as the nominal trustee thereof. Conceding at once that a valid trust may be created as to personal property (Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370), the facts in the instant case do not justify us in applying that

rule. Chard v. O'Connell, 7 Cal.2d 663, 62 P.2d 369. To constitute a valid enforceable trust the declaration thereof should show "1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust." Civ. Code, sec. 2221. The allegations are insufficient to show an intention to create a trust. The allegations show an intention to create a joint bank account, but a failure to do so. To constitute any one a trustee there must be a showing that such trustee accepted the trust. Civ.Code, sec. 2222. But there is no allegation that any one, having possession of the subject matter, consented to act as trustee during the life of Mrs. Coffin or afterwards. Giving all of the allegations the fullest meaning to which they are entitled, there was no trust created. Molera v. Cooper, 173 Cal. 259, 260-262, 160 P. 231. The memorandum dated August 31, 1937, certainly had as much force the day it was written as it had after the death of Mrs. Coffin. However it must be conceded at once that said memorandum was of no force or effect as a draft or an assignment and binding on Mr. Harris as executor of the estate of Mr. Coffin, nor, after the death of Mrs. Coffin, did it have such force or effect on Mr. Bliss who had been appointed executor of her will. To whomever that memorandum was addressed, in as far as it purported to create an agency, such agency terminated the moment Mrs. Coffin died. Civ.Code, sec. 2356; 2 Am.Jur. p. 52.

Third Cause of Action.

[5-7] The plaintiff next contends a constructive trust was created in her favor. Again she realleges all of the foregoing facts. Continuing she alleges that on the 31st day of August, 1937, Mr. Harris, as executor of the estate of A. F. Coffin, deceased, held a legacy in the sum of $27,058.03, payable to Mrs. Coffin. That "said executor Harris was holding said money subject to court order of distribution". On the date last mentioned "* * * Mrs. Coffin granted, conveyed, transferred and assigned to the plaintiff a joint tenancy interest with right of survivorship in and to $20,000 of the said money in the possession and control of Mr. Harris as executor of her deceased husband's estate". Mrs. Coffin promised that if she survived the operation when the $20,000 was received that she would deposit the same in account No. 47534 in the Crocker Bank and if she did not survive then and in that event Mr. Bliss, her executor, would make the deposit. On the 17th day of November, 1937, the executor of the estate of Mr. Coffin paid $20,000 to the defendant, who ever since has held the same for this plaintiff as survivor in the joint tenancy account. The plaintiff thereafter demanded of the defendant that he pay said moneys to her, but he refused. The plaintiff contends the foregoing facts showed a constructive trust. We think not. A constructive trust is one included among those classed in our statutes as involuntary trusts. Fulton v. Jansen, 99 Cal. 587, 590, 34 P. 331. Involuntary trusts arise under such facts as are enumerated in Civil Code, section 2224. But in the cause of action before us there is no fact alleged showing that this defendant has gained "* * * a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act * * *". Furthermore the facts show the plaintiff had a remedy at law to sue for compensation. Under such facts equity will not take jurisdiction. De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522.

Fourth Cause of Action.

As a fourth cause of action the plaintiff sets forth a count in quantum meruit for services rendered. She repeats all of the foregoing allegations. Continuing she alleges that from October 1, 1932, down to the date of the death of Mrs. Coffin she fully performed her contract to render services. She alleges that Mrs. Coffin agreed to pay therefor an amount equal to the sums Mrs. Coffin paid to Irene Martin. Again she alleges that her services were reasonably worth the sum of $100 per month. She further alleges that Mrs. Coffin failed to pay her the sum of $52,046.53, the balance that was payable to her under the contract with Mrs. Coffin.

[8] At $100 per month during the period of service there would have accrued and been payable the sum of $6,700. But it will be remembered that the plaintiff admits she has been paid a sum in excess of $10,417.13. It follows that she has been paid more than her services were reasonably worth and that she is not entitled to claim any further sum in a cause of action founded upon quantum meruit. Under this cause of action the special agreement made by the parties as to the value of the services is not enforceable as such. The amount of relief that may be obtained is

the reasonable value of the services rendered and not the agreed value. De Mattos v. McGovern, supra.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

44 Cal.App. 2d 178

In re COFFIN'S ESTATE.
BLISS v. SMITH.

Civ. 11668.

District Court of Appeal, First District,
Division 2, California.
April 14, 1941.

1. Wills 🔑334

In proceeding seeking admission to probate of a memorandum as codicil to a will previously admitted to probate, trial court had power under statute to amend its findings in favor of contestant and order entry of a second judgment in ruling on proponent's motion for a new trial. Code Civ. Proc. § 662.

2. Wills 🔑344

A judgment to the effect that a memorandum was not a codicil to a will previously admitted to probate and that probate of such memorandum as a codicil was denied was not subject to objection that it was premature and void because a formal judgment had not first been entered in the proceeding contesting admission of the memorandum to probate.

3. Wills 🔑477

Where a memorandum written on an envelope in decedent's hand and dated and signed by decedent, and which was offered for probate as a codicil to decedent's will, made no reference to notation on envelope written by third person to whom decedent delivered envelope nor to contents thereof, which consisted of a savings bank book, the doctrine of "incorporation" was not applicable so as to lend meaning to memorandum by reference to other writings or contents of envelope.

See Words and Phrases, Permanent Edition, for all other definitions of "Incorporation".

4. Wills 🔑384

On appeal upon the judgment roll from judgment denying application to admit to probate as a codicil to a will previously probated a certain memorandum, which was ambiguous in its use of the word "it," appellate court must conclude that trial court on all of the evidence found that the word "it" did not refer to other writings on the envelope on which memorandum was written nor to the contents of such envelope.

5. Wills 🔑334

In proceeding seeking to probate as codicil to will previously admitted to probate a memorandum "make it joint tenancy 20,000," which was written in decedent's handwriting, dated and signed by decedent, on an envelope containing bank book showing a small joint savings account of decedent and person to whom decedent delivered memorandum, finding that such memorandum did not constitute codicil authorized entry of judgment denying admission to probate, notwithstanding absence of finding upon alleged issue of whether decedent intended by such memorandum to make a revocable disposition of the $20,000 to be effective after her death.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Proceeding in the matter of the estate of Lulu Hannah Coffin, deceased, on the petition of Mable Smith asking that a certain memorandum be admitted to probate as a codicil to the will of deceased previously admitted to probate, wherein Charles A. Bliss, as one of legatees under deceased's will, filed a contest. From a judgment entered upon findings of fact in favor of contestant and a second judgment entered upon amended findings, the proponent appeals.

Judgment affirmed.

Sherman & Peters, of San Francisco, for appellant.

Joseph C. Prior, of Oakland, for respondent.

STURTEVANT, Justice.

This is a companion case to the case entitled Smith v. Bliss, 112 P.2d 30, this day filed. Except as noted the facts are fully set forth in that case.

After the death of Lulu Hannah Coffin, Charles A. Bliss was granted letters testamentary and proceeded to administer her estate. About sixteen months after the death of Mrs. Coffin, Mable Smith, this defendant, appeared and filed the written memorandum dated August 31, 1937, and at the same time filed a petition asking that it be admitted to probate as a codicil to the will of Mrs. Coffin. Charles A. Bliss, as one of the legatees under the will, appeared and filed a contest. In that contest he set forth two counts. Afterwards, by permission of the court, said contest was amended. Later this defendant filed an answer to said contest as amended. The pleadings of both parties were very full and complete. After a hearing of the parties the trial court made and caused to be filed a set of findings in favor of the plaintiff and against the defendant. Those findings were very full and complete. However, being dissatisfied with the findings, the defendant made a motion for a new trial. After considering said motion the trial court made an order that the motion be denied, that the findings be amended, and that a second judgment be entered. The defendant appealed from both judgments and has brought up the judgment roll.

[1] The defendant contends that the second judgment and the additional findings are void. Linstead v. Superior Court, 17 Cal.App.2d 9, 61 P.2d 355. That case is not in point. The trial court, in that case, had entered a decree of distribution but certain parties had not appeared. In an application by those parties to amend the decree of distribution such application affected directly the matter embraced in the decree. Another interested party having perfected an appeal from the decree before the motion to vacate was made, the trial court had no power to set it aside on an application made under section 473 of the Code of Civil Procedure. The facts in the instant case are quite different. The judgment was entered August 24, 1939. A notice of intention to move for a new trial was filed August 29, 1939. The motion was denied October 16, 1939. The notice of appeal was filed October 17, 1939. Section 662 of the Code of Civil Procedure provides: "Causes tried without jury: Powers of court on motion for new trial. In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, * * *." It follows that the trial court did not exceed its power. Veterans' Welfare Board v. Burt, 4 Cal.App.2d 659, 41 P.2d 587.

[2] The defendant contends the decree was premature and void because the trial court did not first enter a formal judgment in the contest proceeding. In re Estate of Cook, 205 Cal. 581, 271 P. 1083. There is no question regarding the soundness of the rule stated in that case. However the facts are in no respect similar to the facts in the instant case. Eliza Cook died testate. Her will was offered for probate. Before the hearing of that application a contest was filed. That contest was dismissed. Another contest was filed. Then, as stated in 205 Cal. on page 583, 271 P. on page 1084, the proceedings were as follows: "The proponents promptly moved the court to strike out and dismiss said second contest, which motion was granted on December 6, 1927, and three days thereafter the court made its order admitting said will to probate. From each of these two last-mentioned orders the contestants have appealed." Continuing the court shows that both orders were erroneously entered because, "As a valid contest was on file at the time the petition for the probate of the will came on for hearing, the probate court was in error in hearing and thereafter granting said petition without first disposing of, in the manner provided by law, the contest then on file. It follows, therefore, that the orders appealed from should be, and they are hereby, reversed." The same contention which this defendant makes was made in Re Estate of Wall, 187 Cal. 50, 200 P. 929. The facts in that case were more nearly in point. The will of the decedent had been admitted to probate. Later a contest was filed. The contest was decided against the contestants. On page 55 of 187 Cal., on page 931 of 200 P., the court said: "The judgment should have formally denied the petition for the revocation of the probate of the will, but we cannot see that the appellant is injured by the failure to expressly deny her petition." In the instant case there was no application to revoke the will that had been admitted to probate, but the sole effect of the defendant's petition was to ask that the memorandum above referred to be admitted to probate as a codicil to the will that was being probated. The judgment as entered was in effect a decree that the alleged memorandum was no codicil and application to probate it was denied. The law required nothing more.

The defendant further contends that the findings do not support the judgment. In that connection she quotes from In re Estate of Spitzer, 196 Cal. 301, 237 P. 739. On page 307 of 196 Cal., on page 742 of 237 P., the court quoted with approval: "It is undoubtedly the general rule enunciated by the leading case of Habergham v. Vincent, 2 Ves.Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death and passing no present interest." She then asserts that, unless there was a finding to that effect, the findings do not support the judgment. Conceding the rule to be as stated in the excerpt just quoted, it is a sufficient reply to call attention to the fact that finding IX contains almost the identical words contained in the quotation.

[3-5] The alleged codicil was written on an envelope which had printed thereon, "Crocker First National Bank of San Francisco, San Francisco, California". The codicil was written in pencil, "Make it Joint Tenancy 20,000. Mrs. A. F. Coffin Aug. 31/1937." It was in the handwriting of the decedent. On the reverse side of the envelope was written in pencil by this defendant, "born Topeka, Kansas Mable Judith Hann 1500 Burnside Portland, Ore. Mary Anderson". Enclosed in the envelope was a savings bank book showing a deposit on September 1, 1936, of five dollars. Printed in the book were rules and regulations of the savings department. The purported codicil contained no words referring to the envelope or any of the endorsements written by defendant thereon, nor to the book nor any of the insertions therein. Nevertheless the defendant asks that the doctrine of incorporation be applied to the case. Because there was no cross-reference that doctrine is not applicable. Garde v. Goldsmith, 204 Cal. 166, 168, 267 P. 104. The purported codicil was ambiguous in its use of the word "it". Assuming that on the trial evidence was introduced in an attempt to remove the ambiguity, on this appeal based on the judgment roll we must conclude that on all of the evidence the trial court found the word "it" did not refer to anything written on the envelope nor to anything contained in the book which was enclosed. However, assuming solely for the purposes of this decision that the doctrine of incorporation is applicable, such additional writings in no manner affect anything we have said. They contain nothing of a dispositive nature. The defendant asserts there was no finding upon the material issue of whether the testatrix intended to make a revocable disposition of the $20,000 effective after her death. There was no issue to that effect. The issue was codicil or no codicil. On that issue there was a direct finding. That was all that was required. In re Estate of Berry, 195 Cal. 354, 360, 233 P. 330.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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44 Cal.App.2d 187

H. S. CROCKER CO., Inc., v. LAKE COUNTY et al.

Civ. 6541.

District Court of Appeal, Third District, California.

April 14, 1941.

1. Judgment 🔑720

A judgment of appellate court that claim for balance due on furniture contract was based on a valid obligation against county, and that the exhausting of fund subsequent to incurring of obligation, even though claimant received some of moneys which exhausted such fund, did not constitute a bar to claimant's right to judgment based on the contract was "res judicata" as to both issues. Pol.Code, § 3714, subd. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Counties 🔑162

A county board of supervisors may approve a claim and county auditor may issue a warrant in excess of budget appropriation upon an order of a court of competent jurisdiction, or for an emergency. Pol.Code, § 3714, subd. 5.

3. Mandamus 🔑111

Where appellate court had held that claim for balance due on furniture contract was based on valid obligation against county and that the exhausting of fund subsequent to incurring of obligation did not constitute a bar to claimant's right to judgment based on the contract, superior court properly ordered county to pay its obligation under judgment obtained by claimant from fund representing money collected from taxes assessed and levied for fiscal year when contract was executed. Pol.Code, § 3714, subd. 5.

◆

Appeal from Superior Court, Lake County; Ben R. Ragain, Judge.

Mandamus proceeding by H. S. Crocker Company, Inc., against the County of Lake and others, to compel payment of a judgment recovered against the county. From a judgment in favor of petitioner, the respondents appeal.

Affirmed.

Burt W. Busch, of Lakeport, for appellants.

Jesse H. Steinhart, J. J. Goldberg, and Erland O. Erickson, all of San Francisco, and Ralph V. Devoto, of Lakeport, for respondent.

TUTTLE, Justice.

This is an appeal from a judgment entered in favor of respondent in a mandamus proceeding.

H. S. Crocker Company, Inc., respondent, recovered a judgment in the amount of $3,427.33, against the County of Lake, and commenced this mandamus proceeding to compel payment of such judgment. A judgment and peremptory writ of mandate, filed July 30, 1940, ordered and directed that the board of supervisors of the County of Lake, the treasurer of the County of Lake, and the auditor of the County of Lake, pay to respondent the amount of said judgment mentioned above.

Respondent's cause of action arose out of a contract entered into between respondent and the County of Lake. The date of the contract, the circumstances existing at the time of the execution thereof, and the subsequent proceedings of the parties are stated as follows:

(1) December 31, 1929, respondent, Crocker Company, Inc., was awarded a furniture contract by the County of Lake in the amount of $7,429.84. There was ample money in "Capital Outlay Courthouse Fund", of the county budget, from which this charge was to be paid, *to meet all obligations which had then been incurred against that fund.*

(2) This contract was fully performed, and on *April 19, 1930,* respondent was paid $5,572.40, on account. This left a balance of $1,857.46.

(3) Subsequent to December 31, 1929, and prior to respondent's presentation on June 11, 1930, of his claim for the balance of $1,857.46, the "Capital Outlay Courthouse Fund" was exhausted, except for the sum of $7.94. Between December 31, 1929, and June 11, 1930, respondent was paid from this same fund the sum of $1,664.22, in addition to the $5,572.40 paid to him on the furniture contract. The sum of $1,664.22 was paid to respondent in satisfaction of other independent claims.

(4) On June 11, 1930, respondent presented his claim for the balance of $1,857.46, due on the furniture contract, to the board of supervisors of Lake county. This claim was disallowed by the board of supervisors, upon the ground that the "Capital Outlay Courthouse Fund" was at that time exhausted by payments on other obligations which were in excess of the budget appropriations for the fiscal year, which ended *June 30, 1930.*

(5) Respondent commenced suit against said county after disallowance of his claim for $1,857.46, and on the assumption that the claim was not a liability against the county, except for the $7.94 remaining in the fund, under the provisions of section 3714, subdivision 5 of the Political Code, the claim was disallowed to the extent of $1,849.52. Respondent appealed from that judgment, and on appeal the County of Lake contended:

(a) That under the provisions of section 3714, subdivision 5, of Political Code, the respondent's claim is not a valid liability against the county, except for $7.94, even though the obligation for the payment to respondent of $7,429.84 for the furniture was lawfully incurred by the county when there were ample funds in the treasury with which to meet the claim.

(b) That because respondent was paid from the fund, ten other claims aggregating $1,664.22 which were incurred after the awarding of the furniture contract, it may not complain of the lack of money with which to meet its original contract.

This court reversed the judgment rendered in favor of the County of Lake, and the opinion of the court is reported in 4 Cal.App.2d 29, 40 P.2d 931. In concluding that respondent, Crocker Company, Inc., was entitled to judgment for the unpaid balance of its claim in the sum of $1,857.46, the court stated at page 31 of 4 Cal.App.2d, at page 931 of 40 P.2d, as follows: "The plaintiff's claim in the sum of $1,857.46 was legally incurred and is a valid obligation against the county of Lake, for which sum it is entitled to judgment, notwithstanding the fact that the funds from which it was payable were practically exhausted at the time the claim was presented for payment." (Citing authorities.)

In answer to the contention that Crocker Company, Inc., could not complain of the lack of funds with which to meet the original contract, in that Crocker Company, Inc., had been paid $1,664.22 on other claims which were incurred subsequent to the awarding of the furniture contract, the court said at page 32 of 4 Cal.App.2d, at page 933 of 40 P.2d: "The exhausting of a fund after a valid obligation has been incurred by the subsequent misappropriation of the money, regardless of the persons to whom it is paid, may not defeat the claimant's right to a judgment based on a previous valid claim, even though the misappropriation may prevent the satisfaction of the judgment."

Section 3714, subdivision 5 of the Political Code, at the time of the awarding of the furniture contract, and at the time of suit upon the rejected claim, read as follows: "Expenditures made, liabilities incurred, or warrants issued in excess of any of the budget appropriations * * * shall not be a liability of the county * * *. The county board of supervisors shall approve no claim, and the county auditor shall issue no warrant for any expenditure in excess of said budget appropriations, * * * except upon an order of a court of competent jurisdiction, or for an emergency, as hereinafter provided."

In construing the foregoing provision of the Political Code, the court, at page 33 of 4 Cal.App.2d, at page 933 of 40 P.2d, said:

"This amendment of the Political Code may not be construed so as to defeat vested rights which have accrued by virtue of obligations incurred by the terms of previous valid contracts. * * * The language heretofore quoted from section 3714 of the Political Code should be construed to mean that 'liabilities incurred * * * in excess of * * * the budget appropriations' are invalid. This is exactly what article 11, § 18, of the Constitution of California declares by providing that 'no county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year.' * * * The Code provision relied upon by the respondent, in so far as it enlarges upon constitutional inhibition above referred to, applies merely to the payment of money or the drawing of warrants, and not to the validity of claims which were previously legally incurred or to the establishing of legal liability for lawfully incurred obligations by the recovery of a judgment therefor. * * * The question as to whether the law furnishes some means of satisfying such a judgment after it has been recovered is not before us in this case. We are not called upon to determine that problem.

* * *

"The judgment is reversed, and the trial court is directed to render judgment for the plaintiff in the sum of $1,857.46, together with 7 per cent. interest thereon from June 11, 1930, at which time the claim was presented for payment."

Subsequent to the close of the fiscal year in question, which ended *June 30, 1930*, there was then, and admittedly there is now in the treasury of the County of Lake, sufficient money collected from taxes assessed and levied to provide income for such fiscal year to pay respondent's claim and the present judgment against the county.

There being sufficient funds in the treasury of the County of Lake, which funds represent delinquent taxes assessed and levied for the fiscal year in question, our duty at this time is to determine the propriety of the order of the superior court which directed that respondent's judgment be paid and satisfied from such funds.

[1] The former opinion of this court, cited above, determines that respondent's claim for the balance due on the furniture contract was based on a valid obligation against the County of Lake, and also concludes that the exhausting of the fund subsequent to the incurring of the obligation, even though respondent received some of the moneys which exhausted such fund, did not constitute a bar to respondent's right to a judgment based on the previous valid furniture contract. The former judgment is *res adjudicata* as to both of these issues.

It further appears that under the provisions of section 3714 of the Political Code, the superior court did have power to order payment of the judgment in question out of the funds now in the treasury of the County of Lake. That section of the Political Code, subdivision 5, reads in part as follows: "Expenditures made, liabilities incurred, or warrants issued in excess of any of the budget appropriations * * * shall not be a liability of the county * * *. The county board of supervisors shall approve no claim, and the county auditor shall issue no warrant for any expenditure in excess of said budget appropriations, * * * *except upon an order of a court of competent jurisdiction, or for an emergency, as hereinafter provided.*"

[2] The exception provided in effect that the board of supervisors may approve a claim, and that the county auditor may issue a warrant in excess of the budget appropriation *upon an order of a court of competent jurisdiction, or for an emergency.*

Respondent cites two cases in support of the power of a superior court to order payment of a judgment under circumstances such as exist in the present case. Both of these cases, by virtue of the language of the opinions, uphold the propriety of the orders, basing the power of the court to act on the exception to subdivision 5, of section 3714, supra. In the case of Niceley v. County of Madera, 111 Cal.App. 731, 296 P. 306, a sheriff incurred expenses in excess of the amount allowed to that office by the county budget for the fiscal year. A claim for the items in excess of the budget provision was filed with the board of supervisors and disallowed, on the ground that the expenditures were unnecessary, and also on the further ground that the fund allowed for the sheriff had been exhausted. The trial court found the expenses proper and necessary, and further found that the expenses constituted a legal charge against the county of Madera, and awarded judgment, as prayed for. This judgment was affirmed on appeal, and in so doing, Justice Plummer, in construing subdivision 5 of section 3714, stated, at page 735 of the opinion in 111 Cal. App., at page 308 of 296 P., as follows: "* * * it is important to observe that subdivision 5 of section 3714, supra, does not make final the budget as adopted by the board of supervisors, nor does it make final the sum or allowance made or allotted to any particular official. The question is left open for a determination by the court as to whether any other items of expenditure shall be determined to be a claim against the county, *and whether the county shall be held liable therefor.*" (Italics ours) "This plainly appears from the words specifying that no payment shall be made, 'except upon an order of a court of competent jurisdiction.' And this provision follows that portion of the section relating to expenditures outside of, and in excess of, the budget allowance."

This rule in the Niceley case has been reiterated by this court in Barry v. County of Glenn, 42 Cal.App.2d 76, 108 P.2d 81.

[3] The construction of subdivision 5 of section 3714, supra, by the court in the two cases cited above, compels the conclusion that the superior court of Lake county did have the power to make the order in question, and there being sufficient funds on hand representing money collected from taxes assessed and levied for the fiscal year in question, the County of Lake was properly ordered to pay its obligation.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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44 Cal.App.2d 140

BLAIR v. BLAIR.

Civ. 12082.

District Court of Appeal, Second District, Division 1, California.

April 11, 1941.

1. Husband and wife 🔑279(1)

In action on contract providing for support and maintenance of wife wherein upon the state of the case as submitted there were no equities in favor of husband, trial court was without jurisdiction to do more than determine whether any liability existed and, if it did exist, the amount thereof as provided by the contract, as against contention of husband who had received his discharge in bankruptcy that even if he were liable under terms of the agreement to pay the sum prayed for, the court should have reduced the amount to a reasonable sum for a bankrupt to pay. Bankr.Act § 17, 11 U.S.C.A. § 35.

2. Husband and wife ⚷279(1)

Agreement which was denominated a property settlement agreement and which provided for creation of trust by husband in favor of wife was construable as an agreement for support and maintenance of wife, under which, in event requisite amount of support was not provided by the trust created, it devolved on husband to make up the deficiency until such time as he had satisfied condition of agreement requiring him to convert trust property into income-bearing securities.

3. Contracts ⚷147(3)

The substance of a contract controls in determining intent of contracting parties, and the entire contract must be taken by its four corners and construed as a whole to effectuate the obvious intention.

4. Bankruptcy ⚷421(5)

Husband's discharge in bankruptcy did not release husband from his obligation under contract providing for support and maintenance of wife. Bankr.Act § 17, 11 U.S.C.A. § 35.

5. Husband and wife ⚷279(1)

Agreement providing for support and maintenance of wife was construable as requiring husband to pay any part or all of sum of $1,500 per month which net income from trust, which husband agreed to create, did not yield, until such time as the trust property should be converted into securities as provided by the agreement, as against contention that the husband's agreement to pay the $1,500 per month only began with his failure to convert the property into securities.

6. Mortgages ⚷138, 187, 193

Under a "trust deed," the trustee obtains none of the incidents of ownership other than right to convey upon default on part of debtor in payment of debt, and the legal estate thus left in trustor or his successors entitles them to possession of the property until their rights have been fully divested by conveyance made by trustees in lawful execution of the trust and entitles them to exercise all ordinary incidents of ownership in regard to the property subject to the execution of the trust.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust Deed".

7. Mortgages ⚷8

A "trust deed" given as security as distinguished from an "express trust" is created for the benefit of the trustor as well as for the benefit of the named beneficiary. Civ. Code, § 2250.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Trust".

8. Limitation of actions ⚷24(2)

Trust created under an agreement providing for support and maintenance of wife under which husband was later to substitute other property for that placed in trust was not construable as a "trust deed" or a "mortgage" so as to require action for amount due under the agreement to be brought within three months after sale of the trust property to meet deficiency in income payable to wife prior to substitution of the property, as provided by the agreement, and action brought within four years after cause of action accrued was not barred by limitation. Civ. Code, § 2250; Code Civ.Proc. § 337, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

9. Pleading ⚷111

Where only evidence introduced on issue of defense that another action was pending in the same court between the same parties for the same cause was the complaint in the other action, and there was nothing in the record to indicate that the other action was still pending, the defendant failed to sustain burden of proving the defense.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Velma Blair against John H. Blair to recover an amount alleged to be due to the plaintiff from the defendant for maintenance and support under an agreement. From an adverse judgment, the defendant appeals.

Affirmed.

Porter & Sutton, of Los Angeles, for appellant.

Arnold Praeger and Laurence Berger, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff in an action to recover an amount alleged to be due plaintiff from defendant for maintenance and support under a property settlement agreement. The appeal is taken upon a bill of exceptions and the matter having been submitted to the trial court upon stipulations of fact and a small amount of documentary evidence the bill contains a detailed report of the proceedings had below.

Respondent is the former wife of appellant, the parties being now divorced, and the suit herein is based upon an agreement entered into between the parties while they were still husband and wife, dated July 20, 1926, which date was a little over a year prior to the institution of divorce proceedings. The agreement, annexed to the complaint herein as an exhibit, is denominated "Property Settlement Agreement", and recites that it is made "in order to establish and fix from this date for all future time, the past, present and future obligations, claims, demands, property rights and all other matters of a pecuniary nature which exist or might arise between the parties hereto, irrespective of the continuance of the marital relations now existing, or the present or future living together of the parties hereto, and in full settlement of the community property rights of the respective parties hereto". It provides for the creation of a trust wherein the appellant, as husband and trustor, was to deposit certain real and personal property of a cash value of $300,000, the income from which trust was to be used to pay respondent, the wife and beneficiary, the sum of $18,000 per year in equal monthly installments of $1,500 during her life. The agreement also provides that the said trustor should, within three years from the date of the agreement, replace the above-mentioned trust property with income-bearing securities, as described in the agreement, of a value of not less than $300,000. Another provision of said agreement reads as follows: "(g) In addition to the provisions for the support and maintenance of the Beneficiary out of the net income to be derived from the trust estate, as herein provided, the Trustor covenants and agrees to pay to the Trustee, for the support and maintenance of the Beneficiary, any part or all of the sum of $1500.00 per month which the net income from the trust estate, under the terms and provisions herein, does not yield, until such time as the entire properties" (being the properties deposited with the trustor) "have been converted into securities as herein defined." The agreement also provides for sale of the trust property in the event of default of the trustor to meet any deficiency in income prior to the time of the conversion of said trust property and obligates the trustor to restore any part of the principal of the trust estate which is so sold. Appellant, as trustor, admittedly failed to convert the property of the trust into securities as provided. The agreement also provides for the release by respondent of any and all right, title, claim, interest or demand against appellant, except as otherwise provided in the agreement.

The complaint herein, after setting forth the necessary facts as to the status of the parties and the said agreement, alleges the default of the trustor in the sum of $96,552.86, the subsequent sale of the trust property in accordance with the terms of the agreement, a deficiency in the proceeds of sale to meet the default in the sum of $38,381.41, and the further default in payments of $1,500 per month for plaintiff's (respondent's) maintenance and support from June 1, 1936, to November 1, 1937, and prays for judgment in the total sum of $63,881.41 and interest plus the additional sum of $1,500 for each month subsequent to and including November, 1937, to the date of rendition of judgment.

Appellant's answer, while admitting the agreement, denies the liability of appellant thereunder and sets up separate defenses of a subsequent discharge of appellant in bankruptcy, the pendency of another action in the same court between the same parties for the same cause, the bar of the provisions of section 337, subdivision 1, of the Code of Civil Procedure as to limitation of time within which to bring such an action, and a release of appellant's obligation by the terms of the agreement itself.

As noted above, the parties agreed to the facts at the trial and the only evidence offered was the interlocutory decree of divorce of the parties, which decree referred to and made the agreement here in question a part thereof, and the complaint in the action which appellant claimed to be pending between the same parties for the same cause.

The trial court found for the plaintiff upon all material issues and concluded that the purpose of the agreement above referred to was to provide for the maintenance and support of plaintiff and by the terms of said agreement the defendant undertook and agreed to provide for the support and maintenance of plaintiff to the extent of the sum of $18,000 per annum during the term of her natural life; that the personal obligation of the defendant to so provide for plaintiff's support and maintenance was not released or quitclaimed by any of the terms of said agreement; that the said obligation was not discharged by virtue of the discharge granted to defendant in his bankruptcy proceedings; and that the plaintiff (respondent) was entitled to recover of and from the defendant (appellant) the sum of $74,381.41, with interest and costs.

Appellant takes exception to certain of the findings of the court upon the ground that the evidence is insufficient to sustain them and assigns the conclusions as error. However, it will not be necessary to take up each specification of error separately as a consideration of the nature of the agreement in question will serve to dispose of nearly all points raised, except that of the defense of the statute of limitations. The question of the pendency of another action is not covered in appellant's brief, although raised by the bill of exceptions.

[1] Appellant also contends that even if he were liable under the terms of the agreement to pay respondent the sum prayed for, the court should have reduced the amount to a reasonable sum for a bankrupt man to pay, and assigns the court's failure to do so as error. This contention may be disposed of summarily by pointing out that the action here is one at law to enforce the obligations of a contract and upon the state of the case as submitted there are no equities in favor of appellant. Under the circumstances, the trial court was without jurisdiction to do more than determine whether any liability existed and, if any did exist, the amount thereof as provided by the contract.

The nature of the trust in question and the obligation of appellant as trustor thereunder has already been considered by the District Court of Appeal for the Fourth Appellate District in Allen v. Blair, 13 Cal.App.2d 227, 56 P.2d 544, an action in which the trustee sought a declaratory judgment as to his duties under the trust. In that case the court said (at page 228 of 13 Cal.App.2d, at page 544 of 56 P.2d): "A study of that portion of the declaration of trust brought before us forces the conclusion that it was the clearly expressed intention of John H. Blair, the trustor, to provide a trust fund of $300,000, having a net income of not less than $1,500 per month, for the support of Velma Blair, his wife, and Marion Blair, his daughter, during the life of Mrs. Blair, with provisions for the support of the daughter thereafter. The obligation was placed upon Blair to keep the value of the corpus of the trust estate up to $300,000 and supply any deficit in its net income should such income be less than $1,500 per month."

[2, 3] It is clear from a reading of the agreement that it is one providing for the support and maintenance of respondent and that in the event the requisite amount of support was not provided by the trust created, it devolved upon appellant to make up the deficiency until such time as he had satisfied the condition of the agreement requiring him to convert the trust property into income bearing securities, which condition he never satisfied. It is equally clear that under the terms of the agreement appellant could only be released from his obligation to pay the deficiency through effecting the said conversion, and such obligation on appellant's part was expressly excepted from any release contained in the said agreement. It follows, therefore, that the findings and conclusions of the trial court as to the nature of the said agreement and appellant's obligation thereunder are well founded and correct. The fact that the agreement was called a property settlement and was referred to as such in the decree divorcing the parties is immaterial. It is the substance of the contract that controls in a determination of the intent of the contracting parties. "The entire document is to be taken by its four corners and construed as a whole to effectuate the obvious intention." Lazar v. Superior Court, 16 Cal.2d 617, 107 P.2d 249, 251, and cases there cited.

[4] Manifestly, appellant's discharge in bankruptcy had no effect upon his obligation to support respondent. As a debt for maintenance or support of a wife it is expressly excepted by the provisions of the Federal Bankruptcy Act, (11 U.S.C.A. § 35; In re Ridder, 2 Cir., 79 F.2d 524, 103 A.L.R. 719; In re Adams, 2 Cir., 25 F.2d 640), and the court was correct in concluding that appellant's said discharge did not release the debt. See Remondino v. Remondino, Cal.App., 106 P.2d 437.

[5] Appellant's contention that his agreement to pay $1,500 per month only begins with his failure to substitute interest-bearing securities, as mentioned above, is without foundation, as the contract clearly provides that such obligation shall continue until such time as the securities are substituted.

[6-8] As to the defense of the statute of limitations, appellant contends that respondent's action is barred by the three months' provision contained in subdivision 1 of section 337, Code of Civil Procedure, which provides "that the time within which any action for a money judgment for the bal-

ance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage". However, the trust here in question cannot be construed as either a deed of trust or mortgage. The trust was created to provide a fund for the support and maintenance of respondent and was not for the purpose of providing security for a loan to appellant or for a similar obligation. Appellant by the terms of the trust retained none of the incidents of ownership in the trust property and the grant of the property to the trust was absolute and not conditioned upon the payment of any debt or obligation on the part of the trustor. While appellant was later to substitute other property for that placed in trust, until such a substitution was made the property in question remained dedicated absolutely to the purposes for which the trust was created with no right or power in appellant to exercise any control whatsoever over the property, or to obtain a reconveyance thereof. Under a deed of trust the trustee obtains none of the incidents of ownership, other than the right to convey upon default on the part of the debtor in the payment of his debt. "The legal estate thus left in the Trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership, in regard to the property, subject always, of course, to the execution of the trust." MacLeod v. Moran, 153 Cal. 97, 100, 94 P. 604, 605. Moreover, the trust here under consideration is an express trust "created for the benefit of another than the trustor" (sec. 2250 Civil Code), and a deed of trust given as security for an obligation is not such a trust, but is one created for the benefit of the trustor as well as for the benefit of the named beneficiary. Touli v. Santa Cruz County Title Co., 20 Cal. App.2d 495, 498, 67 P.2d 404; and see 25 Cal. Jur. 11. Manifestly, the instrument in question lacks the fundamental characteristics of a mortgage for the same reasons that it cannot be held a deed of trust. The suit herein was clearly brought within four years of the time the cause of action accrued, and the trial court was correct in finding for the plaintiff upon this issue.

[9] The trial court found that it was not true that there was another action pending for the same cause, and inasmuch as the only evidence introduced upon this issue appears to have been the complaint in a former action it cannot be said that the evidence fails to support the finding of the court. There is nothing in the record to indicate that the former action was still pending and appellant appears to have failed to sustain the burden of proof in this respect. As pointed out above, appellant neither raises nor argues the point in his brief.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

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44 Cal.App.2d 236

SPEAR v. LEUENBERGER et al.

Civ. 6500.

District Court of Appeal, Third District, California.

April 16, 1941.

Rehearing Denied May 16, 1941.

Hearing Denied June 12, 1941.

1. Appeal and error 🔑207
Trial 🔑133(6)

In personal injury action against automobile driver and owner, action of plaintiff's counsel, in alluding to fact that driver was not citizen and that he was a national of a certain country, in attempting to lay foundation for impeachment of the driver, who was called as witness by plaintiff under statute, was improper but was not prejudicial, where there was no request to court to instruct jury at time to disregard the occurrence, and court in its general instructions directed jury to disregard questions which court had not permitted to be answered.

2. New trial 🔑140(3)

Where, in personal injury action against automobile driver and owner, plaintiff's counsel in attempting to lay foundation for impeachment of driver alluded to fact that driver was not a citizen and that he was a national of a certain country, but there was no showing on motion for new trial concerning such matter either by way of affidavits or otherwise, implied holding of trial court that the matter did not constitute prejudicial "misconduct" was proper exercise of court's discretion in denying motion for new trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

3. Negligence ⚷4

"Negligence" is the doing of some act which a reasonable or prudent person would not do or the omission to do something which a reasonable or prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

4. Negligence ⚷4

"Negligence" is the failure to use ordinary care or skill by one sought to be charged with negligence in the management of his property or person, and is not extrinsic or absolute, but always relates to some circumstance of time, place or person.

5. Automobiles ⚷246(11)

In motorist's action for personal injuries sustained in collision with an overtaken automobile which had started to make left turn into driveway, instruction regarding negligence was insufficient.

6. Automobiles ⚷172(6)

In motorist's action for personal injuries sustained in collision with an overtaken automobile which had started to make left turn into driveway, instruction that if defendant driver turned to left without knowing that movement could be made with reasonable safety, and then only after giving proper signal, jury should find such defendant was guilty of negligence was objectionable, since a person is not required to know that the turning movement can be made with safety. Vehicle Code, § 544, St.1935, p. 185.

7. Automobiles ⚷169

A motorist making left turn is not required to know that the turning movement can be made with safety, but all that is required is that he take the precautions which a reasonably prudent person would take under the circumstances reasonably apparent to him at the time. Vehicle Code, § 544, St. 1935, p. 185.

8. Automobiles ⚷242(2)

The fact that collision occurred when motorist attempted to make left turn into driveway does not justify a holding that motorist before starting to turn did not first see that his movement could be made in safety. Vehicle Code, § 544, St.1935, p. 185.

9. Appeal and error ⚷1064(1)

In motorist's action for personal injuries sustained in collision with an overtaken automobile which had started to make left turn into driveway, the giving of instruction that if defendant motorist turned his vehicle to left without knowing that such movement could be made with reasonable safety was prejudicial error. Vehicle Code, § 544, St.1935, p. 185.

10. Trial ⚷253(4)

In motorist's action for personal injuries sustained in collision with an overtaken automobile which had started to make left turn into driveway, instruction that if defendant driver neglected any duty or duties imposed upon him by law or duty imposed upon him to be generally careful in operation of automobile, and that accident could not have been avoided by plaintiff motorist even though plaintiff motorist had observed all demands of law and good judgment because of recklessness and carelessness of defendant, jury should find for plaintiff, was improper, since it did not contain necessary elements that defendant's negligence must have been proximate cause of accident and that contributory negligence proximately contributing to accident would bar recovery.

11. Trial ⚷253(1)

An instruction purporting to state all of the conditions upon which liability could be imposed upon defendant must correctly set forth all of the conditions necessary, and the exclusion of one necessary element constitutes reversible error and even a correct instruction in another part of the charge of a matter omitted from the formula instruction does not rectify the error.

12. Trial ⚷295(1)

All instructions of court are to be considered and construed as a whole to determine whether they contain reversible error.

13. Trial ⚷296(1)

If a single instruction omits an essential element of a cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby.

14. Trial 🔑296(1)

If an essential principle of law is stated to the jury materially incorrect, the prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction.

15. Appeal and error 🔑1064(1)

The giving of instructions which are contradictory in essential elements may warrant a reversal of a judgment, since it is impossible to determine which charge controlled the determination of the jury.

16. Automobiles 🔑246(37)
Trial 🔑296(3)

In action for personal injuries sustained in automobile collision, instruction, regarding the "sudden peril doctrine", which did not contain the qualification that to be entitled to benefit of the doctrine the emergency must not have been caused by person's own negligence was erroneous, and the error was not cured by other instructions.

See Words and Phrases, Permanent Edition, for all other definitions of "Sudden Peril Doctrine".

17. Automobiles 🔑246(26)

In motorist's action for personal injuries sustained in collision with an overtaken automobile which had started to make left turn into driveway, refusing to give requested instruction regarding duty of driver of automobile to refrain from following another automobile too closely was error.

18. Appeal and error 🔑930(1)

On appeal from judgment for plaintiff, the evidence must be considered in light most favorable to the plaintiff, all conflicts in the evidence must be resolved in his favor, and court must draw all reasonable inferences from the evidence in favor of the affirmance of the judgment.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Personal injury action by Roy Spear against Marie Leuenberger and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, and Mervin C. Lernhart, of Napa, for appellants.

George E. Maloney, of San Francisco, and Rutherford, Rutherford & Rutherford, of Napa, for respondent.

MONCUR, Justice pro tem.

This is an appeal from a judgment after a verdict by a jury, and after denial of a motion for a new trial, against the defendants and appellants and in favor of the plaintiff and respondent, and is for personal injuries to the respondent alleged to have been sustained in a collision between two automobiles. The collision occurred on Christmas Eve of 1938 shortly before six o'clock when it was dark. Appellant Ernest Peters was the driver of one car, a 1936 Lincoln Zephyr automobile. Appellant, Mrs. Leuenberger, was the owner of the automobile and was riding in the back seat. Appellant Peters was employed in taking care of the ranch of his codefendant and drove the car on her behalf. The lights of the Leuenberger car were lighted, including the headlights and tail lights; the weather was clear and the pavement was dry.

Appellants had left Napa and were on their way to the residence of Mrs. Leuenberger, which is on the west side of the Napa-Saint Helena highway, and were driving in a northerly direction. At a point about opposite from where the collision occurred there was a driveway to the west or leading from the left side of the main highway and to the Leuenberger property, and into which it was necessary for the Leuenberger automobile to turn.

Plaintiff was riding alone, was driving a 1936 Plymouth Sedan, and proceeding northerly and behind defendants' automobile.

Plaintiff testified that he first saw defendants' car when he was 300 feet away from it; that he gained on it and pulled up fairly close, and that when somewhere in the neighborhood of 150 feet back from the other car, gave two little toots of the horn and turned his car to the left-hand side of the road in an attempt to overtake and pass the defendants' automobile; that during all of this time he was traveling at 45 miles an hour; that when he was 300 feet back from the Leuenberger car, the latter was, in turn 100 feet from the driveway into the Leuenberger property; that when the Leuenberger car was 50 from the driveway he was back 50 feet from the Leuenberger automobile; that he traveled 300 feet while the car ahead of him traveled 50 feet; that at this point, 50 feet back from the other car, he saw the car angling across in a left-hand turn and about to enter the driveway into the Leuenberger property; that when he saw the car ahead make this left-hand turn, he swung his own car to the right and that the car ahead discontinued the left-hand turn and got back upon the easterly half of the road, facing north; that plaintiff's car started to skid, with the result that the left rear of his car struck the defendants' car and then turned over; that he saw no arm signal from the car ahead; that he did, however, see the red tail lights flash from the application of the brakes as the car started to make the turn.

Respondent, in his deposition taken previous to the trial, stated that he did not see any signal given by appellant Peters or any signal from the tail light or stop light indicating that the brakes were being applied or the flashing of a red light.

Defendant Peters was called by respondent under section 2055 of the Code of Civil Procedure and testified that 150 feet from the Leuenberger driveway he put out his hand to indicate a left turn; that he also signaled throughout that distance by the use of the foot brake, causing his tail lights to flash; that he came over gradually to the left in a diagonal direction in order to accomplish the turn into the driveway, and that he was back 35 or 40 feet from the driveway when he saw the plaintiff's car; that he was on the right-hand side of the highway when he gave the signal and was traveling between 30 and 35 miles an hour and had already slowed up. His testimony in this respect was as follows:

"Q. Now, at that time, when you were at that point there as indicated on the diagram, where you gave the signal, how fast were you going? A. Oh, I think about 30 or so—35.

"Q. In other words, you had already slowed up, Mr. Peters? A. Yes.

"Q. Did you give any signal indicating that you were slowing up? A. Yes.

"Q. In what way? A. In going down from 45 miles to about 20 and 15, 5—6 times with my foot brake on that way (indicating).

"Q. Is the highway level there at that point? A. Pardon me?

"Q. Is the highway level there at that point? A. Well, I don't know of unlevel highway; it seems to me all level.

"Q. How far do you have to press the brake down in order to give a signal with your foot? A. Oh, just about (indicating). How far I have to put my brake, huh? The foot, you mean the distance between the brake and the foot pedal?

"Q. In order to give a signal without stopping your automobile? A. Oh, I think about an inch or two until I touch, if I feel the brakes.

"Q. When you do that, doesn't that slow up your car somewhat? A. A little bit, yes.

"Q. Now, is that the only signal that you gave? A. Now I just told you I held out my hand.

"Q. I meant the slowing up? A. No, that is my only signal."

Appellant Peters testified that he started to make the turn in the Leuenberger driveway at about 25 to 35 feet before reaching a point opposite the driveway:

"Q. You went diagonally across, is that correct? A. Yes.

"Q. I will ask you this: when you first endeavored to go diagonally across here—A. Yes.

"Q. —did any part of your, any part of your automobile go on this side, or all of it go on? A. No, not all of it.

"Q. How much of it went on that side of the highway?

"Mr. Hodge: The west side.

"Mr. Rutherford. Yes.

"The witness. A. I was just exactly about ready to drive into the place. So how much is absolutely over the white line. I couldn't tell you, but I should imagine I straddled the white line, and I intended to move over into the place.

"Q. Do you know whether your left wheels were over the center line? A. I couldn't tell you exactly. I suppose they must have been over at that time; I was ready to drive into the place.

"Q. Was your hand still out at the time you pulled over to cut diagonally across the road there, preparatory to making the turn? A. Pardon me?

"Q. Was your hand still out as you cut diagonally over to make the turn into the driveway of the Leuenberger home? A. Yes; just up to that point, about 35 feet away, about that.

"Q. Your hand was out? A. My hand was out, was as far as it could go.

"Q. And it was out up to that time? A. Yes.

"Q. And then did you take it back in? A. I pulled in my hand as quick as I could, Mr. Maloney, when I did see kind of a shadow—what could you say? Kind of a shadow on my left side coming toward me.

"Q. How far was that, how far were you away from the driveway when you pulled your hand in? A. I just told you 35 feet.

"Q. 35 feet? A. Yes; about, maybe—maybe it has been 40 or 45; I don't know for sure, but to my estimation it is about 35. * * *

"Q. Where was that automobile at that time? A. About 35 feet back—40, 45 feet.

"Q. About 35 or 45 feet back. A. I didn't know that it was an automobile so by that time—just a shadow, it was very dusk already by that time."

Mrs. Leuenberger testified that she saw appellant Peters put out his hand for the left-hand turn and that he withdrew it at the time he started to make the turn; that she did not see any lights of an approaching automobile closer than about two blocks, which automobile appeared to have stopped; neither did she hear the noise of any approaching automobile from behind.

The foregoing statements of the evidence are made for the purpose of showing the conflicts in the testimony and to illustrate the contentions of the appellants concerning the alleged misconduct during the course of the trial and in the giving of instructions requested by the plaintiffs and the refusal to give instructions requested by the defendants.

It is contended by appellants that counsel for respondent was guilty of prejudicial misconduct in seeking to establish that the defendant Peters was an unnaturalized alien and a native of Germany. The occurrence which constitutes the grounds of this alleged misconduct is set forth in the following:

"Mr. Maloney. (one of counsel for plaintiff) Q. Mr. Peters, are you a naturalized citizen? A. No—

"Mr. Hoge. Well—

"The Witness. A. (continuing)—I am not; and it is my solemn duty, ladies and gentlemen—

"The Court. Just—

"Mr. Maloney: I am not bringing this in—just a minute; Your Honor, I am not bringing this in for the purpose of trying to induce the jury. I have a definite reason for asking the question. Now, I suggest that you let me go along this line and in the event it is not—

"Mr. Hoge: What is your purpose?

"Mr. Maloney: I think it is going to be a question of impeachment.

"The Witness: Your Honor—

"Mr. Hoge: Impeachment? Ask him whether he is a naturalized citizen?

"Mr. Maloney: For the purpose of the record.

"Mr. Hoge: What; what purpose? What type of record, counsel? I think we are—

"Mr. Maloney: For the purpose of his age.

"Mr. Hoge: For the purpose of his age?

"Mr. Maloney: Yes.

"Mr. Hoge: Well—

"Mr. Maloney: He testified he was 61 years of age.

"Mr. Hoge: It doesn't make sense, Your Honor.

"Mr. Maloney: Yes, it makes sense.

"The Witness: 61 years.

"Mr. Maloney: Q. Were you born at Carlsbad, Germany? A. In Carlsbad?

"Q. Yes. A. May I ask where you got that from?

"Q. I am just asking you. A. No.

"The Court: He didn't get it; he is asking you.

"The Witness: A. No, I am not.

"Mr. Maloney: Q. Is your middle initial 'H' like in Harry? A. Pardon me?

"Q. Is your middle initial 'H'? A. No; no, I am sorry. I have three—I have three, my three papers out, I have three papers out and one paper is missing that I can't get, and I have to wait until I get it from my mother's place. I don't seem—can't get my certificate what is needed to get my second paper out; but I think—

"Mr. Maloney (interrupting): I had no reference to that—

"The Witness: I think—

"Mr. Maloney (continuing): —for the purpose of trying to embarrass you in front of the jury; I apologize. I had a definite purpose. I think you realize—

"Mr. Hoge: Still I fail to get the purpose.

"Mr. Maloney: If you want me to explain further, I will tell the jury why. There was a record downstairs of Ernest

H. Peters who filed for citizenship papers in 1904, and I thought he was the man at that time who gave his age as 39; I thought he was the party. I had it—the only way I could do was to ask him those questions.

"Mr. Hoge: In other words you were trying to prove he was 43; is that it? Well, 39 and 4 are 43.

"Mr. Maloney: I didn't know; I had to ask the question that way; not trying to embarrass you, Mr. Peters.

"Mr. Hoge: He wouldn't embarrass you, Mr. Peters.

"The Court: Then do I understand that all of this age matter goes out? Age and citizenship business both go out then.

"The Witness: If I may say—

"Mr. Hoge: No, that is all right; His Honor has stricken it from the record.

"The Witness: May I go ahead with my conversation?

"Mr. Hoge: No, that is all, Mr. Peters. That is our case, Your Honor."

The trial of this case took place on the 14th and 15th days of March, 1940. At that time the conditions existing in Europe, and particularly in Germany, were well known and, undoubtedly, the court and jury were fully cognizant of the situation existing then and the general feeling in the United States concerning this situation. It is earnestly contended by appellants that the introduction into the case of the question of the nationality of appellant Ernest Peters, and particularly the asking of the question if he was not born in Carlsbad, Germany, resulted in such prejudice to the rights of the appellants that they were thereby precluded from having the fair trial to which they were entitled.

[1] Assuming that impeachment of the testimony of appellant Peters as to his age was material, still the method of procedure adopted was not necessary and is not to be commended. Very easily a proper foundation could have been laid for the introduction of the impeaching testimony sought to be introduced without alluding in any way to the fact that appellant Ernest Peters was not a citizen of the United States, and especially that he was a national of any particular country. However, we are not satisfied that the said occurrence resulted in such prejudice as to affect the verdict of the jury. It is apparent that the court and counsel for all of the parties understood that the whole matter was stricken out, and it is likewise apparent that the jury must also have so understood. There was no request to the court to instruct the jury at that time to disregard the occurrence and not to consider it in any way in arriving at their verdict, but the court did, in its general instruction, direct the jury to disregard any evidence that was admitted and afterward stricken out and to disregard the matter so stricken out entirely, and that if any counsel had asked any questions which the court had not permitted to be answered to disregard such questions and refrain from any inference based upon them; and also that if counsel upon either side had made any statements in the presence of the jury concerning the facts of the case, to be careful not to regard such statements as evidence and to look entirely to the proof in ascertaining what the facts are.

Nowhere in the testimony as shown in the transcript does there appear any reference whatever to the question of the nativity of any person connected with the case except in the instance hereinbefore referred to in connection with the attempted impeachment of Ernest Peters; and also there is no showing on the motion for a new trial concerning this matter, either by way of affidavits or otherwise, though the matter of the claimed misconduct is one of the grounds of the motion for a new trial.

We think, therefore, that a determination of the claimed misconduct rests upon the principles stated in the case of Walling v. Kimball, Cal.Sup., 110 P.2d 58, decided February 17, 1941. Therein at page 60, the court said: "The entire controversy and every issue here set up as misconduct were before the trial court upon the motions for new trial and the affidavits filed by respective counsel in support thereof and in opposition thereto. Upon the issues thus raised in the trial court, the court decided that there had been no prejudicial misconduct, and this was a finding of fact which the trial court was justified in making when the motions for new trial were denied, for all of the matters of which complaint is made also took place in the presence of the trial judge, who was in the best position to observe the demeanor of the parties and to gauge any possible effect it might have had upon the jury. In the leading case on this subject, Lafargue v. United Railroads, 183 Cal. 720, at page 724, 192 P. 538, at page 540, this Court said: 'The trial court denied a motion for a new trial based upon the ground, among others, of misconduct of plaintiff's attorney. In doing this the court must be deemed to have concluded that no prejudice was suffered by defendant by reason of any of the matters to which we have referred. Conceding some of the statements made by counsel, whatsoever the provocation thought by him to exist therefor, were improper, we are satisfied that this conclusion of the trial judge should not be disturbed by an appellate court. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong.'"

The opinion analyzes and distinguishes a considerable number of cases wherein alleged misconduct during the course of trials was involved. At page 61 of 110 P.2d the opinion concludes as to the particular matter of misconduct as follows: "Conceding that the statements made by respondents' counsel, whatever may have been the basis of his assertion, were improper, we are satisfied that the conclusion of the trial judge, after consideration of these same facts presented by the conflicting affidavits in the course of the argument on the motions for a new trial, should not be disturbed by this Court." See, also, Wills v. Newberry Co., Cal.App., 111 P.2d 346.

[2] In the instant case, there being no affidavits presented on the motion for a new trial, the showing of prejudicial misconduct is not as strong as in the case of Walling v. Kimball, supra. From the quoted testimony it appears that in answer to the question asked appellant Peters if he was born in Carlsbad, Germany, that his answer was "no". Whether by this answer he intended to deny only that Carlsbad was his place of birth, or that he was born in Germany, there is no affirmative showing that he was a German national. From all that appears to this court, the implied holding of the trial court that these remarks did not constitute prejudicial misconduct was a proper exercise of the court's discretion in denying the motion for a new trial as to that particular ground.

We will next consider the claimed errors on the part of the court in giving certain instructions to the jury at the request of plaintiff and in refusing to give certain instructions at the request of the defendants. An examination of all of the instructions given to the jury discloses that there was no definition of negligence given in any of the usually accepted forms. Plaintiff's instruction No. 24 in the following form was given: "In connection with the obligation under the law of one person to another, you are further instructed that it is the law that every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights, and that everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself. Want of ordinary care is called negligence."

[3-5] Negligence is usually defined as the doing of some act which a reasonable or prudent person would not do, or the omission to do something which a reasonable and prudent man would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care or skill by one sought to be charged with negligence in the management of his property or person. It is not intrinsic or absolute, but always relates to some circumstance of time, place, or persons. We doubt whether the jury, from the foregoing quoted instruction given to them at the request of plaintiff, received an adequate understanding of the term negligence such as would be required in an action like the one before us. To say that "want of ordinary care is called negligence" seems scarcely sufficient.

Neither the terms ordinary care nor proximate cause were defined, and the jury were not told that negligence must be the proximate cause before a liability could be imposed, though in some of the instructions given at the request of the defendants, contributory negligence and want of ordinary care were defined and the jury were told that contributory negligence must proximately contribute to the collision and the injury resulting therefrom.

In regard to the alleged errors on the part of the court in instructing the jury, defendants contend that instruction No. 8, requested by plaintiff, should not have been given. Preceding that particular instruction, at plaintiff's request, plaintiff's instruction No. 6 was given to the jury, which is as follows: "The Vehicle Code, [section 544, St.1935, p. 185] also provides as follows: No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement."

[6] Instruction No. 8 is as follows: "I further instruct you that if the defendant Peters, turned his vehicle to the left without knowing that such movement could be made with reasonable safety, and then only after the giving of a signal with the hand and arm extended horizontally beyond the side of the vehicle, then you will find defendant, Peters, was guilty of negligence as a matter of law."

[7] Appellants contend that by the giving of instruction No. 8 the jury were told that because an accident happened the defendant Peters must be considered guilty of negligence; that the law does not require that he must know, as a positive fact, that the turn could be made in safety; that all that the law requires is that he make the observation of a reasonably prudent man, acting under the same or similar circumstances; and that the instruction enforces upon defendant Peters, and his codefendant, the liability of insurers. While the criticized instruction does not perhaps extend as far, in effect, as is contended, nevertheless, we are of the opinion that it is fairly subject to some, at least, of this criticism. We do not understand it to be the rule that a person is required to know that the turning movement can be made with safety. All that is required is that he take the precautions which a reasonably prudent person would take under the circumstances reasonably appearing to him at the time. In the case of Ruperto v. Thomas, 113 Cal.App. 523, at page 526, 298 P. 851, at page 852, it is said:

> "Section 130(a) of the California Vehicle Act provides, in part: 'The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety. * * *'
>
> "This language does not mean the driver of a vehicle may not turn his machine at an intersection of streets unless there is absolutely no possibility of an accident. It must receive a reasonable construction. No specific acts or omissions of the driver of a motor vehicle in changing the course of his machine at the intersection of streets may be characterized as negligent under all circumstances. The negligence of a driver must be determined by an application of the well-settled rule of negligence as to what a reasonably prudent person should do under like circumstances. The language of section 130(a) above quoted should be construed to mean that the driver of a vehicle upon a public highway, before starting, turning or stopping such vehicle must use such precaution as would satisfy a reasonably prudent person acting under similar circumstances that he could do so safely. The question as to whether the conduct of a driver of a vehicle amounts to contributory negligence under the particular circumstances is a problem for the determination of the trial court or jury."

[8] In the case of Ederer v. Shanzer, 134 Cal.App. 137, 139, 25 P.2d 38, 39, it is said: "The fact that a collision occurred does not justify the court in holding that the plaintiff before starting forward did not first see that his movement could be made in safety. The subsequent events would indicate that he determined erroneously, but that is the most that can be said." In some of the cases cited the collisions occurred at intersections, but such fact is immaterial. The application of the legal principle therein set forth is the same whether applied to collisions at intersections of the highways or under facts as disclosed in the instant case.

[9] From these two instructions it reasonably appears that under instruction 6 one rule is stated which could apply to both plaintiff and defendants, while under instruction 8 defendant Peters was required to know that the turning movement could be made with reasonable safety. This clearly constituted a contradiction. Plaintiff's instruction No. 8 was an incorrect statement of the law and should not have been given and, in our opinion, the giving of it resulted in prejudice to the rights of appellants herein.

[10] In appellants' third assignment of error it is contended that the following instruction, the second paragraph of plaintiff's No. 14, should not have been given: "I further instruct you that if you find the defendant neglected any duty, or duties imposed upon him by law, or the duties imposed upon him to be generally careful and prudent in the operation of his auto-

mobile and that the accident could not have been avoided by plaintiff even though plaintiff had observed all demands of law and good judgment because of the recklessness and carelessness of defendant, then you will find for the plaintiff."

[11] It is contended that this instruction purported to state all of the conditions upon which liability could be imposed upon the defendants; that it did not contain the necessary element that the defendants' negligence must have been the proximate cause of the accident, and that contributory negligence on the part of the plaintiff proximately contributing to the accident would bar recovery. Also, that the phrase "all demands of law and good judgment" does not mean contributory negligence and could not be taken by the jury to have that meaning. We are of the opinion that this instruction is subject to the criticism stated. It has frequently been held that instructions of this kind must correctly set forth all of the conditions necessary, that the exclusion of any one necessary element constitutes reversible error, and that even a correct instruction in another part of the charge of a matter omitted from the formula instruction does not rectify the error. Beyerle v. Clift, 59 Cal.App. 7, 9, 209 P. 1015; Pierce v. United Gas & Electric Co., 161 Cal. 176, 184, 118 P. 700; Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237.

The fourth assignment of error is predicated upon the giving of plaintiff's instruction No. 13, as follows: "I instruct you if a sudden emergency arose in this case not due to any fault on the part of the plaintiff, and by reason of the emergency the plaintiff had no time to determine the best course to prevent the impending accident, then the plaintiff would not be chargeable with contributory negligence because he failed to use the best course, and if you find that in the emergency the plaintiff acted as a person of ordinary prudence would have done but the accident resulted nevertheless, plaintiff is not thereby guilty of contributory negligence."

It is urged that said instruction is erroneous for the reason that to be entitled to the benefit of the doctrine of sudden peril the emergency must not have been caused by a person's own negligence; that this instruction does not contain that necessary qualification; and that the failure of the instruction to read in accordance with the law must have worked prejudicial error. Also, that the jury was authorized to absolve the plaintiff from fault, even though the emergency in which he found himself was due to his own negligence. In support of this contention appellants cite the following cases: Vedder v. Bireley, 92 Cal.App. 52, 60, 267 P. 724; Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540; Gootar v. Levin, 109 Cal.App. 703, 706, 293 P. 706. In the case of Vedder v. Bireley, supra, 92 Cal.App. at page 60, 267 P. at page 728, it is said: "One who, without negligence upon his part, is suddenly confronted with imminent danger or seeming imminent danger, is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation; he is required to act only as a reasonably prudent man would act, under similar circumstances." 19 Cal. Jur. 598, sec. 36. The imminent peril must arise from a sudden emergency, but where that emergency is created by the automobilist, or where he brought about the perilous situation, through his own negligence, he cannot avoid liability upon the ground that his acts were done in the stress of emergency."

In Brooks v. City of Monterey, supra, 106 Cal.App. at page 656, 290 P. at page 544, it is said: "While it is the rule that one who without negligence on his part is suddenly confronted with imminent danger is required to act only as a reasonably prudent person would act under the same circumstances (19 Cal.Jur. [Negligence] § 36, p. 598), the rule can be invoked only by those whose position of peril is not caused by their own want of due care (Neff v. United Railroads, etc., 188 Cal. [722] 723, 207 P. 243; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066), and where, as here, there was evidence tending to show that decedent's perilous position was due to his own negligence, the omission therefrom of this question was sufficient ground for the rejection of the proposed instruction."

In Gootar v. Levin, supra, 109 Cal.App., at page 706, 293 P. at page 707, the following instruction was given: "You are instructed that if you find from the evidence plaintiff Gootar was at the time and place set forth in the complaint, suddenly put into a position of imminent danger without having sufficient time to consider all the circumstances, he is to be excused for omitting to take some precaution or for making an unusual choice under such disturbing influences, although if his mind had been clear, he might have done otherwise." The court then said: "The foregoing instruction omitted the necessary qualification that the doctrine of sudden peril is available only to a person who is confronted with such peril without negligence on his own part. Where there is evidence tending to show that such person's sudden peril resulted from his own negligence, it is error to give such an instruction without proper qualification. Brooks v. City of Monterey [106 Cal.App. 649] 290 P. 540; Vedder v. Bireley, 92 Cal.App. 52, 60, 267 P. 724. The main issue in the case was whether plaintiff's injuries resulted from the negligence of the plaintiff or the negligence of the defendant, and the giving of the foregoing instructions constituted prejudicial error requiring a reversal of the judgment."

Other instructions were given which it is contended by respondent cured the claimed errors respecting the doctrine of imminent peril hereinbefore referred to, and the recent case of Ohran v. Yolo County, 40 Cal.App. 298, 104 P.2d 700, decided August 5, 1940, is among the cases cited in support of this contention. In that case the automobile in which the plaintiffs were riding was proceeding along a river highway. It was raining and the highway was wet and slippery. The automobile in which they were riding skidded and went off of the levee highway into the Sacramento river. No other automobile was involved, and there was no conflict in the evidence respecting the manner in which the automobile was being operated. The question of contributory negligence arose only in connection with the manner in which the automobile was being operated at the time it skidded off of the levee into the river. The claimed error in the instructions of the court in that case consisted of the omission of the element of proximate cause and also the failure to include in another instruction the element that the situation of imminent peril was created through no negligence on the part of those seeking its benefit. The court held that as elsewhere the jury were fully and accurately instructed upon the matters involved, that if such claimed error occurred it was harmless.

[12–15] We are of the opinion that the rule to be followed herein is that set forth in the quite recent case of Ferguson v. Nakahara, Cal.App., 110 P.2d 1091, decided March 12, 1941, and wherein at page 1096 it is said: "All instructions of the court are to be considered and construed as a whole to determine whether they contain reversible error. 'If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant a reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury.'" Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675; see, also, Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143.

[16] It appears to us that when all of the instructions herein are considered together, the jury were not clearly, sufficiently, and correctly apprised of the law necessarily required to guide them in arriving at a proper verdict, when considered in the light of the sharply conflicting evidence in this case.

[17] The next assignment of error consists of the refusal of the court to give two instructions requested by defendants regarding the duty of a driver of an automobile to refrain from following a car too closely. Both of these instructions appear to be in proper form and, as there was evidence in the case to which they were applicable, we are of the opinion that at least one of the instructions should have been given and that the court was in error in the refusal.

Other assignments of error in the giving of instructions at the request of plaintiff are also urged but we deem it unnecessary to discuss them.

The appellants also contend that the damages were grossly excessive under the evidence in the case. As we are satisfied that the judgment must be reversed because of the errors hereinbefore set forth, we deem it unnecessary to discuss this matter.

[18] We are not unmindful of the rule that we must consider the evidence in the light most favorable to the respondent; that all conflicts in the evidence must be resolved in his favor and that we must draw all reasonable inferences from the evidence in favor of the affirmance of the

judgment, but, nevertheless, by reason of the errors hereinbefore set forth, we feel that prejudice has resulted to the appellants and that but for such errors a different verdict might have resulted.

It is therefore ordered that the judgment be, and it is hereby reversed.

We concur: TUTTLE, J.; THOMPSON, Acting P. J.

44 Cal.App.2d 193

In re CHAMBERLAIN'S ESTATE.

CHAMBERLAIN et al. v. PERRY.

Civ. 6546.

District Court of Appeal, Third District, California.

April 14, 1941.

Rehearing Denied May 14, 1941.

See 112 P.2d 934.

1. Contracts 🔑99(1)

A relationship of trust and confidence existed between son and aged, infirm mother who had suffered a paralytic stroke, who was living with son, and whose affairs were managed by son, as respects burden of proof in relation to liability of son to account for property received from mother.

2. Contracts 🔑99(1)

Where a fiduciary relation or a relation of trust and confidence exists between a parent and child, a presumption of undue influence in obtaining property from parent arises, and the burden of proving that transaction was the result of free volition and was not superinduced by fraud or undue influence rests upon the child.

3. Appeal and error 🔑1010(1)

If there is any substantial evidence which will justify finding that the acts of mother in turning over property to son were free from undue influence, order based on finding that no undue influence existed must be sustained upon appeal, notwithstanding presumption of undue influence.

4. Contracts 🔑99(1)

Son's evidence that $1,500 paid to him by aged, infirm mother living with son was for care and support and that crops were turned over to son for the same purpose would serve to rebut the presumption of undue influence.

5. Appeal and error 🔑931(1)

On appeal from order finding that no undue influence existed on part of son to whom mother had transferred money and property, appellate court was bound to assume that mother's mental condition was normal, in absence of proof to the contrary, notwithstanding mother's advanced age and illness.

6. Contracts 🔑99(1)

Where presumption of undue influence existed, as regards liability of son to account for money and property transferred to him by aged, infirm mother living with son, fact that mother was in full possession of her mental faculties and capable of understanding the consequences of the transaction was to be considered as tending to rebut the presumption of undue influence.

7. Contracts 🔑99(1)

Evidence that money and property had been turned over by aged, infirm mother to son as compensation for her care and support, and that mother was in full possession of her mental faculties and capable of understanding the consequences of the transaction, *held* sufficient to overcome the presumption of undue influence.

8. Appeal and error 🔑1010(1)

Where evidence was sufficient to overcome the presumption of undue influence on part of son to whom aged and infirm mother had transferred money and property, finding of trial court that no undue influence existed was binding on appellate court.

9. Bills and notes 🔑120
Executors and administrators 🔑202(1)

Where mother and son executed new note in lieu of note signed by son and deceased father, mother and son were severally liable upon the note, and, where mother died, the obligation could be enforced against her estate.

10. Bills and notes 🔑119
Principal and surety 🔑45

If a note is signed by two or more makers, it will be presumed that they are comakers and liable as such and not as principal and surety.

11. Principal and surety 🔑9

Where one signs a note as principal, he will be held as principal, notwithstanding the creditor knew that, as between the one thus signing and the principal debtor, former was in fact only a surety.

12. Executors and administrators 🔑221(1)

Where mother and son executed new note in lieu of note signed by son and deceased father, and mother subsequently died, burden of proving that mother signed the note as an accommodation maker rested upon executor of mother's estate.

13. Bills and notes 🔑96

One who has received value for signing a note cannot set up the defense of "accommodation maker". Civ.Code, § 3110.

See Words and Phrases, Permanent Edition, for all other definitions of "Accommodation Maker".

14. Bills and notes 🔑96

Where mother executed new note with son in lieu of note signed by her deceased husband and son, and son agreed to and did pay funeral and other expenses for which husband's estate was liable and waived his right in separate property of deceased husband, mother was not an "accommodation maker" but was primarily liable on note with son, notwithstanding that months later all the real property of husband's estate was awarded to mother as a homestead. Civ. Code, § 3110.

15. Executors and administrators 🔑507(1)

The only function of the court in settling the accounts of an executor is to determine what property and especially what money belonging to the estate is in the hands of the executor and to charge him therewith adverse to his individual claims or right against the estate. Probate Code, §§ 921, 927.

16. Executors and administrators 🔑486, 507(1)

Where an executor is found to be indebted to the estate, the court in settling the executor's account has power to charge him with amount thereof, but whether such indebtedness shall be set off against the distributive share of the executor can only be considered and adjudicated at time that petition for distribution is heard. Probate Code, §§ 921, 927.

17. Executors and administrators 🔑507(1)

Where mother was primarily liable with son on note executed by them, and after mother's death the son as executor of her estate paid the note with funds of the estate, the court's power on objections to account of son as executor was limited to charging the son as executor with one-half the amount paid by the estate, and the court did not then have jurisdiction to direct that distributive share of son be charged with any portion of amount paid to discharge the note, though the estate was entitled to contribution from the son. Civ.Code, § 1432; Probate Code, §§ 921, 927.

Appeals from Superior Court, Yolo County; J. G. Bruton, Judge.

Proceedings in the matter of the estate of Annie E. Chamberlain, deceased, wherein Elmer V. Chamberlain and Margaret M. Chapman filed objections to the accounts of C. L. Perry, executor. From an order settling the accounts, the objectants separately appeal.

Affirmed in part and reversed in part, with directions.

Prior opinion, 109 P.2d 449.

O'Donnell & Bagby, C. C. McDonald, and R. H. Schwab, Jr., all of Woodland, for appellants.

A. G. Bailey, of Woodland, for respondent.

TUTTLE, Justice.

There are two separate appeals here involved, based upon the same record. Each appellant appeals from an order settling accounts in the estate of Annie E. Chamberlain, deceased. Objections were filed by appellants to said accounts, and after a trial of the issues thus raised, the court overruled said objections.

Annie E. Chamberlain died on October 8, 1931, at the age of 87 years. She was twice married. Both of her former husbands were deceased when the incidents which are the subject of this action arose. By her first husband she had two children, Margaret M. Chapman, one of the appellants, and C. L. Perry, respondent. Appellant Chamberlain is the child of the second marriage. She inherited the ranch, upon which she lived, from her second husband, and continued to live thereon with her son Elmer Chamberlain, for some seventeen years. On the 17th day of May, 1930, she suffered a stroke of paralysis, and upon the same day was removed to the home of respondent, where she resided until her death. Her illness left her in a very weak and helpless condition. She could not get out of bed without assistance, and required the attention of the family of respondent both night and day. She required assistance in dressing and in eating. At this time she had some $3,700 on deposit in a local bank, and was the owner of a small ranch which she inherited from her second husband. During the time she was at respondent's home, he handled all her business affairs. He took her to his own attorney for the purpose of having her will drawn; looked after her almond orchard, harvesting and selling the crops; prepared some of her checks for signature, and attended to all her banking for her. On or about July 14, 1931,—some three months before she died,—Mrs. Chamberlain signed and delivered a check for $1,500 in favor of respondent, and it was cashed by him, and the money applied to his own use. Just how this occurred is detailed by him, in answer to questions propounded by his counsel. We quote from the record:

"Q. Mr. Perry, that $1,500.00—was there any discussion between you and your mother when she gave you that check as to what it was given for? A. Well, she told me; she said that she wanted to stay there and I wanted my sister to take her to Sacramento because it would be handy to doctors and she knew how to take care of her better than I and my wife did. My wife was not hardly able to take care of her, but she did not want to go over there, and my brother he couldn't take her; his wife was away part of the time, and they did not have no use for her, and nobody would take her, and she wanted to stay with me. She told me to take the crop, what was left there, for them two years. There wasn't hardly any, not so much, but she said I had earned it, and then Elmer got this money from the Bank of Esparto.

"Q. Bank of Yolo? A. Or, the Bank of Yolo, and they were all getting a dig at it, and I thought, well, there is no one taking care of her but me and my wife, and I had to get up from five to nine times at night to take her back and forth to the bathroom, and it took both of us most of the time, so I thought—I just mentioned it to her, and I thought she ought to give me something for taking care of her, and she said she would and I told her we would take care of her, and, if she gave us $1,500.00, we would take care of her the rest of her lifetime, and she was very glad to do it, and, if she wanted to go back to the ranch, she could, but she said she would never go back to the ranch, and she wouldn't go over to my sister's, and she didn't want her to have anything."

We now turn to another incident which occurred during the time mentioned above. Perry had been, for several years, managing the almond orchard belonging to his mother. During the two years before her death, he appropriated to his own use the gross proceeds from the sale of almonds. The amount thus received was $1,453.18. Perry gave the following explanation of the matter:

"Q. Was there anything said by her, in your presence, in regard to the almond crop for 1930 and 1931? A. No, only one day I made the remark—we had prunes on our place at that time, and I said, 'The prunes are not going to amount to anything', and I said, 'There are no almonds to amount to a great deal and we won't make much,' and she said, 'Well, what there is, you will make that'."

Perry testified that prior to the above conversation with his mother they had agreed upon the terms of a written contract covering this matter, under which she agreed to let him have the proceeds from the almond orchard, with the understanding that he was to care and provide for her the remainder of her life. This contract was never executed.

Upon the death of Mrs. Chamberlain, respondent Perry and appellant Chamberlain were appointed executors of her estate. During the course of probate, one of the latter's bondsmen died. Upon his failure to give another bond, Chamberlain was discharged by the court as executor, and ordered to file an account. This he did on July 7, 1938. Prior to that date executor Perry filed his second account, wherein he failed to account for the said sum of $1,500 paid to him by the decedent, and also for the proceeds derived by him from the sale of said almond crop. Both appellants filed objections to said account. They set up that the transfer of $1,500 was void, as being procured through undue influence exerted over the deceased by Perry. They also made the same contention with reference to the proceeds from the sale of the almond crop. They prayed that Perry be ordered by the court to account for, and charge himself with said sums. After a hearing which lasted several days, the trial court found in favor of Perry and against appellants on the issues thus raised. Appellants now separately appeal from the order made in accordance with such finding.

[1, 2] It must be admitted that the facts clearly show a relationship of trust and confidence existed between respondent and his mother. The latter was of the age of 86 years, and suffering not only from the infirmities of old age, but also from the result of a paralytic stroke. Her physical condition is described above. She was living in the home of respondent, under his direction and care. He managed her affairs, as detailed above. Where a fiduciary relation or a relation of trust and confidence exists between a parent and child, a presumption of undue influence arises, and the burden of proving that the transaction was the result of free volition, and was not superinduced by fraud or undue influence will rest upon respondent. 24 Am.Jur., page 791, sec. 116; Nobles v. Hutton, 7 Cal.App. 14, 93 P. 289; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336. Respondent contends that the evidence upon the issue of undue influence was conflicting; and that we are therefore bound, under the familiar rule on appeal, to accept the finding of the trial court.

[3, 4] While it must be conceded that there is a rather strong showing made by appellants, still, in the final analysis and in spite of the presumption, if there is any substantial evidence which will justify a finding that the acts of the mother were free from undue influence, the order must be sustained upon appeal. "A mere doubt as to whether a finding is justified by the evidence will not authorize the appellate court to set aside the findings. * * * When the evidence is conflicting, the court will presume that the evidence in support of the verdict or findings is true, and construe it and resolve every substantial conflict as favorable as possible in support thereof." 2 Cal.Jur., pages 880, 881, sec. 515. If the trial court believed the testimony of respondent—(as it must have)—that the $1,500 was paid to respondent as compensation for her care and support, and that the crops were turned over to respondent by her under the same circumstances, such evidence would serve to aid in rebutting the presumption of undue influence. In 13 C. J., page 405, sec. 329, it is said: "Solicitation, importunity, argument and persuasion are not undue influence, and a contract is not to be set aside merely because the one party has used these means to obtain the consent of the other. Influence obtained by persuasion and argument or by appeals to the affections is not prohibited either in law or morals, is not obnoxious even in courts of equity, and may be termed 'due influence'. Nor is the case changed because the parties stand in confidential relations to each other." 17 C.J.S., Contracts, § 180.

In 20 Cal.Jur., page 448, sec. 44, it is stated: "In disproof of any inference of imposition or undue influence, it is especially significant that the parent owed to the beneficiary a debt of gratitude for filial devotion and service and care during the parent's declining years."

[5-8] In addition, there is the fact that there is not a word of evidence in the record that the mental condition of the mother was anything but normal. We must therefore assume that her mind was sound, and that she knew precisely what she was doing at all times. "* * * it is to be considered, as tending to rebut the presumption of undue influence, that the donor or grantor was in full possession of his mental faculties, and capable of understanding the consequences of the transaction." 20 Cal.Jur., p. 447, sec. 43. In view of the foregoing, we are of the opinion that there is sufficient evidence to rebut the presumption of undue influence, and the court having found against the presumption, its order settling the account of respondent in respect to both transactions must be affirmed.

In the account of Elmer Chamberlain, as executor, a question arose in respect to what is known as the "Schwab" note. It appears that in 1911, Elmer borrowed $900 from Sam Schwab, and a promissory note was executed by him and his father in that amount. The father died intestate on January 15, 1932. The note had not been paid. Elmer and his mother were administrators of his estate, and they employed attorney Anderson to represent them. Shortly after their appointment as administrators a meeting was held in the office of their attorney, where the affairs of the estate were talked over between attorney Anderson, Elmer, and his mother. It was there agreed that there was not sufficient money in the estate to pay either the costs of administration, expenses of last sickness, funeral expenses, or the Schwab note, without the sale of some portion of the real property. So Mr. Anderson talked to Mr. Schwab about it, and Schwab agreed to take a new note signed by Elmer and his mother, Annie E. Chamberlain, in lieu of his claim against the estate of V. J. Chamberlain. It was also agreed at that meeting that if Annie E. Chamberlain would go on the Schwab note so as to keep it from being filed as a claim against V. J. Chamberlain's estate, Elmer would pay out of his own funds the attorney's fees, expenses of last sickness, funeral expenses, etc., which the estate could not pay. In addition to the payment of these items, Elmer was asked to waive his half interest in the separate property of his father so that his mother might have a probate homestead upon all of the real property. In the fulfilling and carrying out of this agreement Elmer paid for the cemetery lot, funeral expenses, the doctor's bill, the attorney's fees amounting to some $486. He also complied with attorney Anderson's request and waived his rights in his father's separate property. The mother, on the other hand, joined with Elmer in the making of a new note to Schwab.

[9-12] When Mrs. Chamberlain died, the note was still unpaid. The sum of $5,040.50 was due thereon. Schwab, the payee, filed a claim for said amount against her estate, and it was duly allowed and approved. Elmer, as executor, filed a petition for an order permitting the estate of his mother to borrow sufficient money to pay said note. The court granted the petition, and the claim was paid in full from the funds of the estate so borrowed. The court, however, further ordered that the distributive share of Elmer Chamberlain be charged with the amount which the estate paid to discharge said note. It is from the last-mentioned portion of said order that Elmer Chamberlain prosecutes this appeal. He contends that his mother was primarily liable upon the note, and that her estate must pay it. Respondent contends that there was no consideration for said note so far as Mrs. Chamberlain was concerned, and that her estate was not obliged to pay it, because she was merely an "accommodation party", and not a maker. The parties were severally liable upon the note, and under such conditions, "each is bound to performance * * * and if one dies, the obligation may be enforced against his estate." 8 C.J., p. 66, § 96; 10 C.J.S., Bills and Notes, § 37. "If a note is signed by two or more makers, it will be presumed that they are co-makers, and liable as such, and not as principal and surety." 8 C.J., p. 1002, § 1308; 11 C.J.S., Bills and Notes, § 658. "* * * we understand the rule to be that where one signs as principal he will be held as such, notwithstanding the creditor knew that, as between the one thus signing and the principal debtor, the former was in fact only a surety". California National Bank v. Ginty, 108 Cal. 148-150, 41 P. 38, 39. It therefore appears, in determining the capacity in which Mrs. Chamberlain signed the note, the burden rested upon respondent of proving that she was not what the instrument showed on its face—a joint and several maker—but an accommodation maker.

The undisputed evidence to which we have referred above shows that Mrs. Chamberlain did derive some benefit when she signed the note. She was entitled to succeed to a portion of the estate of her husband. When her son Elmer paid the expenses for which the estate would otherwise be liable and forced to meet, her distributive share was correspondingly increased. Thus, she received value for signing the note. Section 3110, Civil Code, reads as follows: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

[13] Under said section, one who has received value cannot set up the defense of accommodation maker. In 8 C.J., page 255, section 403, it is stated: "No consideration moving to the accommodating party is necessary to uphold accommodation paper. As already defined, accommodation paper is paper to which the accommodation party has put his name without consideration. It follows that the paper is not accommodation paper if there is a consideration accruing to the accommodating party for the signing."

In 11 C.J., Secundum, Bills and Notes, page 297, § 742, it is said: "On the other hand, the consideration may in reality be for value, although the purpose was to accommodate another party, and where a person lending his credit seeks to accomplish thereby legitimate objects of his own and not simply to aid the maker, the act is not for accommodation."

To the same effect: Gardiner v. Holcomb, 82 Cal.App. 342, 255 P. 523; Seth et al. v. Lew Hing et al., 125 Cal.App. 729, 14 P.2d 537, 15 P.2d 190. The case of Warren National Bank v. Suerken, 45 Cal. App. 736, 188 P. 613, is directly in point. There, the court stated that the notes imported consideration, and that the burden was upon the defendant to establish the fact of want of consideration. Disposing of the contention, and holding that the defendant was an accommodation maker, the court said, at page 740 of 45 Cal.App., at page 614 of 188 P.: "An accommodation maker is defined in Parsons on Notes & Bills, § 131, as 'one who puts his name there without any consideration, with the intention of lending his credit to the accommodated party.' As stated in Randolph on Commercial Paper (2d Ed.) § 472, the term 'without consideration' must be considered as meaning simply 'without consideration to the accommodating party directly.' Accepting this definition, can it be doubted that when the defendant here became a party to these notes it was for the direct advantage to be gained by herself and her coheirs and associates in protecting their interest in decedent's estate from the immediate enforcement of this liability against it? It was not a liability enforceable against the defendant, but it was enforceable against the property to which she was about to succeed. Any suspension or forbearance of a legal right constitutes a sufficient consideration for a note or bill. Civ.Code, § 1605; Naglee v. Lyman, 14 Cal. 450. And where heirs or assignees of an estate of a deceased person, in order to protect that estate from claims against the decedent which are enforceable against the property of the estate, obtain a renewal or extension of time on the original claim by agreeing to pay it, such renewal or extension is sufficient consideration for their promise. Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054; Whelan v. Swain, 132 Cal. 389, 64 P. 560; Humboldt Sav., etc., Soc. v. Dowd, 137 Cal. 408, 70 P. 274."

[14] The undisputed evidence shows that the mother signed not simply to aid her son, but also to benefit herself. We therefore conclude that there was no evidence upon which to base a finding to the effect that the mother was an accommodation maker, and that the undisputed evidence shows that she was a maker, and therefore primarily liable with her son upon the instrument. The court therefore erred in deducting from the distributive share of Elmer Chamberlain the amount paid by the estate upon said note. The contention made by respondent that if the consideration did not come from the payee, but from the accommodation party (Elmer) the accommodation status of Mrs. Chamberlain was not affected. The cases cited by him—Gardiner v. Holcomb, supra, and Harris v. Holland, 107 Cal.App. 646, 290 P. 903—do not support his contention. Neither does 11 C. J. Secundum, Bills and Notes, § 742, p. 296, nor 8 C. J. 253, § 398, lay down such a rule. Some months after the note was executed, the court, on application of Mrs. Chamberlain, set aside all the real property of her husband's estate as a homestead. This left practically nothing in the estate. Respondent contends that as the widow had the right to her homestead, irrespective of the claims against the estate, it was no benefit to her to have the claims paid by her son. We do not see how the fact that she might, in the future, take such action would affect the benefit which would accrue to her in the ordinary course of administration, and which was in contemplation of the parties when they executed the note.

In a petition for rehearing filed by respondent executor, we are asked to decide a question which was not directly presented for our consideration by either party on the appeal, but which we believe should be disposed of in the interest of all concerned and in order to prevent a multiplicity of actions. He contends that while we decided that the whole sum of $5,040.50 could not be charged against the distributive share of Elmer V. Chamberlain, there is still left undecided the question as to whether or not one-half of said amount could be so charged. He urges that the estate, having paid the whole of said note, is entitled to a contribution from Elmer of one-half of said amount (Civ.Code, sec. 1432), and that the court should deduct that amount from the distributive share of Elmer, and impress a lien upon real property to be distributed to him out of the estate as security for the payment thereof.

Appellant Chamberlain, while conceding that the estate is entitled to such a contribution, contends that it was beyond the power of the court to enforce it by setting off said sum against the distributive share of Elmer V. Chamberlain and impressing a lien for the amount upon any property which may be distributed to the latter as security for the payment of the same.

We are of the opinion that appellant's contention is the correct view to be taken. It must be remembered that we are considering here only an objection to an account based upon the provisions of section 927 of the Probate Code. The matters to be shown by such account are detailed as follows in section 921 of said code: "Whenever required by the court or a judge thereof, either upon its or his own motion or upon the application of any person interested in the estate, the executor or administrator must render and file with the clerk a verified account showing the amount of money received and expended by him, the claims filed or presented against the estate, giving the name of each claimant, the nature of the claim, when it became due or will become due, whether it was allowed or rejected by him, or not yet acted upon, and all other matters necessary to show the condition of the estate. If he neglects or refuses to appear and render such account, after having been duly cited, an attachment may be issued against him and such accounting compelled, or his letters may be revoked, or both, in the discretion of the court or judge."

[15] That there is no provision in the Probate Code which gives the court power or authority in settling an account, to charge the distributive share of an executor, administrator, heir, devisee, or legatee with a debt which any one of them may owe the estate. The jurisdiction of the court in settling a final account is defined in Cal.Jur. 11b, pages 605, 606, 607, section 1143, as follows:

"As distinguished from the decree of distribution or for payment, which may be prayed for and made at the same time, the only function of the court in the decree of settlement is to determine what property and especially what money belonging to the estate is in the hands of the representative. * * * By virtue of its power to settle a final account and by its decree to determine what remains to be distributed, the court, in settling an account, has jurisdiction to determine the amount of money or property of the estate that has come into the hands of the representative and to charge him therewith, adverse to his individual claims or right against the estate. * * * Settlement on an annual or current account should be confined to the money transactions—receipts and disbursements debited and credited; the property on hand or shown is the subject of the final accounting."

[16, 17] It thus appears that, where, as in this matter, the executor is found to be indebted to the estate, the court has the power to charge him with the amount thereof. The matter of offsetting such indebtedness against the distributive share of a personal representative or an heir, devisee or legatee, if such power exists, is another matter, and can only be considered and adjudicated at the time when the petition for distribution is heard. Here, no such petition had yet been filed, nor does it appear that the estate was ready for distribution. This must be true, for the reason that it cannot be definitely determined, prior to such hearing, what the distributive share of such person would be. In the case most strongly relied upon by appellant—Estate of Polito, 51 Cal.App. 752, 197 P. 976—the attempt to set off against his distributive share, a debt due the estate by an heir, arose upon final distribution, and the appeal was taken from the decree. The numerous cases cited by both parties, and relating to the right of offset against a distributive share, all arose from attacks made upon decrees of distribution, and not upon objections to an account. This rule does not apply, where a claim is allowed, and the estate attempts to offset against such claim, an indebtedness due the estate from the creditor, and where no attempt is made to offset an indebtedness against a distributive share. Estate of Bell, 168 Cal. 253, 141 P. 1179. We do not wish to be understood as holding that, even upon distribution, a debt due from a personal representative, or an heir, devisee or legatee, may be offset against his distributive share. We do hold, however, that the utmost power which the court possessed here was to charge the executor with the debt which the account showed was due from him to the estate. This was one-half of the amount paid by the estate in settlement of the claim.

That portion of the order appealed from which relates to the payment of the sum of $1,500, and the further payment of the proceeds from the almond orchard, is affirmed, while the portion which deducts from the distributive share of appellant Elmer V. Chamberlain the amount paid by the estate on the promissory note is reversed, with directions to the trial court to enter an order in conformity with this opinion.

Appellant Elmer V. Chamberlain will recover his costs on appeal. Appellant Chapman and respondent will each pay his own costs.

We concur: PULLEN, P. J.; THOMPSON, J.

44 Cal.App.2d 183

PEOPLE v. WHITE et al.

Cr. 3430.

District Court of Appeal, Second District, Division 1, California.

April 14, 1941.

1. Criminal law 🔑1131(4)

An accused's appeal was dismissed under provision of the Penal Code that judgment may be affirmed, but cannot be reversed, without argument, and under court rule relating to filing and service of briefs. Pen.Code, § 1253; Rules of the Judicial Council for the Supreme Court and District Courts of Appeal, rule 2, § 15.

2. Criminal law 🔑404(4)

It was not necessary that gun, flashlights and goggles found in accused's possession be positively identified as those used in robbery, but it was sufficient if they were recognized as similar, or bore a sufficient resemblance to remove the elements of mere speculation or surmise.

3. Robbery 🔑24(3)

The identification of accused as the person who committed robberies was not required to be positive.

4. Criminal law 🔑419(10)

Statements made by others than accused are "hearsay", whether made in accused's presence or outside accused's presence.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

5. Criminal law 🔑407(1)

Evidence of accusatory statements is admitted only as the basis for evidence of accused's conduct in the face of such accusations.

6. Criminal law 🔑419(10), 1169(1)

In prosecution of two accused, admission of statements of third parties, made when only one accused was present, was erroneous as to the other accused, but not prejudicial.

7. Robbery 🔑24(1)

Evidence supported robbery conviction.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Fred White and one Clark were convicted of two offenses of robbery, and they appeal. The People moved to dismiss the appeal as to named accused.

Motion granted and judgments affirmed.

Omer Dale Clark and Gladys Towles Root, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendants were charged by information with two offenses of robbery. The jury returned a verdict of guilty on both counts and this appeal is from the judgments thereafter entered.

Briefly, the evidence reveals that the defendants on the night of May 4th accosted one Robert Gordon and Jeanne Patrick, who were seated in a parked automobile on Riverside Drive, and robbed them, at the point of a gun; Gordon of his wallet which contained $7 and an identification badge worn by him as an employee of an aircraft company and Mrs. Patrick of a purse which contained nothing of value. Defendants then drove away in their own car, which had been parked back of and near the car occupied by the victims.

The next night, about 9:15 p. m., Kelly Walp, a patrolman on duty in the Palos Verdes Estates, saw the defendants in an automobile parked at the side of the road in Palos Verdes Hills. Upon questioning defendants and informing them that they were to be taken to the substation for further investigation, defendant White fled. Defendant Clark was arrested and taken to the substation. Walp returned to the scene of the arrest for defendants' car, at which time a gun was found on the ground about three feet from the car. The badge, above referred to, was also found in the car as well as flashlights and goggles identified as similar to those used in the robbery. White was arrested the following morning in Long Beach on information furnished the officers by defendant Clark.

[1] With regard to the appeal of defendant White, respondent moves for a dismissal under section 1253 of the Penal Code and rule II, section 15, Rules of the Judicial Council for the Supreme Courts and District Courts of Appeal. The record clearly discloses that such motion should be granted.

[2, 3] As to defendant Clark, it is argued, among other things, that the verdict is contrary to law and the evidence. In that connection it is contended that appellant is the victim of mistaken identity. It is also urged that the identification of the gun, flashlights and goggles found in the possession of defendants is insufficient. With regard to the latter, it is not necessary that such objects be positively identified. It is sufficient if they are recognized as similar or bear a sufficient resemblance to remove the elements of mere speculation or surmise. Nor need the identification of the defendant be positive. Appellants' objections go to the weight rather than to the admissibility of such evidence.

It is also contended that certain errors relating to the defendant White indirectly affected rights of defendant Clark. Without going into detail it is sufficient to note that there is no merit to the contention. Notwithstanding the fact that such contention lacks merit generally, nevertheless there is one phase of the argument relating thereto that is entitled to attention. In that regard it is urged that certain conversations and statements of defendant White's wife, and another individual as well, were received in evidence over defendants' objection. The court denied a motion to strike such testimony and sustained an objection to a question calling for such a conversation, "unless foundation is laid to show White was present"; and again, the testimony of the arresting officer referring to a conversation had with defendant White's wife was admitted as follows:

"Q. Did you later have a conversation with her in the presence of the defendant White? A. Yes.

"Q. And what was said at that time? A. In the presence of the defendant? Q. Yes. A. One of the accompanying officers asked the young lady if she was the defendant White's wife. She said she was not.

"Mr. Ryan: This is objected to as incompetent, irrelevant and immaterial and not binding on the defendant White. It was outside of his presence.

"The Court: It was in his (defendant White's) presence, was it not?

"The Witness: Yes sir.

"The Court: Objection overruled.

"Mr. Ryan: It still has no bearing on the issues.

"The Court: Objection overruled."

The foregoing will serve as examples. Apparently the trial court was under the impression that the presence of the defendant alters the character as hearsay of the statements and declarations of others. Such is not the rule.

[4, 5] Manifestly, statements made by others outside the presence of the defendant are clearly hearsay. Statements made by others are no less hearsay when made in the presence of a defendant. The so-called exception to the rule permitting the introduction of evidence of accusatory statements made to the accused may account for the confusion that appears to exist somewhat generally. Evidence of accusatory statements, however, may be received for but one purpose, namely, as the basis for evidence of the conduct of the accused in the face of such accusations. People v. Shellenberger, 25 Cal.App.2d 402 at 408, 77 P.2d 506; People v. Teshara, 134 Cal. 542 at 544, 66 P. 798; People v. Philbon, 138 Cal. 530 at 532, 71 P. 650; People v. Weber, 149 Cal. 325 at 338, 86 P. 671; People v. Ah Yute, 54 Cal. 89; People v. Ayhens, 16 Cal.App. 618 at 623, 117 P. 789. Although often referred to as an exception to the rule, the foregoing doctrine, it would seem, emphasizes and confirms the rule and is in entire accord therewith, rather than an exception.

[6] The objections by defendants to the questions as above noted should have been sustained. However, under the circumstances here presented, the failure of

the court in this respect was not prejudicial.

It is also contended that the district attorney was guilty of misconduct. An examination of the record reveals no serious infraction in this regard which could be said to have affected the outcome of the trial.

[7] The evidence is abundantly sufficient to sustain the judgment.

For the foregoing reasons the judgments are affirmed. The motion to dismiss the appeal as to White is granted.

We concur: YORK, P. J.; WHITE, J.

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44 Cal.App.2d 155

PEOPLE v. COWAN et al.

Cr. 606.

District Court of Appeal, Fourth District, California.

April 11, 1941.

Hearing Denied May 8, 1941.

1. Criminal law 🔑1180

Where convictions of murder in the first degree were reversed with directions to pronounce judgments for murder in the second degree, grounds relied upon and determined on the first appeal could not be invoked on appeal from the latter judgments for the additional reason that the grounds showed violations of the "due process" clause of the federal constitution. U.S.C.A.Const. Amend. 14.

2. Constitutional law 🔑268
Criminal law 🔑656(7), 721(1)

Constitutional and statutory provisions were not violative of Fourteenth Amendment to Federal Constitution to extent that they permitted court and counsel to comment on failure of accused to explain or deny evidence or facts in case against him. Pen. Code, § 1323; Const.Cal. art. 1, § 13; U.S.C.A.Const.Amend. 14.

3. Criminal law 🔑1129(1)

Appellants must call to attention of the district court of appeal matters in record claimed to be erroneous.

4. Criminal law 🔑1181

A finding on appeal that any errors committed on trial were not prejudicial is in effect a finding that defendants were not deprived of "due process of law". U.S.C.A. Const.Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

5. Constitutional law 🔑271
Criminal law 🔑1186(4)

The constitutional provision prohibiting reversals unless the appellate court determines that error has caused a "miscarriage of justice" would not be held violative of provision in the federal constitution guaranteeing a fair trial to every defendant, on ground that the term "miscarriage of justice" can only mean conviction of a person who is probably innocent, since the term does not merely mean that a guilty man has escaped or an innocent man has been convicted, but provision is applicable also where an acquittal or conviction has resulted from form of trial in which essential rights of accused or people were disregarded. Const.Cal. art. 6, § 4½; U.S.C.A.Const.Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

6. Criminal law 🔑1186(4)

The constitutional provision prohibiting reversals unless error has caused a miscarriage of justice obviates necessity for new trial on account of unimportant errors which could not be expected to affect result and which have not interfered with substantial rights of accused, including right to fair trial. Const.Cal. art. 6, § 4½.

7. Constitutional law 🔑268
Criminal law 🔑1166½(1)

The alleged fact that jurors prior to their empanelment had, in some other department of the trial court, been given copies of pamphlet containing general instructions as to their duties would not warrant reversal on ground that defendants had been denied "due process of law", in absence of showing as to what the general instructions were or anything to indicate that prejudice resulted. U.S.C.A.Const.Amend. 14.

8. Constitutional law 🔑271
Criminal law 🔑1184

The statute providing that where evidence shows defendant to be not guilty of the degree of crime of which he was convicted but guilty of a lesser degree, either trial court or appellate court may modify judgment accordingly without ordering a new trial was not violative of "due process of law" as applied to modification of conviction for murder in the first degree to murder in the second degree pursuant to order of the district court of appeal. Pen. Code, §§ 1157, 1181, subd. 6; U.S.C.A.Const. Amend. 14.

9. Criminal law ⊂⊃1188

Remanding of causes from district court of appeal to trial court for modification of convictions for murder in the first degree to convictions for murder in the second degree did not extend time within which trial court was authorized by statute to direct whether term under a second conviction should run concurrently or consecutively and did not empower trial court to insert in each judgment the additional clause that the sentences for murder in the second degree should run consecutively with sentences each defendant was then serving, since the original judgments were in effect affirmed except as they were modified. Pen.Code, § 669.

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Appeals from Superior Court, Los Angeles County; Arthur Crum, Judge.

Robert Cowan and others were convicted of murder in the second degree. George Gartler, one Fisher and one Freedman appealed from the judgments. The appeal of Gartler was dismissed on his own motion.

Modified and affirmed as modified.

See, also, 38 Cal.App.2d 231, 101 P.2d 125.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Thomas F. O'Brien, Deputy Dist. Atty., both of Los Angeles, for respondent.

BARNARD, Presiding Justice.

Five defendants were convicted of murder in the first degree, the jury recommending life imprisonment. Upon appeal, the judgments entered were modified and the cause was remanded to the trial court with directions to pronounce judgment against each of these defendants as for murder in the second degree. People v. Cowan, 38 Cal.App.2d 231, 101 P.2d 125. This was done and three of these defendants again appealed from the judgments thus entered. Upon his own motion the appeal taken by defendant Gartler has been dismissed and we will refer to the defendants Fisher and Freedman as the appellants.

On the former appeal these appellants contended that the corpus delicti had not been proved; that the evidence was not sufficient to sustain the verdict, mainly in that the testimony of accomplices was not sufficiently corroborated; that the court erred in the admission and exclusion of certain evidence; that the court erred in giving and refusing certain instructions; and that the district attorney was guilty of prejudicial misconduct. In their petition for a hearing in the Supreme Court, after decision in this court, the appellants urged the same grounds and also that the due process clause of the Consitution of the United States had been violated, and that the opinion of this court had failed to consider all of the questions raised. With respect to the latter contention it may be here observed that while the reporter's transcript therein had contained about 2,100 pages the opening briefs alone contained 2,304 printed pages and 243 typewritten pages. Five appellants were there involved, with many assignments of error and innumerable subpoints. While it was impracticable to cover all of the points in the detail in which they were treated in the briefs, this court considered them all and in the opinion filed, which was condensed to twenty-two pages, grouped and discussed them as much as could be done within reasonable limits and in so far as necessary to indicate the reasons which controlled the decision.

[1] On this appeal the main contention is that the judgments are void under the due process clause of the fourteenth amendment to the Constitution of the United States, it being argued that the record discloses, in a number of respects, that the appellants did not have a fair trial. It is first argued that the procedure leading up to their conviction "was based upon passion and prejudice, misconduct, matters dehors the record, and inflammatory matter having no bearing whatever upon the case"; that a conspiracy was not charged in the indictment; that there was no proof of the corpus delicti; that there was no legal or sufficient evidence to connect the appellants with the commission of the crime charged; and that each of these constitutes a violation of the due process

of law requirement of the federal Constitution.

All of these matters were presented as errors and consideration given thereto on the former appeal. It was there held that the indictment was sufficient, that the corpus delicti had been established, that the connection of the appellants with the crime charged had been shown by legal and sufficient evidence, and that no prejudicial misconduct appeared. The record on that appeal, which is now before us, contains ample direct evidence that the appellants were guilty of the crime charged. The contention that this evidence was not sufficient because it appeared in the testimony of accomplices who were not corroborated has been disposed of and is without merit.

The point that these various matters also constituted violations of the due process clause of the federal Constitution was not raised on the former appeal, at least not before the filing of a petition for a hearing in the Supreme Court. It is now urged that where a judgment is void as violative of the fourteenth amendment to the Constitution that point can be raised at any time, and that the Supreme Court of the United States has jurisdiction to review such a void judgment of a state court. This may be conceded, but the question remains whether these judgments are void for the reasons now under consideration. The matters thus relied on as rendering the judgments void were passed upon by the trial court, by this court, and by the Supreme Court in denying a hearing. Those matters have been finally passed upon under the Constitution, statutes and decisions of this state (People v. Marshall, 209 Cal. 540, 289 P. 629), and in so far as this state is concerned have been held sufficient to support a conviction under the due process of law furnished and established in this state.

[2, 3] Another point which was first raised in appellants' petition for a hearing in the Supreme Court in connection with the former appeal, is that section 13 of article I of the Constitution of this state and section 1323 of the Penal Code are in violation of the fourteenth amendment to the federal Constitution, to the extent that they permit court and counsel to comment on the failure of the accused to explain or deny any evidence or facts in the case against him. These sections authorizing such comment were cited and approved in the case of People v. Perry, 14 Cal.2d 387, 94 P.2d 559, 124 A.L.R. 1123. Moreover, our attention is in no way called to any portion of the record in this case showing that any comment of that nature was here made. It is the duty of appellants to call our attention to matters in the record which are claimed to be erroneous and we should not be expected to search this voluminous record in order to determine whether or not any such thing occurred.

[4] The points above raised were passed upon in connection with the former appeal. As a part of that decision it was necessarily found on review of the record that any errors which may have occurred were not prejudicial and could not have affected the result. This, in itself, was a holding that the fundamental requirement that the due process of law be followed and observed had been complied with. The appellants now contend that such findings and holdings were based upon section 4½ of article VI of the Constitution of California, which reads:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[5] It is then argued that the term "miscarriage of justice", as used in that section, "can only mean the conviction of a person who is probably innocent"; and that, thus construed, this section violates the provision of the fourteenth amendment to the federal Constitution which guarantees a fair trial to every defendant. That section of our state Constitution is not and never has been construed in that manner by the courts of this state. In considering that section shortly after it was originally adopted the court said, in People v. Wilson, 23 Cal.App. 513, 138 P. 971, 975:

> "Under such circumstances we are required to examine the entire cause, including the evidence, and thereby to determine whether the error complained of has 'resulted in a miscarriage of justice.' The phrase 'miscarriage of justice' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the

acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied."

The court then pointed out that in applying this section the matter of guilt or innocence was not to be controlling but, on the other hand, that the matter of how the conviction was obtained was to be considered and the right of the accused to a fair trial under established law and procedure was to be protected. In People v. Mahoney, 201 Cal. 618, 258 P. 607, 610, the court said: "The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the Constitution." In Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 973, it was said:

"Whether the error found to be present 'has resulted in a miscarriage of justice' presents a question of law on the record before the court, and the purpose of the section was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies."

That rule and that construction of section 4½ has been consistently applied in this state and it would serve no useful purpose to cite the many cases so holding.

[6] Section 4½ has for some thirty years served a useful purpose in obviating the necessity for ordering a new trial on account of unimportant errors which could not be expected to affect the result and which have not interfered with the substantial rights of the accused, including the right to a fair trial. But it is substantial rights and orderly procedure in accordance with established rules of law which are involved in applying that section and determining whether due process of law requirements have been met. It is unnecessary to go back to medieval conceptions of technical niceties in passing upon the question as to whether due processes of law have been followed. In every case involving complicated facts and situations, and taking weeks to try, minor errors are almost inevitable. While such errors are to be found in this record they fall within the provisions of section 4½ of article VI of the Constitution of California, as long construed and applied in this state.

[7] It is now further urged that the giving of instructions to the jury outside of the presence of the appellants was a denial of due process of law. It seems to be claimed that the jurors, prior to their empanelment in this case, had in some other department of the trial court been given copies of a printed pamphlet which contained general instructions as to their duties. Again we are pointed to nothing in the record to show what, if anything, occurred in this regard. There is no showing as to what these general instructions were and nothing to indicate whether or not any possible prejudice could have resulted. It cannot be assumed that the fact that some or all of the jurors at some other time had been generally instructed as to their duties, or had received other instructions in some other case, would result in a disqualification or would prevent them from fairly acting under and in accordance with the specific instructions given to them in this particular case.

[8] It is next urged that section 1181, subdivision 6, of the Penal Code is unconstitutional as violative of the fourteenth amendment to the federal Constitution. This statute provides that where the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, either the trial court or an appellate court may modify the judgment accordingly without ordering a new trial. This procedure was followed on the former appeal taken by these appellants. It is now argued that the Constitution of this state provides for a jury trial; that this state has by statute provided that the jury shall fix the degree of the crime, whenever a crime is distinguished into degrees; that when a state provides something "as the sole means of prosecution", to act otherwise would be a violation of due process of law; that the modification of the judgments which was ordered on the former appeal, with the effect of reducing them from first degree murder to second degree murder, was a departure from the procedure thus provided by this state; that this deprived the appellants of their right to have the jury determine the degree of their guilt; and that due process of law has thus been denied them.

Section 1157 of the Penal Code provides "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Subdivision 6 of section 1181 of that code provides, as above noted, that after the degree has been thus found it may be reduced to a lesser degree without ordering a new trial when the evidence warrants that action. This provision has been frequently upheld in decisions in this state, only a few of which need be cited. People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Covington, 1 Cal.2d 316, 34 P.2d 1019; People v. Kynette, 15 Cal.2d 731, 104 P.2d 794; People v. Harvey, 109 Cal.App. 111, 292 P. 654; People v. Connors, 124 Cal.App. 216, 12 P.2d 43. The appellants now contend that in none of these cases has the point been raised or considered that this statute is in violation of the due process clause of the federal Constitution.

The legislature which provided that the jury should in the first instance fix the degree of the crime has, in subdivision 6 of section 1181, also provided that this degree may be reduced by the courts under the circumstances named therein. The same power which made the first provision as a matter of procedure, has modified it through the other statute and provided for a controlling and corrective procedure under certain circumstances. Both are a part of the process of law established in that regard in this state, and the first has not been provided "as the sole means of prosecution" with respect to this matter, but the second has been included as a component part of that means of prosecution.

Not only has due process of law in this regard been here followed and applied, but it is also true that in finding the appellants guilty of murder in the first degree the jury necessarily found against them on every fact involved in and necessary to finding them guilty of murder in the second degree. Even in the first place, the jury was not free to fix either degree as a matter of mere discretion or choice resting with them, but it was their duty to fix it in accordance with the facts as disclosed by the evidence. Their error in performing that duty could be and was corrected on appeal, not by finding or changing any fact, but by applying the established law to the existing facts as found by the jury, the correction itself being in favor of and beneficial to the appellants. In principle, the procedure thus established in this state, and here followed, has been approved by the Supreme Court of the United States. Trono v. United States, 199 U.S. 521, 26 S.Ct. 121, 50 L.Ed. 292, 4 Ann.Cas. 773; Flemister v. United States, 207 U.S. 372, 28 S.Ct. 129, 52 L.Ed. 252; Ocampo v. United States, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231. We find no violation of the federal Constitution in the matter here in question.

[9] The appellants had previously been convicted of felonies for which each was then serving a term in the penitentiary. Under the law of this state, as set forth in section 669 of the Penal Code, the terms of these appellants under the judgments originally entered in this cause would run concurrently with the terms which they were serving under their prior convictions. When judgments were repronounced as for second degree murder in conformance to our decision on the former appeal, the trial court, after sentencing the respective appellants to imprisonment in the state penitentiary for the term prescribed by law, inserted in each judgment the additional clause "which sentence is ordered to run consecutively with sentence defendant is now serving."

Appellants assign this as error, contending that in doing this the trial court did not follow the directions of this court under which the cause was remanded for a further definite proceeding; that the trial court added something to what it was directed to do by this court; and that it had no authority in law to make such an addition to the judgment.

We think this contention must be sustained. On the former appeal the judgments were, in effect, affirmed except that they were modified in the one respect of reducing them from first to second degree murder, and the cause was remanded for the purpose of having that one matter corrected through the entry of proper judgments. The judgments which were then entered were not new and separate judgments, but they were, in law, the same judgments as had been originally entered, modified as ordered on appeal.

Under section 669 of the Penal Code, the direction as to whether the term under a second conviction shall run concurrently with or consecutively to the term on a prior conviction may only be made by the trial court within sixty days after the date of entry of the judgment upon the subsequent conviction. We think this provision must be construed here as applying to the date when these judgments were first entered and pronounced, and that the remanding of this cause for the purpose of carrying out the one modification which was ordered could not and did not have the effect of extending the time within which the trial court could act in the respect now under consideration, and that it did not authorize or empower the trial court to add anything of this nature to the judgments which had already been approved as modified.

The judgments entered as to these appellants, respectively, are modified by striking from each of said judgments the words "which sentence is ordered to run consecutively with sentence defendant is now serving". As so modified, the judgments are and each of them is affirmed.

I concur: GRIFFIN, J.

MARKS, J., not having heard the argument, did not participate herein.

44 Cal.App.2d 147

PACHECO v. CLARK et al.

Civ. 6473.

District Court of Appeal, Third District, California.

April 11, 1941.

Hearing Denied June 9, 1941.

1. Officers 🔑72(1)

Record of proceedings for dismissal of captain in highway patrol *held* to show sufficient observance of statutory requirements. Pol.Code, § 360c(m–*o*); Vehicle Code, § 802, St.1935, p. 247; St.1929, p. 252, § 14.

2. Mandamus 🔑168(4)

In proceeding for writ of mandate to compel restoration to civil service position as captain in highway patrol, evidence *held* to warrant finding that dismissal of plaintiff was not effected by fraud or bad faith. Pol. Code, § 360c(m–o); Vehicle Code, § 802, St. 1935, p. 247; St.1929, p. 252, § 14.

3. Appeal and error 🔑996

Even though two or more inferences could be reasonably deduced from the evidence, reviewing court is without power to substitute its deductions for those of the trial court.

4. Limitation of actions 🔑100(1)

A proceeding for writ of mandate to compel restoration of dismissed captain in highway patrol, based on fraud in the dismissal proceeding, was barred by limitations when trial court's finding that fraud was discovered more than three years before institution of the proceeding was not attacked. Code Civ.Proc. § 338, subds. 1, 4.

5. Mandamus 🔑143(2)

One seeking mandamus to compel reinstatement to a civil service position from which he has been dismissed must act promptly.

6. Mandamus 🔑143(2)

The defense of "laches" in proceeding for writ of mandate to compel reinstatement to civil service position involves more than the element of delay, and it must appear that prejudice has resulted and if so, a satisfactory explanation for the delay is required.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

7. Mandamus 🔑143(2)

Where proceeding for writ of mandate to compel restoration of dismissed captain in highway patrol was brought more than five years after the dismissal, and meanwhile salary had been paid to others filling the same position, and satisfactory excuse for delay was not shown, proceeding was barred by "laches".

8. Mandamus 🔑143(2)

In determining whether prejudice resulted from delay in bringing proceeding for writ of mandate to compel restoration to an active civil service position, so as to show laches, it may be presumed that someone else has been chosen to take the dismissed employee's place.

9. Mandamus 🔑143(2)

In proceeding for writ of mandate to compel restoration of dismissed captain in highway patrol, fact that earlier mandamus proceedings were dismissed in consideration of favorable action by state personnel board reinstating petitioner did not "estop" respondents from raising defense of laches, where the reinstatement was invalid because civil service commission had exhausted its power by approving the dismissal. Pol. Code, § 360c(*o*).

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

10. Estoppel ⚿62(2)

The doctrine of estoppel should not be lightly invoked where the state is involved.

11. Officers ⚿103

An agency such as the state personnel board may not sit in review of its own orders, or vacate or annul them, in absence of statutory authority.

12. Officers ⚿103

Clear intention of Legislature to vest an agency with continuing jurisdiction with power to alter or modify its orders must appear, and, in absence of provision allowing commission to change its determinations, right to do so is usually denied.

13. Officers ⚿103

The statute providing that decisions of civil service commission, later the state personnel board, should be final and not subject to review by any other tribunal, merely deprived other tribunal of right of review, and did not grant such power to the state personnel board. St.1929, p. 252, § 14.

14. Officers ⚿72(2)

The statute providing that one holding position under Civil Service Act may be "restored to his position" merely grants power to restore one who has been suspended pending a hearing, and does not imply intent to give the civil service commission power to review its own decision removing one from his position. St.1937, p. 2112, § 244.

See Words and Phrases, Permanent Edition, for all other definitions of "Restore to his Position".

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Proceeding by John Pacheco against Frank W. Clark and others, for writ of mandate directing Director of Motor Vehicle Department and another to restore petitioner to position as captain in highway patrol. From a judgment denying the writ, petitioner appeals.

Affirmed.

Joseph Scott, of Los Angeles, and John J. Jones, of San Jose, for appellant.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

HELD, Justice pro tem.

Appellant, on August 15, 1929, acquired civil service status as a captain in the California highway patrol, and was assigned for duty to the county of Santa Clara. On February 19, 1932, he was dismissed from the service, which dismissal he contends was accomplished illegally and through fraudulent means. From a judgment denying him a peremptory writ of mandate directing the director of the motor vehicle department and the chief of the California highway patrol to restore him to his former position he appeals.

On December 22, 1931, one Thomas O'Brien filed with the department of motor vehicles, division of enforcement, a verified complaint against appellant, wherein the latter was charged "with intemperance, and other failure of good behavior incompatible with and inimical to the public service of the State of California". Specific particulars of misconduct were set forth in the complaint, a copy of which was served on appellant. On December 26, 1931, he filed an answer denying the charges. The chief of the division of enforcement, on January 12, 1932, designated a trial board of officers of rank equal or superior to that of appellant. A public trial was had at the court house in Salinas in the county of Monterey, on January 29, 1932, at which trial appellant was present and represented by counsel, and evidence was presented. On February 5, 1932, said trial board unanimously found petitioner "guilty of conduct unbecoming an officer and other failure of good behavior incompatible with and inimical to the public service of the State of California", and specifying the particulars of such misconduct. The findings of the trial board were submitted to the chief of the division of enforcement, and the latter, on February 10, 1932, transmitted to the civil service commission his decision, finding petitioner guilty and ordering his dismissal from the service. On February 19, 1932, the civil service commission approved such decision. Appellant, on the 7th day, of February, 1935, instituted a proceeding in the superior court for Santa Clara county, seeking to be reinstated in his position on the grounds now urged herein. That proceeding was later transferred to the superior court for the city and county of San Francisco. On August 26, 1936, appellant filed with the state personnel board (successor to the civil service commission) an application for reinstatement, and at a meeting of that board held on December 29, 1936, a motion prevailed that petitioner be reinstated, in consideration of which action by the board appellant, on January 22, 1937, dismissed the mandamus proceedings then pending in the city and county of San Francisco. The state personnel board, on February 16, 1937, made an order awarding appellant the sum of $1,500 as salary for the period that elapsed between his dismissal and his purported reinstatement. The respondents having failed to assign appellant to a position as captain in the department, this action was filed on April 20, 1937.

Until repeal thereof in 1935 (Stats. 1935, p. 247), subdivisions m, n, and o of section 360c of the Political Code (Stats.1931, pp. 1044, 1045) provided for the trial of members of the California highway patrol charged with violation of section 14 of the Civil Service Act (Stats.1929, p. 252). The statute provided that proceedings be instituted by the filing of a verified complaint; that the accused have a fair and impartial public trial and hearing before a trial board designated by the chief of the division of enforcement, and to consist of three officers of rank equal or superior to that of the accused. The hearing was required to be held in the county in which the offense charged is alleged to have occurred and at a place designated by the chief of the division of enforcement. The accused had the right to appear in person or by counsel. Findings of the trial board were required, and these were to be transmitted to the chief of the division of enforcement for his decision, and thereafter to the civil service commission for its approval.

[1] The record here establishes a meticulous observance of the requirements of the statute, and appellant's contention that his dismissal was not legally accomplished cannot be sustained.

[2, 3] Nor do we find any merit in appellant's attack on the finding of the trial court that his dismissal was not effected by either fraud or bad faith on the part of the trial board or of the director of the department of motor vehicles, or of the chief of the California highway patrol. The testimony of two witnesses, Dr. H. Dewey Anderson, and Honorable C. C. Cottrell, the legislative representative from the assembly district wherein appellant resided, and who had actively interested himself in the case of appellant, are relied on by appellant to establish fraud. We find nothing, however, in the testimony of these witnesses that supports the allegations of the petition specifying the items of fraud there set out. On the contrary, the evidence produced by respondents is conclusive that no fraud existed in the proceedings. It was affirmatively shown that the members of the trial board entered upon the discharge of their duties without any prior opinion as to the merits of the case; that they were not approached by the chief of the division of enforcement or anyone else, nor given any instructions by anyone to find appellant guilty regardless of the evidence. An examination of the record compels the conclusion that appellant had a fair trial by an impartial trial board, not influenced by any extraneous circumstances. The finding of the trial court that the dismissal of appellant was not accomplished by fraudulent means is amply supported by substantial evidence. Even though two or more inferences could be reasonably deduced from the evidence, this court is without power to substitute its deductions for those of the trial court. Cummings v. Kendall, 41 Cal.App.2d 549, 107 P.2d 282.

[4] Furthermore, assuming that appellant's action is based on fraud, this proceeding is barred by subdivision 4, section 338 of the Code of Civil Procedure. The order dismissing appellant was made on February 19, 1932. This proceeding was instituted on April 20, 1937, and the petition recites that the fraud alleged was not discovered within three years prior thereto. The trial court found this allegation to be untrue, and such finding is not attacked by appellant. If this proceeding is based upon a statute, it is barred by the provisions of subdivision 1 of section 338. Raymond v. Christian, 24 Cal.App.2d 92, 74 P.2d 536.

[5-8] Respondent contends that petitioner is guilty of laches herein. It is settled that one who seeks the remedy of mandamus to compel his reinstatement to a civil service position from which he has been dismissed must act promptly. Hay-

man v. City of Los Angeles, 17 Cal.App. 2d 674, 62 P.2d 1047. But the defense of laches involves more than the element of delay. It must appear that prejudice has resulted, and, if so, a satisfactory explanation for the delay is required. Brown v. State Personnel Board, 43 Cal.App.2d 70, 110 P.2d 497. The element of delay is present here, more than five years having elapsed between the dismissal of appellant and the date of the institution of these proceedings. As to prejudice resulting from the delay, it may be presumed, as was said by the court in Hayman v. City of Los Angeles, supra [17 Cal.App.2d 674, 62 P.2d 1050], "that, where one has been dismissed from an active position in the public service, some one else has been chosen to take his place. The work has to be done and it has to be paid for". Curtin v. Board of Police Commissioners, 74 Cal.App. 77, 239 P. 355. The evidence here shows that between the date of dismissal of appellant and the filing of the petition herein there was paid as salary to others filling the position the sum of $14,164.40, and thereafter and to the date of trial, on October 18, 1939, the further sum of $7,506.02. Petitioner lays claim herein to $1,500 as compensation to December 26, 1936, and at the rate of $250 per month thereafter. Whatever he might eventually receive in the event of reinstatement would be for services which he had not rendered, but which had been performed by others, who had been compensated therefor. The element of prejudice to the state therefore appears herein. It remains to be seen whether a satisfactory excuse for the delay is shown. After his dismissal, appellant made several ineffectual attempts to interview the director of motor vehicles to seek to obtain his approval of appellant's reinstatement. At no time, however, did he request Chief Cato to reinstate him, nor was he given any encouragement by anyone else until long after the time to institute legal proceedings had passed. Due to the efforts of Assemblyman Cottrell and the Santa Clara county delegation in the state legislature on behalf of appellant, a legislative investigation of his case was had in 1936. Several conferences were held between various officers of the department of motor vehicles and Mr. Cottrell, the latter acting in the interest of appellant. Chief Cato, however, at no time agreed to the reinstatement of appellant. And Director Ingels, in June, 1936, wrote to Mr. Cottrell: "I cannot understand why this matter was not taken to the courts immediately and settled instead of dragging on for these many years." At one conference, held in the latter part of July or early in August, 1936, at the request of Governor Merriam, there were present Governor Merriam, Director Ingels, Chief Cato and Mr. Cottrell. The Governor suggested a compromise of the controversy in which appellant was involved, and that an application for reinstatement be made by him. Pursuant to this suggestion, appellant, on August 23, 1936, four and one-half years after the order of dismissal was made, filed with the state personnel board an application for reinstatement, which application resulted in the action by the board heretofore stated. In our opinion neither the activities of appellant or of others in his behalf, during the time that elapsed between his dismissal and the institution of the present proceedings nor the filing of the mandamus proceedings in Santa Clara county, nor the dismissal thereof, furnish a satisfactory excuse for the delay in seeking redress herein. The appellant was clearly guilty of laches.

[9, 10] Nor are respondents estopped to urge the defense of laches by the circumstance that the dismissal of the earlier mandamus proceedings was made in consideration of the favorable action by the state personnel board on December 29, 1936. The doctrine of estoppel where the state is involved should not be lightly invoked. Taylor v. Spear, 196 Cal. 709, 238 P. 1038; Sacramento, etc., Drainage District v. Riley, 194 Cal. 624, 229 P. 957. Furthermore, if, as respondents contend, and we think correctly, the civil service commission by its approval of appellant's dismissal on February 19, 1932, had exhausted its power to further act in the matter, the outcome of the earlier litigation could not have been otherwise than adverse to appellant. He therefore suffered no detriment by the dismissal of the proceedings.

Subdivision *o* of section 360c of the Political Code, in effect at the date of appellant's dismissal, provided that when the decision of the chief of the division of enforcement is approved by the civil service commission, it shall be final. Here the decision was so approved.

[11] That an agency such as the state personnel board may not sit in review of its own orders, or vacate or annul them, in the absence of statutory authority, is well set-

tled. In Olive Proration Program Committee v. Agricultural Prorate Commission, 17 Cal.2d 204, 109 P.2d 918, 921, the court said:

"Almost without exception, courts have held that the determination of an administrative agency as to the existence of a fact or status which is based upon a present or past group of facts, may not thereafter be altered or modified."

[12] And where the intention of the legislature is clearly to vest an agency with a continuing jurisdiction with power to alter or modify its orders, that fact must appear. As was said in the Olive Proration case above cited: "Since all administrative action must be grounded in statutory authority, in the absence of a provision allowing a commission to change its determinations, courts have usually denied the right so to do."

To the same effect is the case of Heap v. City of Los Angeles, 6 Cal.2d 405, 57 P.2d 1323, and Proud v. McGregor, 9 Cal.2d 178, 70 P.2d 194.

[13] Appellant contends that a legislative grant of continuing authority to the civil service commission (now the state personnel board) is found in the language of section 14 of the Civil Service Act (Stats.1929, p. 252) as it stood prior to its repeal in 1937. (Stats.1937, p. 2112.) It was there provided that the decisions of the commission shall be final and not subject to review by any other tribunal. It is the contention of appellant that finality attended such decisions, only so far as another tribunal was concerned, and that this language expressly gave to the commission the power of review. We do not so construe this language. It merely deprives any other tribunal of that right, without a grant thereof to the state personnel board. It is questionable, too, whether in a case such as this, where the trial procedure is laid down by the Political Code for a particular class of public servants, the provisions of the Civil Service Act as to trial procedure have any application.

[14] Section 14 of the Civil Service Act provided also that the tenure of one holding a position under the Civil Service Act shall be during good behavior, but such person may be removed, demoted, suspended, transferred to another position, reprimanded, or restored to his position. Appellant contends that the words "restored to his position" imply an intent on the part of the legislature to vest the civil service commission with the power of review of its own decision removing one from his position. Those words clearly do not have that effect; they grant merely the power to restore one who has been suspended pending a hearing of charges, which suspension is authorized by section 14.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

44 Cal.App.2d 220

UNION SUPPLY & MILLING CORPORATION et al. v. CITY OF LOS ANGELES et al.

Civ. 12867.

District Court of Appeal, Second District, Division 2, California.

April 15, 1941.

Electricity ⚷19(5)

In action by owner of milling plant and insurers for fire damage allegedly caused by defendants in negligent tests and alteration of electrical appliances, evidence sustained finding that milling plant was not guilty of contributory negligence in violation of city ordinance prohibiting the accumulation of explosive or inflammable dust in quantities sufficient to create a fire, or explosive hazard on electric motors.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by the Union Supply & Milling Corporation and others against the City of Los Angeles and others for fire damage. From a judgment in favor of the plaintiffs, the defendants appeal.

Judgment affirmed.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Everard L. McMurrin, Deputy City Atty., all of Los Angeles, for appellants.

Thompson & Thompson, of Burbank, for respondents Potomac Ins. Co., American Home Ins. Co. and Capital Fire Ins. Co.

Hindman & Davis, of Los Angeles, for respondent Union Supply & Milling Corporation.

WOOD, Justice

This appeal is by defendants from a judgment in plaintiffs' favor in the total sum of $7,000 for damages resulting from the burning of an alfalfa milling plant.

Plaintiff Union Supply and Milling Corporation was the owner of a milling plant used in the manufacture of alfalfa meal through the processing of alfalfa hay. Electricity was furnished by defendants for lighting and power purposes in the operation of the mill, defendant Laner being the employee of the other defendants and the person whose negligence caused the fire. For the purpose of furnishing electricity defendants supplied, constructed, installed and maintained the necessary wires, transformers, meters and testing devices. The fire resulted from the negligence of defendant Laner in performing certain tests and alterations in and about these instrumentalities while the mill was in operation. The plaintiffs other than Union Supply and Milling Corporation are insurance companies which have derived their rights in the litigation through subrogation.

Defendants alleged that the plaintiff milling corporation was guilty of contributory negligence but the trial court found adversely to them on this contention. The only contention made by appellants on appeal is that this finding of the court is not supported by the evidence. Defendants introduced in evidence an ordinance of the City of Los Angeles in which it is provided: "(A) No person shall permit the accumulation of any explosive or inflammable dust in quantities sufficient to create a fire or explosion hazard on electric motors, walls, ledges or other interior surfaces on which dust may settle. Metallic dust shall be stored in a cool, dry place. (B) Every plant, factory, workshop or other premises in or by which inflammable or explosive dust is created or produced shall be equipped and maintained with an approved pneumatic or mechanical dust-collecting system, so installed, maintained and operated as to keep free from all hazardous accumulation of dust all parts of such premises including all enclosed and inaccessible areas and spaces, excepting only storage bins equipped with explosion vents of sufficient area to release any explosion occurring from the presence of dust accumulation to the outside atmosphere or to an upper story of the building in which such bins are located, which is vented to the outside atmosphere." It is now argued that the milling company did not comply with the terms of this ordinance.

The record discloses a conflict in the evidence on the question whether the milling corporation complied with the terms of the ordinance and whether any negligence was shown in the operation of the mill. Evidence was introduced on behalf of the milling company to show that no accumulation of explosive or inflammable dust was permitted, that the plant was equipped with a proper dust-collecting system which was properly operated and that the plant was kept in a clean condition. The witness Hoffman, an expert of 20 years' experience, testified that the dust-collecting system used in the mill was the system usually and ordinarily installed in mills of the kind and that it was 99 per cent efficient, it being impossible to entirely prevent the escape of some dust into the air by the use of the most modern and efficient appliances. The findings are supported by the evidence.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

17 Cal.2d 812

PEOPLE v. HAWK.

Cr. 4337.

Supreme Court of California.

April 23, 1941.

1. Homicide ⚷18(3, 5)

Under the statute every murder committed in the perpetration or attempt to perpetrate robbery, or burglary, is "murder of the first degree". Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder of the First Degree".

2. Criminal law ⚷980(2)

In prosecution for murder, evidence sustained finding of trial court that defendant was guilty of murder in the first degree. Pen.Code, § 189.

3. Criminal law ⚷980(2)

It was the exclusive province of the trial court to determine whether the death penalty or life imprisonment should be imposed on one guilty of murder in the first degree. Pen.Code, § 189.

Appeal from Superior Court, Yolo County; J. G. Bruten, Judge.

Eldon Richard Hawk was convicted of murder in the first degree, and he appeals.

Judgment affirmed.

Neal Chalmers, of Woodland, and A. R. Dunn, of Neosho, Mo., for appellant.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and C. C. McDonald, Dist. Atty., of Woodland, for respondent.

PER CURIAM.

In an information filed by the district attorney of Yolo county, the defendant Hawk and one Winfield Barnes were jointly charged with the murder of Lee Arris, an elderly man. Each defendant entered a plea of guilty, whereupon the court below received evidence to assist in the determination of the degree of the homicide. Following an extended hearing, at which both defendants were represented by counsel, the court decided that the offense was murder of the first degree and sentenced the defendant Hawk to death and the defendant Barnes to life imprisonment. Defendant Hawk alone appeals.

At the hearing considerable evidence was adduced as to the circumstances surrounding the commission of the crime. The 245-page transcript of the evidence has been examined. It affords ample support for the judgment and sentence imposed upon appellant. Briefly, it appears therefrom that appellant, who is twenty-six years of age, learned from a friend that the deceased, who lived in a cabin at Knights Landing with a young boy, appeared to have plenty of money about his person or cabin, much of which apparently was being expended for liquor. There was some discussion as to the possibility of "rolling" the deceased or otherwise relieving him of his money. Nothing came of this particular discussion. On the night of the homicide appellant attended a theater in Woodland with three other young men. During the course of the evening appellant mentioned "an old man had some money over there" that he was going to take. Additional discussion of the subject followed, during which appellant referred to a taped hammer handle which he possessed and obviously intended using in the event it should be needed to accomplish the announced objective. It further appears that appellant and his accomplice, Barnes, whom he had met for the first time that evening, later left the automobile in which the quartet was returning from the theater and went to the deceased's cabin. Appellant admitted taking the taped hammer handle with him in the event it should be needed to "knock [deceased] loose with it". The other two men returned to town, parking the car where directed by appellant. Appellant entered the deceased's cabin while Barnes remained close by as a "lookout". The visit to the cabin was timed to coincide with the temporary absence of deceased's youthful companion. Appellant admittedly expected to find the aged victim either asleep or in a drunken stupor, thus making the commission of the robbery comparatively simple. Instead, as appellant entered he came upon the deceased who was moving about the cabin. Some discussion as to money was had in which appellant admittedly said "hand it over". The request was not complied with and a fight ensued in which appellant struck deceased on the head several times with a taped hammer handle. In the scuffle the old man's wallet was taken by appellant or his accomplice, each charging that the other took it. The taking is the only material fact. Both men fled the scene, thereafter burying portions of their clothes or weighting them down with a sandbag and throwing them in a river. Shortly after the assault deceased's companion returned and found him "in a mess of blood". Assistance was procured and the victim was rushed to a hospital where an emergency operation was performed. He died, however, the following morning. Medical testimony disclosed that deceased had twelve or fifteen lacerations on the top of his head and a fractured skull, the brain itself being cut and torn.

[1-3] Section 189 of the Penal Code provides that "All murder * * * which is committed in the perpetration or attempt to perpetrate * * * robbery [or] burglary * * * is murder of the first degree * * *." See People v. Reid, 193 Cal. 491, 496, 225 P. 859. Under the evidence the court properly found that the crime was murder of the first degree. It was exclusively within the province of the court to determine whether the death penalty or life imprisonment should be imposed. Undoubtedly the court was influenced to impose the death penalty in defendant's case by the fact that he was not only the instigator of the visit to deceased's cabin but actually struck the fatal blows.

The judgment is affirmed.

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17 Cal.2d 762

WORTLEY v. WOOD–CALLAHAN OIL CO., Limited, et al.

L. A. 17039.

Supreme Court of California.

April 21, 1941.

1. Executors and administrators 🔑56

The administratrix of estate of deceased oil and gas lessee, who assigned lease before his death to corporation without reserving any interest therein, has no right or interest as representative of deceased's general creditors in proceeds of sale of oil produced under lease, as deceased had no interest therein at time of his death.

2. Executors and administrators 🔑75

An administratrix represents deceased's creditors and owes fiduciary duty to collect all sums due his estate so that creditors' claims against it may be satisfied, but has no greater rights as such representative than deceased had before his death.

3. Descent and distribution 🔑69
Executors and administrators 🔑56, 423

Where all of oil and gas lessee's interests in lease and royalties thereunder were conveyed by him to corporation during his lifetime, no part of such interests could be reached by his heirs, personal representatives, or creditors after his death, in absence of fraud on creditors by such conveyance.

4. Executors and administrators 🔑56

A reservation of royalty holders' rights in oil lessee's assignment of lease to corporation, which procured court order permitting payment of proceeds of sale of oil produced to such holders, gave administratrix of deceased assignor's estate no right to or interest in such proceeds, as such reservation protected royalty holders as against assignee, between which and such holders there was no dispute.

5. Mines and minerals 🔑79(1)

Purchasers of participating oil royalties or interests from oil lessee issuing such interests are not junior in right to lessee's general creditors.

6. Mines and minerals 🔑79(1)

A royalty interest assigned by oil lessee is more than a mere personal obligation.

7. Executors and administrators 🔑56

The administratrix of estate of deceased oil lessee who assigned lease to corporation before his death cannot assert invalidity of oil royalty interests, issued by deceased in excess of number permitted by corporation commissioner in violation of statute. Corporate Securities Act, St.1917, p. 673.

8. Executors and administrators 🔑59

In action by administratrix of deceased oil lessee's estate for proceeds of sale of oil produced under lease, which deceased assigned to defendant corporation before his death, plaintiff's motion to introduce in evidence file of Superior Court's probate department, containing claims of creditors of estate, was properly denied, as plaintiff had no right to or interest in oil royalties.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Mildred Una Wortley, as administratrix of the estate of S. S. Wortley, deceased, against the Wood-Callahan Oil Company, Limited, for the proceeds of sale of oil produced under a lease assigned by decedent to defendant, which filed a cross-complaint against plaintiff, Rosalie Templar Allen and others. From the judgment rendered, plaintiff appeals.

Affirmed.

Maurice Gordon and Harris & Field, all of Los Angeles, and Everett L. Ball, of Hollywood, for appellant.

Jonah Jones, Jr., of Long Beach, for respondent.

CURTIS, Justice.

Plaintiff and cross-defendant prosecutes this appeal from a judgment of the trial court decreeing that she, as administratrix of the estate of S. S. Wortley, has no right, title or interest in the proceeds from the oil production of a certain oil lease and that the holders of royalty interests under the lease are entitled to receive their proportionate shares of the proceeds derived from the sale of oil and gas produced.

The facts, as stipulated to, are as follows: On December 22, 1930, S. S. Wortley, now deceased, was the owner and holder of a leasehold estate in certain oil land. On that date Wortley obtained a permit from the corporation commissioner authorizing him to issue a total of forty-eight (48) one per cent participating oil interests or royalties; eight (8) one per cent interests to be issued in consideration for the rental of equipment and the remaining forty (40) one per cent interests for cash to the general public.

Thereafter, and prior to July 4, 1932, Wortley assigned to various persons a total of eighty (80) one per cent participating oil interests, ten (10) of which were assigned to the Petrol Corporation as collateral to secure the repayment of a loan. All such assignments over forty-eight (48) one per cent interests were in violation of the corporation commissioner's permit. As a result of these assignments and the twenty (20) one per cent royalty interests retained by the land owner, Wortley divested himself of all of the proceeds from the production of oil and gas and held only the bare leasehold estate, the equipment on the property and a possibility of reverter in the ten (10) one per cent interests issued to the Petrol Corporation. On July 4, 1932, Wortley, by written assignment, assigned all of his interests in the lease to Wood-Callahan Oil Company. The assignment expressly reserved the rights of the royalty holders and provided that on repayment of the moneys due the Petrol Corporation, the ten (10) one per cent interests held by it as collateral security would revert to the Wood-Callahan Oil Company.

After the assignment of the lease and up to the time of Wortley's death, the Wood-Callahan Oil Company distributed the proceeds (other than the land owners' royalties and certain other small per cent interests which were distributed directly) derived from the production of the oil well to Wortley, who, apparently acting as trustee or agent, distributed the proportionate sums to the various royalty holders. By this time the Petrol Corporation loan had been paid off and the Wood-Callahan Oil Company was retaining that ten (10) per cent interest for itself.

After Wortley's death appellant, as administratrix of his estate, demanded that Wood-Callahan Oil Company pay all of the proceeds from the production of the well to her. This demand was refused and the instant action was then instituted to determine the rights of all the parties concerned. Since the commencement of the action the Wood-Callahan Oil Company has been paying the proceeds to a receiver, who is holding all sums received until final disposition of the cause.

[1-3] The determinative question here is whether an administratrix of the estate of an original lessee of an oil and gas lease, claiming as a representative of the general creditors of the deceased lessee, has any right to or interest in the proceeds from the production of oil (oil royalties) under the lease when the lease itself, prior to the death of the original lessee, was assigned to another without reservation of any interest in the lessee. The ruling of the trial court that the administratrix had no interest in the proceeds from production is obviously correct.

The cross-defendants, other than the administratrix of Wortley's estate, are claiming proportionate shares of the proceeds as assignees of royalty interests assigned to them by S. S. Wortley prior to the assignment of the lease. The Wood-Callahan Oil Company, as defendant and cross-complainant, is claiming a reversionary right to ten (10) one per cent interests, the loan to Petrol Corporation having been repaid. The Wood-Callahan Oil Company is further claiming the right, as assignee of the leasehold interest from Wortley, to distribute the proportionate shares of the proceeds of the oil and gas produced directly to the royalty holders. The plaintiff, as administratrix of Wortley's estate, is claiming the proceeds from the royalties as a representative of the general creditors of the original leaseholder.

The assignment of the leasehold by Wortley to Wood-Callahan Oil Company was complete and without reservation of any kind as to Wortley. His estate, therefore, could have no possible interest in or claim to any property related to the leasehold. Yet appellant, as administratrix of this same estate, is claiming proceeds derived from the oil and gas lease. We are unable to conceive of any right or interest that appellant could have that the deceased did not have. Appellant contends that she is not making a claim on the assumption that Wortley had any interest in the leasehold at the time of his death, but that she is claiming as a representative of the general creditors of deceased and in some way has greater rights in that capacity. It is true that an administratrix represents the creditors and that there is a fiduciary duty to collect all sums due the estate so that creditors' claims against the estate may be satisfied. In re Wood's Estate, 143 Cal. 522, 77 P. 481; In re Heydenfeldt's Estate, 117 Cal. 551, 49 P. 713. However, the administratrix can have no greater rights than the deceased had prior to his death. All of Wortley's interests in the lease and royalties having been conveyed during his lifetime, no part of such interests could be reached by his heirs, personal representatives or creditors. Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67; Hibernia, etc., Soc. v. London, etc., Ins. Co., 138 Cal. 257, 71 P. 334. The exception of conveyance by decedent in fraud of creditors is not involved in the instant case, for no such fraud is alleged.

[4] Appellant points to the reservation in the lease reserving the rights of the royalty holders and somehow concludes that that reservation makes the assignment to Wood-Callahan Oil Company immaterial. The reservation protects the royalty holders as against the assignee, but there is no dispute here between the assignee, Wood-Callahan Oil Company, and the royalty holders. In fact, the Wood-Callahan Oil Company is attempting to and did succeed in getting an order from the lower court permitting payment of the proceeds to the royalty holders. Such reservation can give no greater rights to the administratrix of Wortley's estate than he himself had, and he had none.

[5] That the appellant does not recognize the significance or effect of the assignment of the lease is illustrated by her first contention, viz., that "purchasers of participating oil royalties or interests from a lessee of oil land, who is the issuer of such interests, are junior in right to the general creditors of such issuer". In support of this proposition the appellant cites the cases of In re Lathrap, 9 Cir., 61 F.2d 37, and Bank of America National Trust & Savings Association v. Fisher, 9 Cir., 61 F.2d 53. The factual distinction between those cases and the instant one is the very thing that defeats the claim of appellant. There the question arose as a result of bankruptcy proceedings against the lessee, and at the time of the action the lessee held the lease. Here the deceased had nothing at the time of his death. Assuming that the holding in the federal cases was proper and even assuming that the proposition could be applied to the instant case, the federal cases have since been expressly overruled by the case of Laugharn v. Bank of America National Trust & Savings Association, 9 Cir., 88 F.2d 551, 553, wherein the court stated:

> "As the law then stood, this court was presented with two cases involving the nature of royalty interest holder's right whose interest was acquired from a lessee in an oil and gas lease. It was held that neither the owner nor the lessee had any present title to oil in place, and therefore the assignment by the lessee did not convey the present title. [Citing the Lathrap and Fisher cases, supra].
>
> "Thereafter, the Supreme Court of California, in Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 792, 101 A.L.R. 871, considered the same issue and held that after an oil and gas lease, both the lessor and the lessee had an interest in real property capable of asssignment or conveyance. [Citing further authorities.] * * * Therefore, we must and do overrule the prior decisions of this court in so far as they are inconsistent with the settled law of California as adjudged by the California courts."

[6] It is difficult to determine just what appellant's argument really is, but apparently it is dependent on the theory that a royalty interest assigned by a lessee is merely a personal obligation in the nature of a corporation-preferred stockholder relationship, a joint adventurer relationship, or, perhaps, a partnership relationship. The facts of this case do not warrant a full discussion of the exact nature of interest of a royalty holder on assignment from a lessee of an oil and gas lease. It is sufficient to state that such interest is more than a mere personal obligation.

[7] As previously stated, the original lessee, Wortley, issued eighty (80) one per cent royalty interests although he was granted permission by the corporation commissioner to issue only forty-eight (48) one per cent interests. In this regard appellant offers the proposition that as administratrix of Wortley's estate and acting on behalf of general creditors of the deceased, she may assert the invalidity of the oil royalties issued by the deceased in violation of the Corporate Securities Act, St. 1917, p. 673. Again assuming the correctness of such proposition, appellant is defeated in her contention because of the assignment by Wortley of all his interests prior to his death. Appellant cites the federal case of Cecil B. DeMille Productions, Inc. v. Woolery et al., 9 Cir., 61 F.2d 45, in support of her contention. This case, as were the two federal cases cited in support of her first proposition, was a bankruptcy proceeding in which the lessee became insolvent without any assignment of the lease. For the same reason, therefore, the case is not applicable here. Furthermore, this case was referred to and overruled by the Laughran case, supra. The question of invalidity of the royalty interests because of issuance without permit may only arise as between the royalty holders and the Wood-Callahan Oil Company, as assignee of the lease, or others claiming under it. Appellant further cites the case of Julian v. Schwartz, 16 Cal.App.2d 310, 60 P.2d 887, in support of her contention. No better answer can be made to this citation in relation to the instant case than to quote from 16 Cal.App.2d at page 323, 60 P.2d at page 894 of the case itself. It is there stated: "Neither Schwartz nor Mack occupied the position of creditor of Julian in the operation of the wells here in question. The court found and the finding is supported by substantial evidence 'that said C. C. Julian had no interest in the premises * * * at the time of the levy of the execution * * * and at the time of said execution sale.' The question of the invalidity of the participating agreements as the result of failure to obtain a permit from the corporation commissioner, in so far as it may affect the Schwartz claim, becomes immaterial."

[8] Appellant finally contends that the trial court erred in denying appellant's motion to introduce in evidence, as an exhibit and by way of reference, the file of the probate department of the same court containing the claims of creditors in the estate of Wortley. In view of our conclusion that appellant had no right to or interest in the royalties, it follows that there was no error on the part of the trial court in refusing to receive such proffered evidence.

The judgment is affirmed.

We concur: EDMONDS, J.; CARTER, J.; SHENK, J.; TRAYNOR, J.

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17 Cal.2d 753

FRY v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.

BEEBE v. SAME.

S. F. 16548.

Supreme Court of California.

April 18, 1941.

1. Schools and school districts 🔑144(4)

Within the limits fixed by school code, board of education has discretionary control over salaries of teachers.

2. Schools and school districts 🔑144(4)

The legislative limitation requiring boards of education to apply principle of uniformity of treatment concerning salaries for those performing like services with like experience does not prevent boards from making reasonable classifications.

3. Schools and school districts 🔑144(4)

In fixing salaries of school teachers, board of education of city could reasonably classify teachers with teaching experience in city and those with teaching experience outside city.

4. Schools and school districts 🔑144(4)

Resolution of board of education that, in setting salary ratings for incoming teachers, no credit for outside experience should be granted, was within power of board.

5. Schools and school districts 🔑144(4)

Where newly appointed school teachers were granted leaves of absence to end of school year and while they were on such leaves board of education adopted resolution that in setting salary ratings for incoming teachers no outside experience would be credited, duly appointed teachers were not "incoming teachers" within resolution and were entitled to advanced rating based on outside experience, since, when resolution was passed, they were in employ of board of education.

See Words and Phrases, Permanent Edition, for all other definitions of "Incoming Teachers".

6. Schools and school districts 🔑144(4)

Resolution of board of education that, in setting salary ratings for incoming teachers, no outside experience would be credited, would not be construed as applying to teachers who had been employed but were on leaves of absence.

7. Schools and school districts 🔑144(4)

Where, after appointment of six teachers two of whom were granted leaves of absence to end of school year, June 22, 1932, board of education adopted resolution that, in setting salary ratings for incoming teachers, no outside experience would be credited, and in May, 1932, all six were dismissed but were re-employed in August, 1933, action of board of education in refusing to consider outside experience of the two teachers and in denying them advanced ratings and in restoring the other four to their original advanced ratings, based upon their outside experience was arbitrary, unreasonable, violated rules of uniformity and was not justified by the resolution.

8. Schools and school districts 🔑133

A teacher employed but on leave of absence is an "employee" of the board of education.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

9. Schools and school districts 🔑136

The relation between board of education and teacher is that of "employer" and "employee", and the relationship is created by contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer".

10. Schools and school districts 🔑136

The rules and regulations of board of education and resolutions fixing status of teachers are integral parts of contract between board and teachers.

11. Schools and school districts 🔑136

The contract between board of education and teacher is contained in statute, rules, and regulations of board of education, resolution appointing teacher, and resolutions of the board.

12. Schools and school districts 🔑144(4)

Where resolution of the board of education, providing that in setting salary ratings for incoming teachers no outside experience would be credited, was inapplicable to school teachers appointed before adoption of resolution, but assistant director of personnel erroneously informed teachers that resolution applied to them, fact that teachers thereupon accepted employment without credit for outside experience did not defeat right to advanced rating based on outside experience.

13. Action 🔑63

Question of laches must be determined by facts and circumstances of each case.

14. Action 🔑63

Lapse of time short of period provided by statute of limitations will not bar an action unless prejudice to defendant is shown.

15. Mandamus 🔑187(9)

Where resolution of board of education adopted February, 1932, providing that in setting salary ratings for incoming teachers no outside experience would be credited, was improperly applied to teachers appointed prior to adoption of resolution but who were on leaves of absence and who did not commence teaching until after August, 1933, in mandamus proceeding instituted in October, 1937, to compel board of education to give teachers advance ratings based on outside experience, whether teachers acted seasonably and whether board of education and superintendent of schools were prejudiced by the delay were "questions of fact" for the trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

16. Mandamus ⚷143(2)

Where resolution of board of education adopted February, 1932, providing that in setting salary ratings for incoming teachers no outside experience would be credited, was improperly applied to teachers appointed prior to adoption of resolution but who were on leaves of absence and who did not commence teaching until after August, 1933, trial court's determination that teachers' mandamus proceeding instituted in October, 1937, to compel board of education to grant advance ratings based on outside experience was not barred by "laches", was justified where record disclosed that prior to commencement of proceedings the matter was under discussion and it was hoped by all that a compromise could be effected.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

17. Limitation of actions ⚷34(2)

Where teachers re-appointed in August, 1933, were not given advance salary ratings to which they were entitled because of outside experience, but teachers did not institute mandamus proceedings to enforce right to advance ratings until October, 1937, board of education, contending that proceedings were barred by statute of limitations, could not complain of trial court's action awarding teachers back salary and advance ratings for three-year period prior to commencement of proceedings and in holding that balance of teachers' claims was barred.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Separate mandamus proceedings by Clarence G. Fry and by Wallace B. Beebe against the Board of Education of the City and County of San Francisco and others, to compel defendants to classify and rate the plaintiffs, high school teachers, at rating and salary in excess of that granted them by defendants and to compel the payment of back salary, which were tried together. From judgments for plaintiffs, the defendants appealed, and the appeals were consolidated.

Affirmed.

For prior opinion, see 107 P.2d 468.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for appellants.

Daniel R. Shoemaker, of San Francisco, for respondents.

PER CURIAM.

A petition for hearing in this case was granted to the end that further consideration be given to the contentions of the appellants. On such consideration, we agree with the disposition of the appeal by the District Court of Appeal of the First Appellate District, Division One, and adopt as the opinion of this court the opinion of that court prepared by Presiding Justice Peters. It is as follows:

"The defendants, the Board of Education and its members, and the Superintendent of Schools of the City and County of San Francisco, appeal from judgments of the trial court in two mandamus proceedings ordering defendants to classify and rate the two plaintiffs, both high school teachers, at a rating and salary in excess of that granted them by defendants, and awarding both plaintiffs back salary for a designated period at the higher rating. The two cases were tried together, and have been consolidated on appeal.

"The facts are not in dispute. Plaintiffs Fry and Beebe were appointed high school teachers in the San Francisco school department on November 3, 1931, and January 4, 1932, respectively, each being given at that time, in accordance with the then existing rules and regulations of the school department, an advanced rating predicated upon previous teaching experience outside the City and County of San Francisco. Not only were plaintiffs so appointed and rated, but, at that time, they were assigned to particularly designated schools. At the time of their appointment, at their request, they were granted leaves of absence to the end of that school year—June of 1932. The salary schedule then applicable to plaintiffs was one that had been duly adopted by the Board of Education, and which is still in effect. This salary schedule provides for an increase of salary dependent upon years of service. After the leaves of absence were granted, substitutes were appointed to teach in the place of plaintiffs for the balance of that school year.

"While plaintiffs were on their respective leaves of absence, but while they were in the employ of defendants, the Board, on February 16, 1932, adopted the following resolution:

"'Resolved: That the Personnel Department be and is hereby advised that it is the policy of the Board of Education, at present, that in setting salary ratings for incoming teachers, no outside experience will be credited. (This regulation also applies to persons on existing eligible lists not appointed to positions in the San Francisco Public Schools to date.)'

"On February 24, 1932, the plaintiffs were informed by letter from the Assistant Director of Personnel of the school department, Mr. Irving W. Snow, that the resolution had been passed, and that it applied to them, and asking the plaintiffs whether they wanted an assignment on those terms. Both plaintiffs replied that they would accept employment at the reduced salary, but expressed the hope there would be an adjustment.

"On May 4, 1932, both plaintiffs were notified in writing that, effective at the end of that school year, they were discharged from the school department, and they were notified that they would be placed on the eligible list. On August 9, 1933, effective on the 14th of that month, both plaintiffs were again appointed to positions in the school department without credit for their outside experience.

"At the time that plaintiffs were first appointed in 1931, four other teachers were also appointed and assigned to positions in the school department. These four teachers, like Fry and Beebe, had no teaching experience in San Francisco, but, like them, were given an advanced rating for outside teaching experience. Unlike Fry and Beebe these four teachers did not take leaves of absence but taught from the date of their respective appointments until June 30, 1932. These four teachers, just as were plaintiffs, were dismissed in May of 1932. They were likewise re-appointed at the same time as were plaintiffs. These four teachers, however, were not re-employed at a first year's salary rating as were plaintiffs, but were given an advanced rating predicated upon their outside experience. For all practical purposes the only difference between these four teachers and the plaintiffs is that they taught in San Francisco during the period the plaintiffs, although appointed and assigned, were on leaves of absence.

"After the appointment of these four teachers some question arose as to whether, under the resolution of February 16, 1932, they were entitled to the advanced rating predicated solely on outside experience. On August 29, 1934, the Board adopted a resolution interpreting its former resolution. This so-called 'interpretation' was adopted to determine whether these four teachers were legally entitled to advanced ratings. It stated that the resolution 'was not intended to cover, and did not refer to teachers who were already in the Department, and who had been given a rating as in the case of the teachers above mentioned; but applied to incoming teachers'.

"The trial court found, on competent evidence, that plaintiffs, ever since their respective re-appointments, continuously and by diligent means, have endeavored to be restored to their original ratings and to be placed in the same classification as the four teachers above mentioned.

"Based on these admitted facts, the trial court found that plaintiffs were entitled 'under the rules and regulations of respondents then in full force and effect', to be classified at the advanced rating. The court also concluded that the failure of defendants to so classify plaintiffs 'was arbitrary and unreasonable and that said conduct violated the rule of uniformity'.

"Based on these findings, the trial court ordered defendants to classify plaintiffs at the advanced ratings, and gave judgment for plaintiffs for back salary for a period of three years prior to the commencement of these proceedings.

"Defendants discuss at some length the question as to whether the Board could have legally classified the plaintiffs differently from the four teachers who actually taught in the San Francisco schools after their first appointment. That is not the real issue in these cases. The real issue is whether the Board did so classify the plaintiffs. In other words, the real issue is whether, under the rules and regulations of the Board, the plaintiffs were entitled to an advanced rating. The arbitrary action of the Board, as found by the trial court, did not consist in classifying plaintiffs in a different group than the other four teachers, but in interpreting their rules, regulations and resolutions so as to place plaintiffs in a different classification. It is our conclusion that the Board was not justified in refusing to grant to plaintiffs an advanced rating; that under the resolution of February 16, 1932, its interpretation of August 29, 1934, and the rules and regulations of the Board, plaintiffs were legally entitled to the advanced rating.

[1-4] "It must be conceded that, within the limits fixed by the School Code, the Board has discretionary control over the salaries of teachers. Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912; Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029; Id., Cal.App., 34 P.2d 790. However, it must also be conceded that the legislature has enjoined on such Boards, within reasonable limits, the principle of uniformity of treatment as to salary for those performing like services with like experience. This same limitation exists in the rules and regulations of the appellant Board. This limitation, however, does not prevent the Board from making reasonable classifications. There can be no doubt that the Board may reasonably classify between teachers with teaching experience in San Francisco and those with teaching experience outside. There can be no doubt that the resolution of February 16, 1932, was well within the power of the Board in so far as it provided that as to all incoming teachers no credit for outside experience should be granted. It might also be conceded that the Board could, by proper action, classify as between teachers employed, but on leave of absence, and teachers employed and actually teaching. It may be that the Board could have lawfully classified the four teachers who had actually taught in San Francisco prior to June of 1932, in one group, and could lawfully have placed the plaintiffs, who were similarly employed but who were on leaves of absence, in another group. But, as already pointed out, the point is that the Board did not do this. It is our opinion that, under this resolution, and the rules and regulations of the Board, both groups were placed in the same classification. Thereafter, by a purported interpretation of the resolution by the Assistant Director of Personnel, the Board, without changing its resolutions, sought to discriminate against plaintiffs, and arbitrarily refused to grant to plaintiffs the salary rating fixed for them by the rules and regulations.

[5-7] "The resolution of February 16, 1932, is not ambiguous on the basic question here involved. The resolution states that it is to apply only to 'incoming teachers', and that as to them, and as to them alone, 'no outside experience will be credited'. Then, apparently, so that no confusion would result, it was added in parenthesis that the regulation applies to persons on the eligible lists 'not appointed to positions in the San Francisco Public Schools to date'. Obviously, the plaintiffs were not 'incoming teachers', because at the time the resolution was passed they were in the employ of the Board. If they became 'incoming teachers' by virtue of their subsequent dismissal and their later re-employment, so did the four other teachers who were likewise subsequently dismissed and later re-employed. There is not one word in the resolution indicating that it was intended to apply to teachers who had been employed but were on leave of absence. To interpret the resolution as do defendants, is to write into the resolution something that is not there. That this interpretation of the resolution is the proper one, is strengthened, if not conclusively demonstrated, by three other factors:

[8] "1. The explanatory clause added to the resolution states that the resolution not only applies to 'incoming teachers', but also 'to persons on existing eligible lists not appointed to positions in the San Francisco Public Schools to date'. In this case the record shows, and the trial court found, that not only had plaintiffs been appointed, but also that they had been assigned to particularly designated schools at the time the resolution was passed. The explanatory clause definitely eliminates plaintiffs from the operation of the resolution. A teacher employed but on leave of absence is, nevertheless, an employee of the Board. Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26; Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042. It has been held that in determining a teacher's seniority rights, the relation of employer and employee continues to exist although the teacher is on leave of absence, and that a teacher on leave of absence is within the terms of a resolution retaining 'the "present staff of teachers"'. Ryan v. Burk, 25 Cal.App.2d 342, 77 P.2d 224, 225.

"2. After the resolution had been passed, and after plaintiffs and the other four teachers had been re-employed, the

Board, on August 29, 1934, attempted to 'interpret' the resolution. At that time the Board approved the interpretation of the chairman of the legal committee that the resolution 'was not intended to cover, and did not refer to teachers who were already in the Department, and who had been given a rating as in the case of the teachers above mentioned; but applied to incoming teachers'. The teachers 'above mentioned' were the four teachers who were appointed at the same time as respondents. This interpretation was undoubtedly correct. But, in applying it, the Board discriminated against plaintiffs, who, so far as the resolution is concerned, were placed in the same class with the four other teachers.

"3. The legal adviser of the board, in June of 1937, in a formal opinion to the board dealing with this controversy, gave it as his opinion that 'the facts as disclosed by the records conclusively show that as a matter of equity and justice, this teacher (Mr. Fry) has a valid claim. There appears to be no authority whatsoever for Mr. Snow's interpretation of the February 16, 1932, resolution, which he interpreted to mean that a teacher who has been *appointed* to the department on a definite rating based on creditable outside experience and granted a leave of absence, was to come within the purview of the February 16th resolution. To so hold would be reading into that resolution something which was not mentioned.

" 'There is no doubt that Mr. Fry was "appointed" to the San Francisco School Department in November, 1931; that the resolution of February 16, 1932, abolishing previous teaching experience was expressly applicable to teachers not as yet "appointed"; that teachers on leaves of absence were already in the School Department. Therefore, Mr. Fry should not have been reduced in his rating * * *.' These conclusions of the legal adviser are sound.

[9-11] "Defendants contend that the ordinary rules of contract apply to a teacher, and that, since plaintiffs accepted their reduced rating, they are barred from now questioning its validity. While it is true that the relation between the Board and a teacher is that of employer and employee, and that this relationship is created by contract, the terms of that contract are to be found in the authority granted the Board by law. Martin v. Fisher, 108 Cal.App. 34, 291 P. 276. The rules and regulations of the Board, and the resolutions of the Board fixing the status of teachers, are integral parts of that contract. The contract is contained in the statutes, the rules and regulations of the Board, the resolutions appointing plaintiffs, and the resolutions of the Board. Certainly, it cannot be contended that the Board can fix the status of a teacher by its rules and regulations, and by resolution, and then by a letter from an employee improperly interpreting the resolutions, claim that the status is different from that fixed by the rules and regulations and by the resolution. In this case, when plaintiffs were first employed, they were properly given advanced ratings. It is admitted that, under the then existing rules and regulations, plaintiffs were lawfully entitled to such ratings. If we are correct in our conclusion that the resolutions of February 16, 1932, and of August 29, 1934, did not apply to plaintiffs, then it must be a fact, as found by the trial court, that, under existing rules and regulations, plaintiffs were entitled to the advanced ratings. These rules and regulations constitute, and are part of, the contract of the parties, and under them plaintiffs were entitled to the advanced ratings.

[12] "The fact that Snow, the Assistant Director of Personnel, erroneously informed plaintiffs that the resolution of February 16, 1932, applied to them, and that plaintiffs stated that, if that were necessary, they would accept the lower ratings, cannot serve to change the terms of the contracts of the parties as fixed by the rules and regulations. Snow erroneously interpreted the resolution, informed plaintiffs of his erroneous conclusion, and on that basis the plaintiffs 'accepted' the reduction. Their rights were fixed not by that correspondence but by the rules and regulations of the Board.

[13-16] "Defendants also urge that plaintiffs' claims for back salary are barred by laches, and by the statute of limitations. The trial court awarded plaintiffs back salary for three years prior to October 29, 1937, the date this proceeding was instituted. So far as laches is concerned, the question must be determined by all the facts and circumstances of each case. Lapse of time short of the period provided by the statute of limitations will not bar an action unless prejudice to the defendant is shown. The applicable principles are exhaustively considered, and the cases cited

by defendants are distinguished, in La Shells v. Hench, 98 Cal.App. 6, 276 P. 377. Whether plaintiffs acted seasonably, and whether defendants were prejudiced by such a delay, were questions of fact for the trial court. The record shows that prior to the commencement of these actions the matter was under discussion, and that it was hoped by all concerned that a compromise could be effected. It was after all hope of a compromise had failed that these actions were brought.

[17] "It is also urged that plaintiffs' causes of action were barred by the statute of limitations. The trial court awarded plaintiffs back salary at the advanced ratings for a period of three years prior to the commencement of the actions, and held that the balance of their claim was barred. This was the minimum period that the court could have awarded. (Rosborough v. Shasta River Canal Co., 22 Cal. 556; Raymond v. Christian, 24 Cal.App.2d 92, 74 P.2d 536.)"

For the foregoing reasons the judgments appealed from are affirmed.

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17 Cal.2d 775

FRENCH v. FRENCH.

L. A. 17420.

Supreme Court of California.

April 21, 1941.

Rehearing Denied May 17, 1941.

1. Divorce 🔑249(3)

Pay which husband would receive in the future as a member of the Fleet Reserve of the United States Navy for future services was compensation for demands the government would make upon the husband in the future and was not a "pension", and was not subject to division, in wife's divorce action, as "community property" of the parties. Act Cong. Aug. 29, 1916, 39 Stat. 590; Naval Reserve Act of 1938, §§ 1, 206, 34 U.S.C.A. §§ 853, 854e.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property" and "Pension".

2. Divorce 🔑286

Where the trial court erred in granting one-half of certain pay to be received by husband in the future to wife in her divorce action as community property, that portion of the decree could not be sustained on ground that an equivalent amount might have been awarded to the wife as allowance for support. Civ.Code, § 139.

3. Divorce 🔑249(3)

Pay received by husband as member of Fleet Reserve of the United States Navy, up to time of dissolution of marriage by final decree of divorce, was required to be considered as "community property" in fixing property rights of parties. Act Cong. Aug. 29, 1916, 39 Stat. 590; Naval Reserve Act of 1938, §§ 1, 206, 34 U.S.C.A. §§ 853, 854e.

4. Divorce 🔑249(3)

"Retired pay" to be received by husband after and in event he should serve in the Fleet Reserve of the United States Navy for 14 years was not subject to division in wife's divorce action as "community property" of the parties. Act Cong. Aug. 29, 1916, 39 Stat. 590; Naval Reserve Act of 1938, §§ 1, 206, 34 U.S.C.A. §§ 853, 854e.

5. Divorce 🔑287

Where trial court erroneously granted one-half of certain property to wife as community property which required reversal of that portion of wife's divorce decree, the wife was entitled to new trial on issue of division of community property and provision to be made for wife's support, and upon further consideration of the needs of each of the parties and property owned by them, trial court should make such determination of property rights of the parties as might seem proper.

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Maxine K. French against Charles Edward French for divorce. From that portion of the decree in favor of the plaintiff, which divided equally between the parties as community property, the husband's reserve pay, pension, or retired pay to be received by him for services in the United States Navy, the defendant appeals.

Portion of decree appealed from reversed, with directions.

Prior opinion, 105 P.2d 155.

Adam Thompson and Renwick Thompson, both of San Diego, for appellant.

Morris Binnard, of San Diego, for respondent.

EDMONDS, Justice.

In awarding the respondent an interlocutory decree of divorce, the court included in the community property of the parties the husband's "reserve pay, pension or retired pay" to be received by him "for services in the United States Navy" and divided such pay equally between them. The husband has appealed from that portion only of the decree, contending that any amounts received by him will not be in compensation for services previously rendered but, on the contrary, for services presently rendered, and that it is therefore not community property subject to division upon divorce.

It appears from appellant's answer to the complaint that he was in the service of the United States Navy for 16 years, and at the time the court made its decree had been transferred from active service to membership in the Naval Reserve. Although under former statutes the compensation of members of the Naval Reserve was referred to as "retainer pay" (39 Stats. at Large, Chap. 417, p. 590), and has been said to be compensation "for the obligation on the part of such members to serve in the Navy in time of war or national emergency" (Sawyer v. United States, 2 Cir., 10 F.2d 416, 421), the Naval Reserve Act of 1938, U.S.C.A. Title 34, sec. 852 et seq., dropped that expression and uses the term "pay". Unquestionably, this change in language was made in order to more accurately designate the character of the compensation provided for by the later enactment.

[1] Under the Naval Reserve Act of 1938, supra, the Naval Reserve is "a component part of the United States Navy" and includes the Fleet Reserve. Sec. 853. The appellant, as an enlisted man transferred to the Fleet Reserve, having completed sixteen years of naval service, is entitled to receive, except when on active duty, "pay" based upon the amount he was receiving at the time of transfer. As a member of that organization he may be required to perform not more than two months' active duty in each four-year period; to submit to a physical examination at least once during each four-year period; and to obey its regulations. He is subject to certain training duty and may be ordered to active duty, in either of which events his reserve pay will cease and he will receive pay at a higher rate. Sec. 854e. His pay as a member of the Fleet Reserve is compensation for the demands the government makes upon him in these particulars; it is not a pension for services which were entirely performed before the date of his transfer.

The cases of Crossan v. Crossan, 35 Cal. App.2d 39, 94 P.2d 609, and Dryden v. Board of Pension Commissioners, 6 Cal. 2d 575, 59 P.2d 104, are therefore not in point. In the first of these, the husband was a member of the State Employees' Retirement Fund and had rights which were acquired because of deductions made from his earnings during marriage. Aside from other benefits, he was entitled to withdraw a certain amount to be paid from that fund whenever his employment with the state was discontinued. The Dryden case concerned the rights of a policeman in a pension fund to which he had made contributions while he was on active duty. It was held that by the provisions of the city charter, under which that fund was created and maintained, the right to a pension was an integral part of the contract of employment and became a vested right at the time the employment began. The pay which the appellant may receive as a member of the Fleet Reserve is of an entirely different character, and it may or may not continue.

[2, 3] In support of the decree, the respondent urges that, assuming the "reserve pay, pension or retired pay" is not community property, the provision for a division of such amounts as the appellant may receive therefor in the future may be sustained as an allowance for her support under the provisions of section 139 of the Civil Code. But the appellant was not directed to pay a certain sum at stated times, based upon the showing that his rating in the Fleet Reserve would enable him to do this; the court decreed that the community property of the parties included that pay and divided it between them. However, as the respondent asserts, the pay to be received by the husband up to the time of the dissolution of the marriage by a final decree of divorce is the property of the community and should be so considered in fixing the property rights of the parties.

[4] Another point raised by the respondent is that retired pay is community property because it is compensation for services rendered in the past. That is correct, but under the applicable statutes the appellant will not be entitled to such pay until he completes a service of 14 years in the Fleet Reserve and complies with all of the require-

ments of that service. At the present time, his right to retirement pay is an expectancy which is not subject to division as community property.

[5] That portion of the decree appealed from must be reversed. However, because the trial court erred in its determination concerning the community property, the respondent is entitled to a new trial upon the issue of the division of that property and the provision to be made for her support. Upon the further consideration of the needs of each of the parties and the property owned by them, the court should make such determination of the property rights of the parties as may be proper.

It is so ordered.

We concur: GIBSON, C. J.; TRAYNOR, J.; CURTIS, J.; CARTER, J.; SHENK, J.

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17 Cal.2d 768

BURNS v. CAMPBELL.

L. A. 17041.

Supreme Court of California.

April 21, 1941.

Rehearing Denied May 17, 1941.

1. Contracts ⇨92

Where one party to a contract acted while he was weak in mind, arising from illness or other cause, and there was either inadequacy of consideration or circumstances of undue influence and advantage, the contract would be set aside.

2. Deeds ⇨211(1)

In action to cancel deed executed three months after grantor suffered a paralytic stroke, conflicting evidence supported finding that at time of execution of deed grantor was in condition of extreme mental and physical weakness.

3. Deeds ⇨210

In action to cancel deed to ranch on ground that grantor at time of executing deed was in a condition of mental weakness and conveyance was procured by undue influence without consideration, evidence that grantee at grantor's request came to live at ranch, took care of it, and provided transportation for grantor, would not support finding that conveyance was made without consideration.

4. Deeds ⇨210

In action to cancel deed on ground that grantor at time of executing deed was in a condition of mental weakness and conveyance was procured by undue influence without consideration, where it appeared grantee had rendered personal services at grantor's request and in reliance upon her promise to give him the realty, in the absence of evidence as to size or value of property conveyed, there was no evidence upon which court could base a conclusion as to inadequacy of the consideration.

5. Deeds ⇨211(4)

In action to cancel deed to realty on ground that grantor at time of executing deed was in a condition of mental weakness and conveyance was procured by undue influence without consideration, evidence that grantee never requested conveyance, but that grantor made appointment with attorney to have deed prepared, and that, although accompanied by grantee, grantor stated to attorney her desires and how she wished deed drawn, reserving to herself a life estate, would not support finding that conveyance was procured by "undue influence".

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

In Bank.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Jewel W. Burns, etc., against John Henry Campbell to cancel a deed to realty executed by Ollie J. Burns. From an adverse judgment, defendant appeals.

Judgment reversed.

Bordwell, Mathews & Wadsworth and John H. Mathews, all of Los Angeles, for appellant.

Ticknor & Maxwell and Roland Maxwell, all of Pasadena, for respondent.

EDMONDS, Justice.

The appellant complains that findings of fact upon which a judgment was rendered against him in an action to cancel a deed are not supported by the evidence. He asserts that the proof falls far short of the law's requirements in such a case.

About two years after Ollie J. Burns executed the deed in controversy, she was declared incompetent and her guardian commenced this action. Later Mrs. Burns died and the administrator of her estate was substituted as plaintiff.

The complaint charges that although Mrs. Burns at the time of the execution of the deed was not entirely without understanding, she was in an extreme condition of mental and physical weakness and therefore did not understand the nature and effect of the deed; that she received no consideration for it; that she signed it wholly under the influence of the appellant, who had succeeded in gaining her trust and confidence by making her believe that he was to be considered by her as her son who had been drowned in the St. Francis Dam flood disaster; and that at the time of the signing of the deed she was not following the dictates of her own will but was acting wholly under the influence of the appellant.

The facts concerning the relations of Mrs. Burns and the appellant, as related by him when called by the respondent as a witness and in testimony upon his defense, show that they met about four years before the deed was executed. Briefly summarized, these facts are as follows:

For more than twenty-five years George Wood had known Ollie J. Burns, the grantor, and her husband. Mr. Wood had lived near their ranch and was "out there on Sunday and so on for years and years". In 1931, Mr. Wood was in the East, and he and the appellant drove back to California in the latter's automobile. They went to the Burns ranch and, at Mr. Burns' request, stayed with him. Mrs. Burns was not living there when they arrived but Mr. Campbell met her sometime later. In the following year, Mrs. Burns came to the ranch to live.

Mr. Wood's visit continued for a month; the appellant remained almost a year, when he left to go to work as an automobile mechanic in a near-by town. A short time later, Mrs. Burns, accompanied by Mrs. Johnson, came to see him at his place of employment. "She just asked me if I would like to live at the ranch and she said if I did, she wanted me to come back there and live and take her wherever she wanted to go and if I did, she would leave the ranch to me upon her death. * * * I told her I would come down in about a month, I had another month's work. * * *"

It was the fall of 1932 when the appellant returned to the ranch. Apparently it is desert land which has never been financially profitable. In describing his life there, the appellant testified that he did odd jobs around the ranch, plowed the land, repaired the well and the roof of the house, and drove Mrs. Burns wherever she wanted to go, including trips to Lancaster, Bakersfield and Long Beach. When he took her "to town" he used his own automobile and paid for the gasoline. He called her "Mother", but explained that many other people addressed her in that way and "a lot of other people, old ladies up in that country" also were called "mother". She was known as "Ma Burns". He and Mr. and Mrs. Burns lived in the same house, each having a separate room.

The appellant is an automobile mechanic and did repairing for the neighbors and others. He loaned Mrs. Burns some small amounts of money which were repaid, but Mrs. Burns provided his living expenses. She professed a great affection for him, he testified, and he carried out her wants.

Although the respondent claims that Mrs. Burns had been in poor health for some time prior to the execution of the deed, the respondent's charges concerning her physical and mental condition relate largely to the period following November, 1934, when she suffered a stroke.

This occurred while Mrs. Burns was at the ranch. According to the appellant, she stayed in bed a few days, but after that, aside from the fact that she was a little slower in walking and one side of her face was affected, "she was practically the same". He took her to the home of Mr. and Mrs. Naley in Los Angeles, because she needed attention.

Early in 1935, the appellant learned that Mrs. Burns had requested a friend to make arrangements for her to see a lawyer. An appointment was made, and on February 11, 1935, the appellant took her to his office. Mr. and Mrs. Naley accompanied them. This lawyer had never met her before. According to his testimony she explained her business to him by saying that she had always wanted to deed her ranch to Mr. Campbell; he had lived there and helped her and she had no relatives except Mr. Burns with whom she was not living at that time. She also said, the lawyer stated, that she wanted to deed her other property to Mr. and Mrs. Naley, with whom she had lived off and on for fifteen or twenty years; that Mr. and Mrs. Naley had taken care of her in town and Mr. Campbell had looked after her at the ranch.

In other testimony, the attorney stated that Mrs. Burns requested that the deeds include certain specific provisions, such as one reserving to her a life estate in the ranch. He stated that the two deeds were prepared by him in accordance with Mrs. Burns' instructions and she executed them. Mrs. Burns talked rationally, he said, stating very definitely what she wanted, "and there is no question in my mind as to her mental condition"; she was competent to execute the deed. So far as he could recall, he added in response to a question, Mr. and Mrs. Naley and Mr. Campbell took no part in the conversation.

The deeds were executed three months after the stroke occurred. A witness, testifying as an intimate acquaintance, stated that during this time he saw Mrs. Burns approximately twice a month; that it was difficult for her to carry on a conversation; that she could hardly take care of herself and had to have an attendant bathe her daily. Her habits after the stroke were entirely different from those before, he said; "she was lively and could carry on a conversation, but after she had the stroke she lost everything". Based upon these observations of her, he formed the opinion that she was of unsound mind at that time.

Another witness had been acquainted with Mrs. Burns since 1915, and saw her on an average of once a month until about eight or nine months before the stroke in November, 1934. She did not see Mrs. Burns again until September, 1935, which was about seven months after the deed was executed. In December of that year Mrs. Burns came to her home and lived there until April, 1936.

The testimony of this witness was to the effect that in September, 1935, Mrs. Burns was feeble and careless about her person; that "she would have fantastic ideas for instance, she told me there was no cemetery in Lancaster where her son was buried". In speaking of the reason that Mrs. Burns had come to stay with her she said that Mrs. Burns had told her she was having extensive repairs made on her house; "she wrote me a letter and asked us to come and get her, which we did * * *". She also expressed the opinion that Mrs. Burns was not of sound mind, explaining, "you couldn't trust her around the house, she would go out in the kitchen and turn on all the gas jets; she would walk away and leave them and she would leave the water running in the wash bowl". A third witness, an acquaintance of Mrs. Burns since 1909, testified that after her stroke she was extremely vulgar and careless with herself; also, that she couldn't carry on a conversation properly as her face was twisted. This witness stated that, in her opinion, Mrs. Burns was of unsound mind after the stroke in 1934 and in the month of February, 1935.

As against this testimony, the appellant, in answer to the question as to whether there were times between the first and a second stroke which occurred when she did not appear to be rational, answered that everyone has "off days", but that he never saw her when she couldn't carry on a connected conversation. From his observation "she was 100 per cent mentally from her first stroke until she had the second one". She was profane, but not more so than before. He stated that Mrs. Burns returned to the ranch in the summer of 1935 and stayed two or three months, and in the following year she went there earlier and remained for a longer period of time. On these occasions there was no one attending her and she took care of herself.

A physician who treated Mrs. Burns for a year commencing just before the deed was executed expressed the opinion that "her mental condition was all right" although "some things were a little hard for her to remember". He examined her weekly, he testified, and there was no change in her mental condition. One of these examinations was made on the day she signed the deed. The doctor's case history included the statements "patient says she cannot remember some things" and "her head bothers her somewhat and cannot think clearly", but he stated that a paralytic stroke does not necessarily result in a disturbance of the mental functions.

Upon this evidence the trial court made findings in literal accordance with the allegations of the complaint. These findings, the appellant declares, are entirely unsupported by the evidence. The evidence clearly shows, he asserts, that after he had left the ranch to work in Mojave, Mrs. Burns induced him to return and assist her in taking care of it. She agreed that if he did so she would give it to him; the conveyance of the property to him was wholly her idea; and the deed was executed without influence on his part and while she was mentally sound.

[1-4] The respondent relies upon the principle that where it is shown that one party to a contract acted while he was weak in mind arising from illness or other cause, and there was either inadequacy of consideration or circumstances of undue influence and advantage, the contract will be set aside. Hays v. Gloster, 88 Cal. 560, 26 P. 367; Moore v. Moore, 56 Cal. 89; Shaffer v. Security T. & S. Bank, 4 Cal.App.2d 707, 41 P.2d 948; Bryson v. Gross, 83 Cal. App. 638, 257 P. 137. It was therefore not necessary for him to prove a complete lack of understanding upon the part of Mrs. Burns, and there is evidence to support the finding of the trial court that at the time Mrs. Burns executed the deed, "her reason was not entirely dethroned, but at that time she was in an extreme condition of mental and physical weakness". However, the court also found that Mrs. Burns "received no consideration for the execution of said deed". This is entirely contrary to the facts shown in evidence, and even if this finding be very liberally construed to mean that there was inadequacy of consideration, there is no evidence to support it.

On the contrary, the appellant testified that in 1932, she asked him to return to the ranch and agreed that if he would do so, look after it and drive her wherever she wished to go, she would deed it to him. This testimony was substantiated by the neighbor who accompanied Mrs. Burns to Mojave and was present when the matter was discussed. There is neither allegation nor proof that Mrs. Burns was in a weakened mental condition at the time of this conversation, and it appears that the appellant carried out his part of the agreement to her satisfaction. Certainly his services and companionship for more than two years were of some value, and the finding that Mrs. Burns "received no consideration" for her deed is contrary to the undisputed facts. Moreover, so far as the record shows, there is nothing upon which a court might base a conclusion that this consideration was inadequate, if such a determination might properly be made, because there is no evidence concerning the size of the property conveyed or its value. However, tax bills offered in evidence for another purpose show that in 1937 and preceding years, it was assessed on the basis of a land valuation of $110 and an additional $80 for improvements.

[5] Concerning undue influence, there is no evidence whatever that the appellant exercised any control over Mrs. Burns or that her actions were the result of his direction. In addition to the testimony concerning the conversation between Mrs. Burns and appellant when she asked him to return to the ranch, two other witnesses related statements made by her at later times on this subject. One of them said that in 1932 Mrs. Burns told him she was going to deed the ranch to the appellant because he had done more for her than anyone else, with the exception of her sons. Another related that she told him she had executed the deed to him. The testimony of the attorney who prepared the deed is clear and unequivocal that Mrs. Burns expressed the desire to convey her ranch to the appellant and that she stated her reason for so doing. There is no evidence that the appellant ever requested her to execute a deed to him or that he influenced her in that or any other matter.

The respondent argues that there was a confidential relationship between Mrs. Burns and Mr. Campbell, and therefore the law will presume that he exercised it unduly to his own advantage. Odell v. Moss, 130 Cal. 352, 62 P. 555; Bradley Co. v. Bradley, 37 Cal.App. 263, 173 P. 1011. He admits that the evidence does not show the existence of a relationship such as attorney and client, or physician and patient, but he declares that it meets the requirements stated in Scovill v. Guy, 205 Cal. 386, 270 P. 934. In that case the court held that "it was sufficient for the plaintiff to show the existence of such friendly relations during a period of several years between himself and the defendant as would entitle the plaintiff to place confidence in the integrity and honesty of the defendant and in the truth of whatever representations the latter was making to him with regard to the transaction and to the particular business wherein the defendant by his correspondence was proposing that the plaintiff and himself should jointly engage". 205 Cal. at page 388, 270 P. at page 935. But the record now before the court includes no evidence that Mr. Campbell made any false representations to Mrs. Burns with reference to the transaction in controversy, or concerning any other business matter. On the contrary, according to the uncontradicted testimony, the first mention of a deed to the ranch came from Mrs. Burns; she made the arrangements to go to see a lawyer; these arrangements were made through her friend without the appellant's knowledge; he accompanied her to the lawyer's office but she stated her wishes and provided the descriptions of the property to be conveyed.

Under these circumstances, the respondent has not complied with the requirements of the rule upon which he relies.

The judgment is reversed.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.; CARTER, J.; CURTIS, J.

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17 Cal.2d 778

PEOPLE v. SHAW et al.

Cr. 4339.

Supreme Court of California.

April 21, 1941.

1. Criminal law 🔑507(1)

One is an "accomplice" who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime, the word "accomplice" including all persons who have been concerned in the commission of an offense. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law 🔑511(2)

In prosecution of mayor's secretary and another for aiding, abetting, and compelling city civil service department manager and other employees to alter and falsify civil service records, such other employees' testimony, tending to connect defendants with offenses charged only when interpreted by and read with testimony of manager, who was admitted accomplice, was insufficient to corroborate his testimony, even if such employees were not accomplices. Pen.Code, §§ 113, 1111.

3. Criminal law 🔑511(2)

In prosecution of mayor's secretary and another for aiding, abetting, and compelling city civil service department manager and others to alter and falsify examination grade records, testimony of retired fire department battalion chief as to his agreement with defendant secretary to place men friendly to mayor's administration in fire department civil service positions and means used to accomplish such purpose was insufficient corroboration of accomplices' testimony as not tending to establish crimes charged or connect defendants therewith, unless read with and interpreted by accomplice manager's testimony. Pen.Code, §§ 113, 1111.

4. Criminal law 🔑511(2)

In prosecution for aiding and abetting and by threats and coercion compelling manager and other employees of city civil service department to alter and falsify civil service records, corroborating evidence must of itself and without the aid of testimony of accomplices connect or tend to connect defendants with the commission of offenses charged against them. Pen.Code, §§ 113, 1111.

5. Criminal law 🔑511(2)

Under statute requiring corroboration of accomplice's testimony, "corroborating evidence" must tend directly and immediately to connect defendant with commission of the offense and regardless of how strong corroborating evidence might be in other respects, it must point to connection of defendant with commission of crime charged to be of any avail, and corroborating evidence is insufficient where it only casts a grave suspicion upon the accused. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroborating Evidence".

6. Criminal law 🔑511(2)

In prosecution of mayor's secretary and another for aiding, abetting, and compelling city civil service department manager and others to alter and falsify examination grade records, police officer's testimony that certain person told witness that there was preferred list of officers friendly to mayor's administration, that defendant secretary agreed and said that friends of administration would be taken care of, and that such person said he might be able to help witness in examination for position of sergeant, was insufficient corroboration of accomplices' testimony as not tending to connect defendants with offenses charged without interpretation and direction furnished by accomplice manager's testimony. Pen.Code, §§ 113, 1111.

7. Criminal law ⚷511(2)

In prosecution of mayor's secretary and another for aiding, abetting, and compelling city civil service department manager and others to alter and falsify examination grade records, testimony that witness received list of numbers and police officers' names from one who told witness which numbers represented true or false answers to examination questions, and that witness gave list to various police officers and received contributions for mayor's election campaign from some of them, was insufficient to corroborate accomplice manager's testimony as not tending to connect defendants with offensés charged. Pen.Code, §§ 113, 1111.

8. Criminal law ⚷511(2)

In prosecution of mayor's secretary and another for aiding, abetting, and compelling city civil service department manager and others to alter and falsify examination grade records, testimony of acting police captain that defendant secretary asked witness how he would like to be captain, whether he favored mayor's administration, how he would like to be fourth on list of eligibles for captaincy, was insufficient to corroborate accomplice manager's testimony as not tending to connect defendants with crimes charged. Pen.Code, §§ 113, 1111.

9. Criminal law ⚷511(2)

In prosecution of mayor's secretary and another for aiding, abetting, and compelling city civil service department manager and others to alter and falsify examination grade records, fire department employee's testimony that he asked defendant secretary whether he could do anything to keep witness from being moved back on list for batallion chief examination, that secretary said that witness appeared to be one who would return favor, and that witness contributed to mayor's election campaign fund after publication of eligible list with witness in second place and was subsequently appointed to such position, was insufficient corroboration of accomplice manager's testimony as requiring interpretation and direction furnished by such testimony to give it value. Pen.Code, §§ 113, 1111.

10. Criminal law ⚷419(1)

In prosecution against mayor's secretary and civil service commissioner for aiding, abetting and compelling manager and other employees of city civil service department to alter and falsify civil service records, testimony of witness that on certain date he received a list of numbers and list of names of police officers from secretary's friend and was told which numbers represented true or false answers and that he gave such list of numbers to police officers and received from some of them campaign contributions which he turned over to such friend was inadmissible as "hearsay." Pen. Code, §§ 113, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

11. Criminal law ⚷1169(2)

In prosecution against mayor's secretary and civil service commissioner for aiding, abetting and compelling manager and other employees of city civil service department to alter and falsify civil service records, error in admitting hearsay testimony that witness received a list of numbers and names of police officers from secretary's friend and was told which numbers represented true or false answers and that witness gave such numbers to officers some of whom gave campaign contributions which witness turned over to secretary's friend was not cured by showing that secretary made a speech at a dinner attended by police officers at which time secretary returned to them through the witness certain contributions which they had previously made to the mayoralty campaign. Pen.Code, §§ 113, 1111.

12. Criminal law ⚷369(1)

In prosecution against mayor's secretary and civil service commissioner for aiding, abetting and compelling manager and other employees of civil service department to alter and falsify civil service records, testimony that commissioner aided a candidate who took examination of sanitary and housing inspector which had no connection with examinations upon which indictment was founded was incompetent. Pen.Code, §§ 113, 1111.

13. Criminal law ⚷511(1)

Corroborating testimony which merely raises a suspicion of a defendant's guilt is not sufficient under statute requiring corroboration of an accomplice's testimony. Pen.Code, § 1111.

14. Forgery ⚷44

In prosecution of mayor's secretary and another for aiding, abetting, and compelling city civil service department manager and others to alter and falsify civil service records, evidence *held* sufficient to make out case of felony of willful alteration of records in public officer's custody in violation of Penal Code, not merely case of misdemeanor under city charter provision concerning obstructions of municipal civil service by preventing fair examinations and falsifying original records. Pen.Code, § 113; St.1925, p. 1068, § 118.

15. Records ⚷1

For entry or record of public officer's official acts to be "public record", it is not necessary that such record be expressly required by law to be kept, but it is sufficient if it be necessary or convenient to discharge of official duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Record".

16. Forgery ⚷15

Civil service examination application blanks and examination reports known as "rough sheets", constituting part of city civil service department's permanent records and kept for proper operation and convenience of such department, were "records" within statute denouncing as felony willful alteration of records in public officers' custody. Pen.Code, § 113.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

17. Criminal law ⚷1169(7)

Judgments of conviction, founded on accomplices' uncorroborated testimony, cannot be sustained. Pen.Code, § 1111.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Joseph E. Shaw and another were convicted of aiding, abetting, advising, encouraging, and compelling the manager of the Civil Service Department of the City of Los Angeles and other employees in such department to alter and falsify certain civil service records, and from judgments of conviction, orders denying defendants' motions for new trial, and an order denying their objections to pronouncement and imposition of judgments and sentences, they appeal.

Appeal from order denying objections to pronouncement and imposition of judgments and sentences dismissed, and judgments of conviction and orders denying motions for new trial reversed.

For prior opinion, see Cal.App., 107 P.2d 59.

Roland G. Swaffield, Cantillon & Glover, and Richard H. Cantillon, all of Los Angeles, for appellant Joseph E. Shaw.

Morris Lavine, of Los Angeles, for appellant William Cormack.

Richard H. Cantillon and John E. Glover, both of Los Angeles, for appellants Joseph E. Shaw and William Cormack.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., Buron Fitts, Dist. Atty., Eugene D. Williams, Chief Deputy Dist. Atty., and John Barnes, Deputy Dist. Atty., all of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted herein after decision in the District Court of Appeal of the Second Appellate District, Division One, to permit a closer study of the case. After an examination of the record and a consideration of the points involved, we approve the opinion of that court prepared by Mr. Presiding Justice York, which, with some interpolation and additional comment, is adopted as the opinion of this court, as follows:

"By an indictment containing sixty-six counts, appellants were charged with violations of section 113 of the Penal Code, in that upon certain stated dates they 'did wilfully, unlawfully and feloniously aid and abet, advise and encourage, and by threats, menaces, command and coercion, compel and cause one Glenn G. Gravatt, who was then and there the duly and regularly qualified and acting manager of the civil service department of the city government of the city of Los Angeles, California, and other employees in said civil service department, to mutilate, deface, alter and falsify' certain civil service records then in the custody of said Gravatt and the other employees of said department, who were officers of the city of Los Angeles.

"Each odd numbered count referred to the falsification of part of a report of a civil service examination pertaining to the mark, grade and rank of a named applicant, which report was known and designated by the civil service department as 'rough sheet'. Each even numbered count of the indictment referred to the falsification of the grade notations which were written on the back of the application of the particularly named candidate in consonance with the notations entered on the so-called 'rough sheet'.

"The charges of the indictment related to five examinations conducted by the civil service department as follows:

"1. Counts 1 to 16, inclusive, to changes made in the oral interview grades of eight named candidates who took an examination for the position of engineer in the fire department prior to December 16, 1936, to wit: on October 30, 1936;

"2. Counts 17 to 22, inclusive, had reference to changes made in the oral interview grades of three candidates who were examined for the position of captain of the fire department approximately on April 10, 1937;

"3. Counts 23 to 38, inclusive, referred to falsification of oral interview grades of eight candidates for the position of auto fireman, an examination for which was conducted on July 29, 1937;

"4. Counts 39 to 50, inclusive, related to the falsification of oral interview grades of six candidates who took an examination for the position of fireman, held on or about January 8, 1938;

"5. Counts 51 to 66, inclusive, had reference to the changes made in the oral interview grades of eight candidates for the position of motor-cycle officer of the police department, an examination for which was held on or about May 8, 1937.

"In each instance it is alleged that the oral interview grade was falsely entered on the so-called 'rough sheet' and upon the back of the application of the particularly named candidate.

"At the conclusion of the trial, the jury returned its verdicts finding appellants guilty on sixty-three counts, as charged in the indictment, verdicts of not guilty having been returned to counts 42, 44 and 50. Appellants' motions for new trial and in arrest of judgments were denied, and judgments of conviction were pronounced. The sentences on the individual counts composing each of the five groups were made to run concurrently, and the sentences on the five groups were made to run consecutively, there being five consecutive sentences imposed upon each appellant.

"This appeal is prosecuted from the judgments of conviction, from the orders denying motions for new trial, and from the order denying the objections of each appellant to the pronouncement and imposition of judgment and sentence.

"It is contended in the twenty assignments of error set forth in appellants' briefs that (1) the evidence is insufficient to sustain a charge under section 113 of the Penal Code for the reason that said section has been superseded by section 118 of article IX of the charter of the city of Los Angeles (Stats.1925, p. 1068); (2) the application blanks and rough sheets were not records within the meaning of section 113, supra; (3) the evidence is insufficient to support the judgments of conviction for the reason that appellants were convicted upon the testimony of accomplices without the corroboration required by section 1111 of the Penal Code; (4) the court erred in its rulings as to the admission and rejection of evidence, and in its instructions to the jury, as well as in its refusal to give certain instructions; (5) the court erred in refusing to allow appellants to impeach the testimony of the witness Gravatt; (6) there was misconduct on the part of the deputy district attorney which amounted to prejudicial error; (7) it was error to impose upon appellants a sentence under section 113 of the Penal Code.

"It is disclosed by the evidence that at the time in question under the charter of the city of Los Angeles the civil service department was presided over by a board of five commissioners, and that the business of the department was to examine the qualifications and select applicants for positions of employment in the classified civil service. The department was generally divided into two divisions, one an examining division and the other a clerical division, both of which were under the supervision and control of the general manager, Glenn G. Gravatt.

"When employees were needed to fill positions in any of the governmental departments of the city, the board of civil service commissioners would be duly notified and they in turn, through consultation with the head of the department requiring such employees, would determine the requisite qualifications for the particular employment. The general manager would then be instructed to arrange to conduct an examination to test the applicants' qualification, and the examination was publicly advertised. Applicants were required to fill out application blanks setting forth their age, education and experience, and these blanks were filed with the clerical division. Before the time set for the written examination, such applicants were notified when and where to appear therefor.

"Each civil service test was divided into two phases, one consisting of a written examination and the other of an oral interview. The written examination was conducted first, whereupon the papers were graded and the grades received by the applicants were forwarded to the clerical division and there entered in pencil on a document known as the 'rough sheet', as well as on the back of each candidate's written application. Those candidates receiving a passing grade in the written examination were summoned to the civil service department, to be interviewed by one of the examiners of the department, who wrote on a memorandum pad called the 'oral sheet' his appraisal of the candidate's education and experience. Thereafter, these oral sheets were forwarded to the clerical division and the marks so entered thereupon were placed in the proper column in pencil on the 'rough sheet', opposite the grades representing the result of the written examination. The mark received on the oral interview was then noted on the back of the written application previously filed by the candidate.

"There was then noted and added to these oral and written grades in the proper columns such credit as the particular applicant might be entitled to by reason of seniority or for military service, and a general average computed by the clerical staff which was entered in pencil in the proper column on the rough sheet. The rank of the applicant was determined from a computation of the general averages, and his numbered place in rank in the order of his relative excellence was entered in pencil upon the rough sheet, which was then delivered to the general manager for inspection, review and approval. Under the rules of the commission, the general manager also occupied the office of chief examiner. If the general manager approved the gradings on the rough sheet he returned it to the clerical division with instructions that a typewritten sheet, designated as the 'smooth sheet' be prepared therefrom and forwarded to the board of civil service commissioners for consideration and approval. It appears that if the general manager disapproved the contents of the rough sheet, it was within his discretion to return it to the examiners or the clerical division with instructions to make any proper corrections or changes, with corresponding changes on the back of the applications. The smooth sheet was not prepared until the general manager, as chief examiner, first approved the grades appearing on the rough sheet. Upon presentation of the smooth sheet to the board, it was duly published, and candidates dissatisfied with their grades were notified to file written protests within a certain prescribed period of time. When that period had elapsed the board approved the smooth sheet from which would then be prepared a list of persons eligible for appointment to positions in the classified civil service, and subsequently appointments were made therefrom in the order of rank obtained by the respective applicants as the city required their services.

"Appellants were not charged with actual participation in the alteration and changing of the grades and marks in question. but with having aided and abetted, advised and encouraged Glenn G. Gravatt and other employees of the civil service department to make such changes."

The said Glenn G. Gravatt, an admitted "accomplice and who was the main witness for the prosecution, had been employed by the city in various capacities over a period of twenty years, and on April 7, 1933, he became the general manager and chief examiner of the civil service department. On July 1, 1933, Frank Shaw took office as mayor and shortly thereafter Gravatt met appellant Shaw, the mayor's brother and secretary, at which time appellant Cormack was a member of the board of civil service commissioners.

"Gravatt was named in the indictment as the principal actor and it was his testimony which formed the background of the instant convictions and judgments. He testified that around the first of October, 1933, appellant Shaw called him to his office on the first floor of the city hall, at which time the following conversation took place between them:

" 'Well, Mr. Shaw said that he had some friends who had assisted the Mayor in his recent campaign, and said that he was very anxious to do something for them toward getting them a job with the city under civil service; and he asked me what could be done to help them. I said I didn't know anything that could be done, that I didn't know of any short cuts in civil service positions. So Mr. Shaw said, "Well, just what is the procedure in connection with getting a civil service job?" and I said, "Well, we accept applications from candidates who meet the qualifications and the specifications that are set up by the Commission, and following that we hold a written examination, and when those papers are marked and graded, we have an oral interview for those candidates who hold a sufficiently high grade in the written portion of the examination to be called for the oral interview." Mr. Shaw said, "Well, couldn't we make some changes in the grades?" and I said, "Well, I didn't see how that could be possible." I said, "The marks are entered on a number of different papers and documents and it is not any one man's job but goes through several hands and goes through several clerks and several examiners, and all of these papers and marks on the—all the grades on the different papers have to correspond." And Mr. Shaw said, "Well, I didn't mean so much the written part of the examination." He said, "Couldn't some change be made in the oral part of the examination?" And I said, "I don't know." And he said, "Well, isn't it a fact that only one examiner gives the oral examination?" I said, "That is usually the case." He said, "Wouldn't it be a very easy and simple matter to make a change in the oral grade?" I said, "Well, I guess it could be done, but I don't like to do it. I have never done anything like that before." So Mr. Shaw said, "Well, you know I am the boss", and he said words to this effect: "You do as I tell you to do and play ball with the administration or I will kick you out." I said, "All right."'

"Gravatt further stated that appellant Shaw on that same day gave him names of two or three candidates in some examination, that Shaw dictated the names to him and gave him a pad of paper and a pencil and Gravatt wrote them down. Three or four weeks later the two men had another conversation, no one else being present, with reference to which Gravatt testified as follows: 'I told Mr. Shaw that in connection with these few names that he had given me on the previous occasion that I had not been able to get them right at the top of the list and he asked why and I told him that their written grades were not sufficiently high and even if I gave them the maximum oral grade that could be given, there were still others who took the examination who were higher in the examination, and he said, "How is that?" And I said, "Well, they made higher marks on the written part of their examination." He said, "How did they make it?" I said, "I don't know; I guess they were just smarter." He said, "No, they couldn't be that smart. There couldn't be anybody make that high a grade on the square." He said, "Did anybody see the questions before the examination?" And I said, "Well, nobody but Mr. Cormack. He had asked to see them, one of the Commissioners." He said "Well," he said, "I will talk to Mr. Cormack about that."'

"A few days later another conversation was had in appellant Shaw's office, with reference to which the witness Gravatt testified: 'Well, Mr. Shaw said that he had seen Mr. Cormack and talked to him and that Mr. Cormack was all right and I should do anything that he told me; that would be all right, and that if he gave me any names of any candidates taking examinations it would be all right to place them as high as I could on the eligible list, but to check with him, Mr. Shaw, first.' Within a day or two thereafter, the witness Gravatt testified that the appellant Cormack gave him a list of names of candidates and told him to see that they got as high a rank as possible in the examinations that were being conducted; that Mr. Shaw was interested. Two or three weeks later, the witness called on appellant Shaw at his office and 'showed Mr. Shaw a rough report for an examination and pointed out the names of the candidates which he had previously given me and showed him where it was impossible to place them at the top of the list, due to the fact that others had such high grades, and he said: "I don't understand that." He said, "We had the questions and answers and we got a good oral mark and still you have got some strangers in here up higher on the list that should not be here." And he said, "Are you sure there aren't any leaks in your office?" I said, "Well, I don't know of any. All the people, or most of the people have been there for some time, and I have had no reason to suspect that any of them would give out any information in advance of the examination and I use all the precautions we have to prevent leaks, and I don't know of any." He said, "Well, then, there is only one thing to do and that is to take these people that are so high up that we can't get rid of them and don't know who they are and just simply cut their oral grade so low that they will be out of the picture." '

"The lists of names which the witness received from appellant Shaw were dictated to him in each instance, while the lists of names handed to him by appellant Cormack were written, both lists often containing the same names. When asked if he retained possession of such lists, the witness stated that he did not; that in some cases he threw them into the wastebasket and in others he turned them over to the clerk or examiner who had charge of the paper work in the examination. The witness also said he received lists of names from Mr. Charles Welch, assistant secretary to the mayor, beginning in the early part of 1937 under the following circumstances: 'Mr. Shaw had stated that it would be necessary for him to be away from the office a good deal of the time, and that whenever Mr. Welch asked me for any questions and answers in advance of an examination, I was to deliver those to Mr. Welch, and whenever Mr. Welch gave me lists of names of any candidates participating in any examinations, that I was to take care of them in the same way that I had been for him.' The witness testified that with reference to any examination for position or promotion in the police or fire departments, he did not give a list of questions or answers in advance of the examination to any person other than appellants Shaw and Cormack and Charles Welch; that after receiving lists of names from these three men, he 'computed from the rough report about what oral grade would be necessary for them to have in order to bring them on the list in accordance with the lists which I had received and then instructed * * * two clerks, two examiners in the department to make those changes * * * on the rough report', to-wit: Mr. Arthur Dvorin, executive clerk and later research examiner, assigned to coordinate the work of the other examiners, and Mr. Bernard Kauffman, a general clerk in the examination division of the civil service department; that such changes were made on the rough sheet prior to the preparation of the smooth sheet, and he thereafter checked the rough report to see that his instructions were carried out.

"The witness Gravatt testified that all the persons named in the indictment had received grade adjustments on his orders which he gave to comply with the requests of appellants. With respect to the memorandum which he handed to Dvorin in connection with the examination for captain of the fire department (counts 17 to 22), Gravatt testified he told Dvorin that the mayor's office and the commission wanted the changes made.

"Over the objections of appellants that they were offenses not included within the charges of the indictment, Gravatt was permitted to testify concerning conversations he had with appellants in which they gave him lists of changes to be made in the grades for examinations other than police and fire department examinations, notably an examination which took place in 1935 for the position of sanitary and housing inspector. The witness testified he had a conversation with appellant Shaw on the subject of one Max Yedwalsky after the list for that particular examination had been certified, to the following effect: 'Mr. Shaw said, "There is a man by the name of Yedwalsky who took the examination for sanitary inspector and he didn't do so well. Is there anything we can do to give him a higher grade?" I said, "No, there is not." He said, "Why not?" I said, "Because the report has been approved and the list has been fully established." And I said, "Furthermore, the book of civil service rules and regulations which provides for protests to be heard within one week after the list is tentatively approved and which provides for the adjusting of grades by the commission in case an injustice is found by the commission. That time has expired and I don't know of anything that can be done." Mr. Shaw said, "This is very important and we will find a way to do it." And I said, "All right." He also said he had a conversation on the same subject with appellant Cormack a day or two later, at which time 'Mr. Cormack said, "There is going to be a board meeting this morning and I want you to go in there and make a recommendation that Mr. Yedwalsky's grade be raised and I will make the motion." I said, "Well, I can't make any recommendation like that." Mr. Cormack said, "Why not?" I said, "Because the time has elapsed for hearing of protests on examinations and after that time has elapsed there is no way on earth that the board can make any changes in marks or grades." Mr. Cormack said, "Well, there is a provision in the book of civil service rules and regulations whereby even after the protest period has expired a clerical error can be corrected at any time." I said, "Well, there isn't any clerical error." Mr. Cormack said, "Well, you can find one, can't you?" I said, "Well, I don't know how," and he said, "Now listen, this Mr. Yedwalsky is a very important man. He is a strong-arm man. He has worked for Al Lushing over in the water and power department, and he will do anything the administration wants. He will go out and commit robbery, burglary or even murder if necessary and we have got to do something for this man." I said, "All right, I will go in and make a recommendation."' (A motion to strike, on the ground that the questions eliciting the above-quoted answer were asked by the deputy district attorney in bad faith and constituted misconduct, was denied.) The witness then testified that he appeared at the said meeting of the board and heard Commissioner Cormack tell the 'other members of the board that it had been discovered that in transposing the grades from one sheet to another that Max Yedwalsky had been marked lower then he should, and that he made a motion to raise him a number of points, I forget the exact number.'

"S. May Smith, secretary to the city civil service commission, testified that she attended meetings of the commission taking minutes of all proceedings, and with reference to the meeting of August 7, 1935, she read from the minutes (Vol. 17, p. 6259) kept by her, that upon that date the general manager Gravatt submitted a report regarding the examination of Yedwalsky for sanitary and housing inspector, to the effect that a clerical error had been discovered by which Yedwalsky's oral grade of 87 had been transferred to the record as 77. The general manager asked the board to order the correction under the provisions of its rules and regulations and appellant Cormack moved such correction be made, whereupon the motion was seconded and adopted by the vote of all commissioners present.

"The cross-examination of Glenn G. Gravatt disclosed that there was then pending against him a misdemeanor charge for violation of section 118 of the city charter; that as general manager of the civil service department he had charge and control of all affairs of the department, and he regarded the individual commissioners as his superiors; that he did not make it a practice to submit questions and answers to the commission prior to the examination; that the rough reports constituted the data from which the smooth reports were made, and the smooth reports were the only reports that went to the commission for its action. An examination was not complete until the report had gone to the commission and had been acted upon; that in his experience the commission had frequently changed grades; that the record and certification department was under his management and control, and its card system was called the register which the city charter requires shall be kept. After the register of eligibles was made up the smooth report was filed in a vault in the civil service offices. Rough reports were kept on file as a custom rather than at his direction.

"Arthur Dvorin, who had been employed in the civil service department for thirteen years and ten months in the following capacities: messenger, junior clerk, general clerk, half code general clerk, executive clerk and research examiner, testified that his duties as executive clerk consisted of supervising the clerical staff in the examining division, the scheduling of examinations, contacting various departments as to specifications and in drawing up requirements and duties for various examinations; that the duties of research examiner were primarily the same, except that he was very occasionally called upon to write and conduct an examination; that in general he directed the work of the examining division and assigned examinations to examiners under the direction of the general manager Gravatt;" that Gravatt mentioned to him the subject of changing of oral grades and that thereafter, pursuant to Gravatt's instructions, he had various of the examiners change the grades of applicants on their "oral" sheets, which altered grades were then transferred to the rough sheets and the general averages computed.

"It was brought out upon cross-examination that he first noticed changes being made in grades when he was executive clerk in 1934 or 1935; that such changes were made upon rough reports in the oral columns; that he received yellow sheets regarding such changes directly from Gravatt; that most of them were written in long hand and a few were typewritten; the fireman's list was received the second week of June, 1938, the engineer's list in 1936, the motorcycle list in 1937, and the auto fireman and captain's lists in 1938. He testified that he turned over all of these yellow lists to the district attorney, about one hundred twenty-five in all; that he kept the lists in his office for a while and then took them home and surrendered them to the prosecution; that there were four hundred fifty or five hundred names on the yellow sheets which he received, names of candidates whose grades were to be changed according to Gravatt's instructions. He testified that this had been going on for four years; that Gravatt told him to make the changes on the rough reports; it was not part of the witness' duties to keep the yellow sheets in his office or at his home; that he kept them for personal reasons, i. e., because he thought there was something wrong about Gravatt's grade changing orders and he wanted to protect himself; that he explained to the board of civil service commissioners his failure to report Gravatt, because he thought if he did it would cost him his job; that Gravatt never did anything to lead him to believe he would fire Dvorin, if the latter remonstrated about the grade changing orders, nor did Gravatt say anything or threaten him in any way. The witness identified People's Exhibit 26 as the slip pertaining to the fireman's entrance examination of January 8, 1938, and stated that when that slip was handed to him Gravatt did not say in effect that the mayor's office and the commission wanted the changes made. The witness stated that he never knew the mayor or Joe Shaw, and in his opinion the 'higher-ups' in his department were Gravatt and the commissioners; that in telling the board that neither he nor his clerks ever changed grades, he meant to say 'of our own volition'; that the only supervision he had over these changes was to hand the oral sheets to the clerks and tell them to make the changes; that his resignation became effective in February, 1938; that at the time he handed in his resignation, the then commission had started its investigation and had been under way a week or two.

"The witness Dvorin also testified that the only instructions he received were to have the examiners make the changes on their oral sheets; that these instructions he received from Gravatt, and there were no others; that he had a conversation with appellant Cormack in October, 1937, at the time Gravatt was away (on a European trip); that his talk with appellant Cormack concerned auto machinists' examination (which examination is not referred to in the indictment herein) and occurred in Gravatt's office with only himself and appellant Cormack present; that Cormack asked for a copy of the questions for said examination and the witness told him they had not been mimeographed; that Cormack then asked him where the rough copy was and the witness told him that Mrs. Tracy probably had it; that the witness then left the room and brought back the mimeographed copies for the test of auto machinist; that appellant Cormack looked at the stencil and removed the cushioned stencil sheet; whereupon Cormack returned the stencil to the witness but kept the cushion sheet which contained a copy of the questions for the said examination; that he complied with Cormack's request because he presumed Cormack had authority to make the same by virtue of the fact that he was a member of the board; that he assumed, since the commissioners composed the administrative body of the department, that they were in a sense superiors of the employees; that he considered appellant Cormack one of the higher-ups of the municipal government.

"With reference to the Dvorin-Cormack episode last referred to, Phyllis Tracy, executive secretary to the department, testified she recalled cutting stencils for the auto machinists' examination during Gravatt's vacation in 1937; that she saw Cormack in her office with Mr. Dvorin; that she did not hear any of the conversation between the two men; that she saw appellant Cormack and Dvorin go into Gravatt's office and in a few moments she saw Dvorin come out again, at which time he returned to her the stencils for the auto machinists' examination; that the cushion sheets from the stencils were missing; that on no occasion, except the one testified to, had any person ever requested her to turn over the stencils to be taken from her room; that she took precautions in locking the questions in her desk if she left the room and at night they were locked in a safe. On cross-examination she testified that all persons coming and going to Gravatt's office passed through her room, including the examiners and other office help; that she occupied the room next to Gravatt's room since 1933, or four years prior to the incident just narrated; that there was a door from Gravatt's office leading directly into the hall, besides the one connecting with her room.

"Bernard Kauffman, general clerk of the department, testified that he worked under Dvorin; that after the written part of the examination for engineer in the fire department was held on October 30, 1936, he made erasures and substitutions of figures opposite names of certain candidates on rough sheets for that examination at the direction of Dvorin. He then recited in detail the various changes and erasures made in the grades shown on the rough sheets and in the final grades shown on the applications of various candidates, identifying People's Exhibits 2, 7, 9, 10, 12, 13, 14, 15, 27, 30, 32, 33, 36, 38, 39, 40; and stated he often made changes on rough sheets and applications other than those shown him during the instant trial; that all changes were made on orders from Dvorin and with Dvorin's knowledge and under his supervision; that no one else ever ordered him to make any changes; that appellant Shaw never talked to him about making changes; that he did not even know appellant Shaw; that neither did appellant Cormack talk to him about such a matter; that the witness made no objection to making the changes because he was only a clerk and had no alternative; he thought the grade changing was unusual but did not discuss it with anyone; that Gravatt ordered the examiners to make grade changes by sending in yellow sheets; that he received yellow slips from Mr. Gravatt in Mr. Dvorin's absence; and that it was his understanding from past experience and conversations with Dvorin that he was to take such slips to the examiners so they could change the grades.

"Charles S. Walbridge, employed in the civil service department in various capacities for eighteen years, testified that he was director of classification when Gravatt became general manager, and that he became an examiner either in July, 1933, or 1934; that he was one of the two examiners who conducted the practical tests in connection with the examination for engineer in the fire department on October 30, 1936; that the other examiner was Harvey W. Webber; that he and Webber graded without reference to each other and the two grades were added and the sum divided by two to arrive at an average grade, which was the official grade for that part of the examination; that Dvorin delivered to the witness and Webber a slip of paper (People's Exhibit 1) about the time when the official report of the examination was submitted to the board for tentative approval; that the witness drew a line on his oral sheet through the grades he had given the candidates named in the yellow slip and substituted therefor the grades shown on the slip, and then initialed the oral sheet to indicate that the adjustments had been made, making a memorandum of the changes in his own handwriting; that by reference to said memorandum (People's Exhibit 41) he was able to tell what the grades had been and to what they had been changed. The witness then recited various changes made in other examinations about which he was questioned, and testified he was instructed to make the changes by either Dvorin or Kauffman. Upon cross-examination, the witness stated that all the changes about which he testified were made under orders from Gravatt, in accordance with his authority as the witness's superior officer; that he made certain memoranda as to the changes as a matter of self-protection, because he assumed there was something wrong about Gravatt's orders; that he protested about the grade changes to Dvorin, Kauffman and to other examiners, but he never protested to Gravatt; that he made two records of the same transaction, did not file his memoranda, but took them home immediately and put them in a safe place.

"Mavis Moulton, a junior clerk in the department working under Dvorin, testified that she made changes in the rough report of auto fireman's examination, and changed the oral average and final grades upon certain named applications to conform to the changed grades on the rough report; that she first erased the original grade figures on the application before putting down the new figures in her own handwriting; that when she made the changes on the rough report she had before her an oral sheet given to her by Dvorin; that she had no conversation with him at that time.

"Harvey W. Webber, who was continuously employed by the civil service department as an examiner for a period of thirteen years which ended on January 19, 1939, testified that during the time he was an examiner he was instructed to make changes in oral grades, the first of such instructions coming to him about January, 1934, from the general manager's office in a written memorandum through the research examiner's department. Referring to the examination of October 30, 1936, for engineer in the fire department, he testified that while conducting that examination he made grade entries on his rough report; that he was working with examiner Walbridge; that after the grading had been completed he received instructions to change the oral grades of certain candidates, such instructions being in the form of a written memorandum delivered to him by Dvorin; that the said witness made the changes as ordered, not because the qualifications of the candidates warranted such changes, but because he was ordered to do so.

"Another witness for the prosecution was Guy Kuykendall, who testified that he entered the employ of the city as an ordinary fireman on August 11, 1915, was appointed battalion chief in 1934 and retired November 11, 1938. During the 1933 campaign he met appellant Shaw at the campaign headquarters of Frank L. Shaw, who was then running for mayor; that he participated in both the 1933 and 1937 campaigns and during that time saw appellant Shaw a number of times; that two to four weeks before the examination for battalion chief was conducted in July, 1936, the witness had a conversation with appellant Shaw at the latter's office in the city hall, at which time said Kuykendall told 'Lieutenant Shaw that that was an important position in the fire department, the position of battalion chief, and that those positions were men that carried quite a little influence, had men under their supervision and that those key positions should be filled with capable, competent men as well as men that were favorable to the administration * * * the Shaw administration. * * * He (Shaw) said he realized it was an important position and he would find ways and means of helping the men out that I thought were competent and capable to fill those positions'. At a second conversation between the two men, fifteen or sixteen days before the examination for battalion chief took place, the witness testified he told 'Lieutenant Shaw that the examination was going to be held in a short time and I was willing to do anything to aid that man if I could do it right away, and he told me that within a day or two he would have the questions and answers for me for the coming examination * * * (he) asked me if I knew Herbert Dikeman and I told him that I did * * * that he was a good man and well qualified and would make a good officer in the department and he (Shaw) said he thought he was the right type of man for an officer in the department'. Two or three days later the witness met appellant Shaw at the Los Angeles Athletic Club, at which time appellant gave Kuykendall a list of questions and answers for the battalion chief's examination, consisting of between two hundred and two hundred fifty true and false questions. After receiving them, the witness asked appellant Shaw what he wanted him to do with the questions and answers after he was through with them and appellant told him to destroy them. He further testified that when he had coached the various applicants on the questions and answers he did destroy them; that thereafter he coached Captains Dikeman, Fien and Schroeder and during Mayor Shaw's campaign in 1937 he collected $100 from Dikeman, $250 from Fien and $50 from Schroeder, and he told appellant Shaw that 'those men felt very grateful for what had been done for them in the examination and that they had offered their willingness to work during the campaign or to help out in any way they could at any time they were called upon'.

"The foregoing testimony of Kuykendall has reference to the examination of battalion chief held in July, 1936, and is not included among the examinations specified in the indictment herein.

"The witness Kuykendall testified with reference to the examination for engineer of the fire department conducted October 30, 1936, (covered by counts 1 to 16 of the indictment) that he again contacted appellant Shaw and received from him a list of questions and answers which he thereafter used to coach men personally selected by him, reciting the names of those men who were specifically referred to in counts 1 to 16 of the indictment and from whom he collected sums of money ranging from $10 to $100; and that, thereafter, between the time of the written examination and the time when the eligible list was made public, he gave appellant Shaw a list of the names of the men he had coached for this examination.

"With reference to the examination for captain of the fire department held in April, 1937, and referred to in counts 17 to 22 of the indictment, this witness testified he received questions and answers from appellant Shaw and coached certain candidates including Woodruff and Evans from whom he collected $300 and $85, respectively; that about the time he received the questions he gave them and a list of names to Captain Bentley, employed at engine house No. 27; that he later gave to appellant Shaw a list of the names of the various candidates that he and Captain Bentley had coached for this examination, and received from Bentley $1,600 to $1,800, of which he delivered to appellant Shaw approximately $1,500 in currency, and the rest he used in the campaign for the election of Mayor Frank Shaw.

"Some time before the examination for auto firemen conducted on July 29, 1937 (counts 23 to 38 of the indictment), Kuykendall had a conversation with appellant Shaw to the effect that if he was going to coach any men for that examination he must have the questions in advance, and appellant Shaw told him to see appellant Cormack about it; that between three and four weeks prior to that examination, he saw appellant Cormack at the latter's office at Ninth and Los Angeles streets, at which time Cormack told the witness that he would see appellant Shaw and get his approval; that the witness subsequently did receive the questions but did not remember whether from Shaw or Cormack, but from either one of the two; that he thereafter coached several men and also gave the questions and answers to Captain Bentley, together with three or four names, and collected from Bentley five or six hundred dollars, a portion of which was used during the campaign of 1937, and the remainder was turned over to appellant Shaw. The witness also testified that he gave to Cormack a list of the candidates that he and Captain Bentley had coached for this particular examination.

"With respect to the examination for fireman held about January 8, 1938 (counts 39 to 50 of the indictment), Kuykendall testified he talked to appellant Cormack about thirty days prior thereto and told him that he (Kuykendall) had several candidates he wanted to coach for that examination and he would need a list of questions in order to do that work in advance of the examination and appellant Cormack told him he would see appellant Shaw and let Kuykendall know later as to what he could do about it; that he thereafter received the questions and answers from appellant Cormack which he used in coaching candidates and also turned over a list of four or five names to Captain Bentley; that he made up a list of all candidates that he and Captain Bentley had coached and gave it to appellant Cormack. He collected seven or eight hundred dollars from Captain Bentley on this examination and received from Bentley a total of approximately $3,000 in connection with all these fire department examinations; that 'some of that money was turned over during the 1937 campaign, some of it was turned over in 1938 to Lieutenant Shaw, some of it was used in the campaign of 1937 and some was used in the campaign of 1938, * * * the recall election'. This witness further testified that the aggregate amount of money that he collected personally and received from Bentley for coaching candidates for the various oral examinations for the fire department amounted to $7,000 or $7,500; that he organized a political club (the F. L. S. Club) and received from the members some $1,000 or $1,200, some of which was used for the expenses of the club and the remainder turned over to appellant Shaw for campaign purposes. He testified that this club was active in both the 1937 and 1938 campaigns; that he made suggestions to appellant Shaw with reference to changes and transfers of men in the fire department on the theory that it would help to build up the Shaw administration by putting certain men in important positions; that he knew Glenn G. Gravatt only by sight and never had a conversation with him.

"The testimony of this witness disclosed that the persons coached by him and Bentley and whose names were contained in the lists which he later presented to appellants were the same persons in the main whom Glenn G. Gravatt claimed he was asked to favor by falsely altering their oral interview grades, and by such process move such candidates forward in rank.

"The main contention of appellants is that there was not sufficient corroboration of the testimony of their [asserted] accomplices to satisfy the requirements of section 1111 of the Penal Code: 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.'

[1] "Quoting from 8 California Jurisprudence 173: 'The word "accomplice" has been defined as including all persons who have been concerned in the commission of an offense. People v. Kraker, 72 Cal. 459, 14 P. 196, 1 Am.St.Rep. 65; People

v. Ruef, 14 Cal.App. 576, 114 P. 48, 54; see, also, People v. Bunkers, 2 Cal.App. 197, 84 P. 364, 370; People v. Kinsley, 118 Cal.App. 593, 5 P.2d 938; People v. Frahm, 107 Cal.App. 253, 290 P. 678. In other words, one is an accomplice who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime. People v. Bolanger, 71 Cal. 17, 11 P. 799; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Linde, 131 Cal.App. 12, 20 P.2d 704; see, also, People v. Howell, 69 Cal.App. 239, 230 P. 991. In several cases, the courts derived a definition from the language of section 31 of the Penal Code, holding that accomplices are all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission. People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L.R.A., N.S., 704; People v. Collum, 122 Cal. 186, 54 P. 589; People v. Lawlor, 21 Cal.App. 63, 131 P. 63; see, also, People v. Moran, 144 Cal. 48, 77 P. 777.'

"In People v. Stanley, 92 Cal.App. 778, 783, 269 P. 465, 467, it was held that 'except in those instances where the rule is altered by special statute, an accomplice is one who has been concerned in the commission of a crime, whether he has directly committed the act or aided and abetted in its commission or advised and encouraged its commission and is liable to prosecution for the identical offense charged against the defendant. As thus construed it does no violence to our sense of justice by saying that an innocent man may as a matter of law be the accomplice of a debased felon and is entirely consistent with those authorities which hold that persons are not accomplices, who, although present for one reason or another, are not guilty of criminal participation'.

[2] "A review of the testimony hereinbefore narrated in detail clearly indicates that the named employees of the civil service department under the orders of their superior officer, Gravatt, directly committed the acts which they admitted they knew were wrongful and which the appellants were charged with aiding and abetting. This [might well] constitute them accomplices under the law. Moreover, the very precise wording of each count of the indictment itself, that appellants did 'aid and abet, advise and encourage, and by threats * * * and coercion compel' said Gravatt and other employees of his department to violate the provisions of section 113 of the Penal Code, definitely [tended to] place both Gravatt and the other employees of the civil service department in the category of accomplices, rendering them liable to be prosecuted for the same offenses with which appellants were charged."

But, even if the employees of the civil service department who participated in the grade changes, other than Gravatt, were not in fact accomplices, their testimony, as disclosed by the foregoing resume, in no way tends to connect either of the appellants with the crime charged, viz., alteration of public records. Other than Gravatt, the admitted accomplice, not one of them indicated any connection between the appellants and his activities in changing the records. Under the authorities to be later referred to, their testimony fails to corroborate in any particular the testimony of the accomplice Gravatt, for it takes direction and tends to connect the appellants with the offenses charged only when interpreted by and when read in conjunction with the testimony of the admitted accomplice Gravatt. As shall later be shown, this is not sufficient corroboration under the authorities.

[3] "This [latter] is likewise true [of the testimony] of the retired battalion chief Kuykendall. Positions for employment in the fire department were all within the classified civil service of the city of Los Angeles, and according to the testimony of said Kuykendall, he and appellant Shaw entered into an agreement to place in those positions men friendly to the Shaw administration. To accomplish this purpose, appellant Shaw secured from Gravatt copies of questions and answers for forthcoming examinations which he gave to Kuykendall, who in turn used them in coaching such candidates as he might select. Thereafter, Kuykendall supplied appellants with recommended lists of names, which appellant Shaw passed on to Gravatt for further action. The alteration and falsification of the grades of candidates as alleged in the first fifty counts of the indictment was [assertedly] done to insure the ultimate appointment of those candidates who were selected and recommended by Kuykendall as persons disposed to be friendly to the Shaw administration."

But, as indicated above, Kuykendall's testimony (whether or not he be regarded as an accomplice, a point we need not decide), like that of the others, in no way tends to establish the crime of alteration of public records or to connect the appellants therewith, except possibly when read in conjunction with and interpreted by the testimony of the accomplice Gravatt. As stated above, however, this is insufficient corroboration under the authorities.

"In answer to appellants' contention with respect to the lack of evidence corroborating the testimony of the accomplices, respondent urges that 'by not only eliminating the testimony of the admitted accomplice Gravatt, but also omitting the testimony of Kuykendall and the employees of the civil service department of the city of Los Angeles * * * there is substantial evidence to connect appellant Shaw with the conspiracy to build up a political machine in the city of Los Angeles and to use whatever means necessary, either criminal or otherwise, to accomplish this purpose'."

Appellants are not here charged with or convicted of building up a "political machine", or with improperly collecting campaign funds, assuming either to be a crime.

[4] "Appellants were charged with violations of section 113 of the Penal Code, in that they aided and abetted, advised and encouraged, and by threats and coercion compelled Glenn G. Gravatt and other employees of the civil service department to alter and falsify public records, consequently the corroborating evidence must of itself and without the aid of the testimony of the accomplices connect or tend to connect appellants with the commission of the offenses charged against them.

[5] "In the case of People v. Braun, 31 Cal.App.2d 593, 88 P.2d 728, the question presented was similar to the question here, as to whether or not there was corroboration of the testimony of an accomplice to the effect that defendant had advised and encouraged him to commit the crime of robbery in the perpetration of which a murder resulted. The opinion of the Court in the Braun case stated that the corroborating evidence must tend directly and immediately to connect the defendant with the commission of the offense and that, regardless of how strong the corroborating evidence might be in other respects, it must point to the connection of the defendant with the commission of the crime charged to be of any avail, and that corroborative evidence is insufficient where it only casts a grave suspicion upon the accused.

"We quote from the opinion in the Braun case, 31 Cal.App.2d at page 599, 88 P.2d at page 731: 'There is no direct evidence connecting appellant with the crimes charged in the information, for the reason that he did not actually participate in the robbery or the shooting in connection therewith. He could be convicted, therefore, only on the ground that though inactive during the commission of the offenses, he had previously advised and encouraged the hold-up in the perpetration of which one man was killed and another wounded. The only direct evidence that appellant knew of the contemplated robbery or that he had previously advised and encouraged it is supplied by the witness Roble, and he concededly being an accomplice, his testimony must be corroborated. "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. * * *" Pen.Code, sec. 1111.

"'It will thus be seen that the statute imperatively makes corroboration of the testimony of the accomplice an essential prerequisite to the conviction of the defendant, where the crime charged rests primarily and solely upon the testimony of an accomplice; and it is apparent, therefore, that the court has no control over the subject except to apply the statute. In People v. Morton, 139 Cal. 719, 724, 73 P. 609, 611 [this] Court quoted with approval the following language found in Welden v. State, 10 Tex.App. 400: "* * * eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." In the same case of People v. Morton, supra, [this] Court voices its approval of the rule as stated in Simms v. State, 8 Tex.App. 230: "The evidence must tend directly and immediately to connect the defendant with the commission of the offense."

"'In New York, under a code provision similar to our own (Code Crim.Proc. sec. 399), it was said in People v. Ryland, 28 Hun. 568, 570, "The corroboration, however strong in all other respects, must point to the connection of the defendant with the commission of the crime to be of any avail."

"'That more is required by way of corroboration than mere suspicion is firmly established in the law of this state. People v. Kempley, 205 Cal. 441, 456, 271 P. 478, and cases therein cited; People v. Davis, 210 Cal. 540, 293 P. 32. In People v. McLean, 84 Cal. 480, 24 P. 32, we find the following: "But, although more is required by way of corroboration than to raise a mere suspicion (see People v. Thompson, 50 Cal. 480), yet the corroborating evidence is sufficient if it of itself tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration."

"'The query of how much is required in order to constitute corroboration has been answered by many cases wherein it is decided that "corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused". People v. Robbins, 171 Cal. 466, 154 P. 317, 319; People v. Woodcock, 52 Cal.App. 412, 417, 199 P. 565; People v. Janssen, 74 Cal.App. 402, 407, 240 P. 799. In People v. Allison, 200 Cal. 404, 253 P. 318, the court is given no alternative but to set aside the conviction unless the testimony of the accomplice is corroborated in accordance with section 1111 of the Penal Code as that statute has been interpreted by the courts. See, also, People v. Robbins, supra, [171 Cal.] at page 469, 154 P. 317.'

"Again in People v. White, 35 Cal.App. 2d 61, at page 69, 94 P.2d 617, 621, it was stated in regard to the subject of corroboration: 'There is, of course, no dispute respecting the provisions of section 1111 of the Penal Code that the testimony of the accomplices must be corroborated and in the absence of any such corroboration a conviction may not stand. The difficulty comes in determining what corroboration is sufficient. First, we must eliminate from the case the evidence of the accomplice, and then examine the evidence of the remaining witness or witnesses with the view to ascertain if there be inculpatory evidence, —evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him. People v. Kazatsky, 18 Cal.App.2d 105, 110, 63 P.2d 299; People v. Morton, 139 Cal. 719, 73 P. 609; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Kempley, 205 Cal. 441, 271 P. 478.'

"In People v. Hobson, 7 Cal.App.2d 392, 394, 46 P.2d 278, 279, it is stated: 'The question of the corroboration of an accomplice was discussed at length and the authorities reviewed in the case of People v. Kempley, 205 Cal. 441, 456, 271 P. 478, 485, where it is said: "The question of how much more than a mere suspicion is required in order to constitute corroboration has been answered by many cases in declaring further that—'Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused.' People v. Robbins, 171 Cal. 466, 470, 154 P. 317; People v. Woodcock, 52 Cal.App. 412, 417, 199 P. 565; People v. Janssen, 74 Cal. App. 402, 407, 240 P. 799. The Code section is mandatory (People v. Allison, 200 Cal. 404, 253 P. 318), and a conviction cannot stand unless the testimony of the accomplice is corroborated in accordance with the standards laid down by the courts in the interpretation of the statute. 'The court has no discretion in the matter, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the State's case depends solely upon his uncorroborated testimony.' People v. Robbins, 171 Cal. 466, 469, 154 P. 317, 318. If the testimony of the accomplice is not sufficiently corroborated, the conviction of the accused is wholly wanting in a legal foundation to support it. People v. Viets, 79 Cal.App. 576, 587, 250 P. 588."'"

In People v. Davis, 210 Cal. 540, 293 P. 32, 38, it is declared: "Taking the testimony of the several witnesses offered in corroboration of the story told by Ben Getzoff, it is exceedingly doubtful whether any of it, or all of it together, in and of itself amounts to corroborative evidence tending to connect the defendant with the commission of the crime charged. In order to give it effect even as tending in that direction, it seems at every point necessary to interpret and explain this 'corroboration' in the light of the testimony of Ben Getzoff. It requires the testimony of Ben Getzoff to give it direction to the alleged crime, before it can be said to connect the defendant with the commission of the crime. But the law requires that such testimony offered in corroboration of the testimony of an accomplice shall *of itself* tend to connect the defendant with the offense charged."

[6] "For the purpose of applying these rules of law, a summary of the [other] evidence, which respondent urges is corroborative of the testimony of the accomplices, follows: Officer Morris testified he had a conversation with appellant Shaw and Peter Del Gado in March of 1937, when they discussed certain charges which had been brought against him (Morris) by the chief of police and upon which he had a hearing in January, 1937, when he was exonerated and restored to duty; he said appellant Shaw wanted to know if he had received his back pay for the time he was suspended—from December 16, 1936, to some time in January, 1937, and Del Gado asked what he had done with it, to which the witness replied he had used it to pay his honest bills and support his family; that Del Gado then said there was a preferred list of officers who contributed to the campaign and were friendly to the administration, to which appellant Shaw agreed, saying that all friends of the administration would be taken care of. Del Gado then asked the witness if he intended taking the examination for sergeant scheduled for April of 1937, to which the witness replied that he did, whereupon Del Gado said, 'Well, I just wanted to know if you were going to take the examination because there might be some way that I could help you.' Del Gado also told said witness that the reason he had been acquitted of the charges preferred against him was because appellant Shaw 'had fixed it', to which Morris replied that everything had been above board and that no fixing had been necessary. He also testified that neither Del Gado nor appellant Shaw suggested that he give them any money."

Applying the rule as set down by the authorities, supra, this testimony in no way tends to connect the appellants with any crime involved in the changing of grade records. It is equally consistent with any other type of assistance (legal or otherwise) to the so-called "preferred list". Without the interpretation and direction furnished by the testimony of the accomplice Gravatt, this testimony is meaningless and in no way tends to connect the appellants with the offenses of which they stand convicted.

[7] "Roy Groom, transportation manager for a local bread company, testified that about May of 1937 he received a list of numbers and a list of names of police officers from Peter Del Gado and was told which numbers represented true or false answers; that he gave this list of numbers to various police officers and received campaign contributions from some of them, which he turned over to Peter Del Gado. The witness also testified that he was present at a banquet at Rene & Jean's Cafe when appellant Shaw thanked the various motorcycle officers there present for their contributions and told them that the money was not needed and would be returned to them by a friend they all knew and trusted, Roy Groom; that thereafter an envelope containing money and a list of names was handed to him, but not by appellant Shaw. Upon examination he discovered that the list of names was larger than the list of names he had previously given Del Gado; that he returned the money to the officers named in the list. This witness also testified that he had known appellant Cormack to speak to for a couple of years and had a telephone conversation with him prior to October or November, 1938, at which time Cormack told him he understood the motorcycle officers had put him (the witness) and Del Gado 'in the middle', to which said Groom replied, 'What do you mean by that?' Appellant Cormack is alleged to have answered, 'Well, I understand they involved you in a payoff', to which Groom replied, 'I don't understand what you are talking about. You know better than to involve me in such a situation.'"

What we have interpolated above with respect to the testimony of the witness Morris is equally applicable to Groom's testimony. It falls far short of furnishing the corroboration of Gravatt's testimony required by the authorities.

[8] "Walter E. Weyerman, acting captain of the police, stationed in Highland Park, testified he had been with the department for twenty-two years, knew appellant Shaw and had kept a luncheon engagement with him at the Los Angeles Athletic Club in September, 1936, at which time they discussed his job with the department and Shaw asked him how long he had been acting captain and how he would like to be captain; also if he had passed any of the examinations. Weyerman replied he had passed all but one but had received no appointments; Shaw then

asked him if he favored the administration and he replied that he did not, whereupon Shaw asked him how he would like to be fourth on the list and Weyerman wanted to know what was the matter with being first, also that he wanted nothing more than a break and that he had never asked for favors in his long years of service with the department. He further testified that he never became a captain and at the time appellant Shaw talked to him he had just been reduced to a lieutenant and had been sent to Highland Park."

We here repeat what we said above with respect to the testimony of Morris and Groom, adding that any implied offer of appellant Shaw to be of assistance in placing the witness "fourth on the list" might equally be fulfilled by furnishing in advance the questions and answers of an examination, or any other method of assistance (whether legal or not), and as to which the appellants are neither charged nor convicted.

[9] "Herbert E. Dikeman, who had been employed in the fire department for a period of twenty-four years, testified that in 1934 he met appellant Shaw in San Pedro while the witness was captain of fireboat No. 2, and discovered that he had been on the United States battleship Vermont with appellant Shaw between 1910 and 1914; that appellant Shaw invited him to call on him at the city hall; that in June, 1936, the witness presented himself at Shaw's office to discuss the forthcoming examination for battalion chief, at which time he told Shaw he had taken two examinations and was number nine on the list for the 1934 examination, but had been moved back four places on the final list; that he wanted to know if there was anything Shaw could do to keep him from being moved back on the forthcoming examination, to which Shaw replied that he was not civil service, and then asked if the witness had studied for the job; the witness replied that he had spent six years studying and felt qualified for the position, and Shaw said he appeared to be a man who would return a favor. Subsequently, the witness called upon Guy Kuykendall at his home in response to a telephone call, and thereafter Kuykendall coached said Dikeman in preparation for the examination of battalion chief. In October, 1936, after the examination had been held, the witness met appellant Shaw at a dinner attended by other firemen, and thanked Shaw for what he might have done for him in this examination. Subsequently, he paid Kuykendall $100 as a contribution to the Shaw campaign fund; that at the time he attended the dinner the eligible list had been published giving the witness number two place thereon; that he received his appointment in July of the following year."

This testimony, like that of the other witnesses just discussed, requires the interpretation and direction furnished by the accomplice Gravatt's testimony to give it value. Under the settled rule it is not corroborative. Moreover, as indicated in connection with Weyerman's testimony, any implied offer of assistance by appellants may equally have been fulfilled in any number of ways other than grade record changes, the offense here charged.

"According to the witness Morris, his brother officer Del Gado, who later fled the jurisdiction of the courts while at large on bail which was forfeited by his bondsmen, seemed interested in the fact that said Morris expected to take a promotional examination and stated to him that there might be some way in which he (Del Gado) could help him. How this was to be accomplished was left unexplained, and while appellant Shaw was present at this conversation, nothing was either said or done by him which could be construed as inculpatory on his part. In order to give this evidence effect as tending to connect appellant Shaw with the offenses charged against him, it is necessary to interpret and explain it in the light of the testimony of the accomplice Gravatt. Eliminating the testimony of the accomplice, this evidence standing alone is insufficient to raise even a suspicion of guilt upon the part of either appellant. * * *

"Moreover, neither the police sergeant's examination referred to by officer Morris, the examination for police captain referred to by officer Weyerman, nor the examination for battalion chief referred to by the witness Dikeman, forms the basis of any of the transactions charged as offences in the indictment."

It is questionable, therefore, whether "the evidence furnished by these three witnesses, under the authority of the Braun case and the other cases cited, supra," furnished anything "in the way of corroborating the testimony of the accomplice Gravatt to the effect that appellants aided and abetted, advised and encouraged, and by threats and coercion, compelled him to alter the grades of some thirty-three candidates as charged in the sixty-six counts of the indictment, in connection with the five civil service examinations therein specifically referred to. In other words, it is not the type of evidence which tends directly and immediately to connect appellants with the offenses charged against them.

[10, 11] "The testimony of the witness Groom with respect to his transaction with Peter Del Gado which was permitted to be introduced over the objection of appellants was purely hearsay and therefore incompetent, and the fact that the prosecution attempted to connect it up by showing that appellant Shaw made a speech at a dinner attended by a group of motorcycle officers at which time he [assertedly] returned to them through the witness Groom certain contributions which they had previously made to the Shaw campaign, did not cure the error of its admission. Further, the purported conversation between this witness and appellant Cormack only shows to what lengths the prosecution went in its vain attempt to procure corroboration. In addition, neither of said portions of the witness' testimony tended to connect the appellants with the offenses charged.

[12, 13] "The testimony introduced with reference to the Yedwalsky matter was incompetent because it was an attempt to establish the commission by appellant Cormack of an offense completely outside the issues herein, it having reference to the examination of sanitary and housing inspector, which had not the slightest connection with the five examinations upon which the indictment herein was founded. The testimony of these witnesses, as well as of the various police officers who testified they received coaching for civil service examinations in return for campaign contributions, has no evidentiary force concerning the offenses charged, except to create an atmosphere of suspicion. Corroborating testimony which merely raises a suspicion of a defendant's guilt is not sufficient. People v. Davis, 210 Cal. 540, 559, 293 P. 32."

It must, as already indicated, tend to connect the appellants with the commission of the offenses charged and of which they stand convicted.

Before proceeding to other matters, the determination of which may be of assistance in the event of a retrial of this cause, it is not inappropriate to point out that each of the appellants took the stand in his own defense and categorically denied the accusations and charges made against him in the testimony of the accomplice Gravatt. They also denied any knowledge of or participation in any illegal alterations of the records. Contrary to respondent's intimation, we find nothing in the testimony of the appellants nor in their demeanor as witnesses, as reflected by the record, which in any way tends to furnish the corroboration of Gravatt required by law. By other witnesses the appellants also attempted to show that it had been the long established but secret practice of Gravatt to sell for his own enrichment questions and answers to approaching civil service examinations, the theory underlying this showing apparently being that Gravatt attempted to shift responsibility when his asserted improper practices were brought to light or were about to be uncovered. Because of the possibility of a retrial, we express no opinion upon the sufficiency or effect of such showing.

[14] In conclusion, and for the guidance of the trial court in the event of a retrial, it is well to state that we find no merit in the appellants' further contention that, even if all the evidence be accepted as true, it serves only to make out a case of misdemeanor under section 118 of the charter, and not one of felony under section 113 of the Penal Code, under which they were charged and convicted. Without quoting the two sections, we are satisfied that so far as material here the Penal Code section defines and denounces as a felony any wilful *alteration* of a record in the custody of a public officer or deposited in a public office. The charter provision, on the other hand, is addressed more particularly to obstructions of the municipal civil service in the prevention of candidates receiving a fair examination and the falsification of the original record—not with the *alteration* of the record as originally made. We find nothing in the charter provision that will preclude such a charge as is here made under the Penal Code section.

[15, 16] Nor do we find any merit in the appellants' contention that the application blanks and "rough sheets" upon which the alleged alterations were made were not "records" within the meaning of the Penal Code section. As stated in People v. Tomalty, 14 Cal.App. 224, 111 P. 513, 515, and the authorities there cited: "In order that an entry or record of the official acts of a public officer shall be a public record, it is not necessary that such record be expressly required by law to be kept; but it is sufficient if it be necessary or convenient to the discharge of his official duty. 'Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.' * * *" The evidence here discloses that the applications and "rough sheets" assertedly altered were part of the permanent records of the civil service department, kept for the proper operation and convenience of the department and consquently were "records" within the meaning of section 113 of the Penal Code.

[17] In view of our conclusion that the conviction of appellants must fall because of the absence of corroborating evidence, the judgments founded thereon cannot be sustained.

The appeal from the order denying the objections of each appellant to the pronouncement and imposition of judgment and sentence is dismissed. The judgments and the orders denying appellants' motions for new trial are, and each of them is, reversed.

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17 Cal.2d 736

COMFORT v. COMFORT.

L. A. 16456.

Supreme Court of California.

April 18, 1941.

Rehearing Denied May 15, 1941.

1. Injunction 🔑1

An "injunction" operates on the person of the defendant by commanding him to do or desist from certain action.

See Words and Phrases, Permanent Edition, for all other definitions of "Injunction".

2. Judgment 🔑17(3), 818(2)

Constructive service on a nonresident is not effective so as to permit a court to render a valid judgment in personam which will be within the protection of the full faith and credit clause, or be valid in the state where rendered. U.S.C.A.Const. art. 4, § 1.

3. Judgment 🔑818(2)

Where husband was not personally served in a suit in New Jersey to enjoin further prosecution of a divorce action in California and husband was at no time a resident of New Jersey, wherein wife resided, New Jersey decree enjoining husband from prosecuting divorce action in California was not entitled to full faith and credit under the Constitution and would not be recognized as a matter of comity as against husband who was a California citizen, as against contention that New Jersey injunction operated upon marital status and that personal service was not necessary. U.S.C.A. Const. art 4, § 1.

4. Divorce 🔑326

A New York separate maintenance decree granted to wife who subsequently established residence in New Jersey did not deprive California court of jurisdiction of husband's action for divorce on ground that the New York decree conclusively established that wife was innocent party and that the marital domicile followed that of the innocent party, where wife appeared in California action, objected to jurisdiction of court and also answered on merits and requested affirmative relief.

5. Divorce 🔑141

Where wife obtained separate maintenance decree in New York and subsequently established residence in New Jersey, in subsequent divorce action in California by husband, California court had jurisdiction to ascertain whether after separation wife had committed a marital offense and whether circumstances were such that husband could lawfully secure independent domicile which would also be the marital domicile, notwithstanding that marital domicile may have followed domicile of innocent party in separation proceedings.

6. Divorce 🔑12

A husband under some limited circumstances may secure a divorce from his wife for causes arising after the wife has separated from him.

7. Divorce 🔑326

Where under California law desertion must continue for one year to constitute cause for divorce and New York separate maintenance decree purported to cover a period of only eight months rather than a year, Supreme Court would not, in husband's California action for divorce, determine whether there was such a desertion as would constitute a ground for divorce and thus a lawful defense of recrimination. Civ.Code, § 107.

8. Divorce 🔑326

Finding of New York court in separate maintenance proceedings that husband sought annulment of marriage on ground of epilepsy and of disloyalty to United States, based on false, malicious and unjustified charges and resulting in great mental anguish, pain and suffering, established that at time decree was entered wife under California law had a cause of divorce against her husband on ground of "extreme cruelty". Civ.Code, §§ 94, 122.

See Words and Phrases, Permanent Edition, for all other definitions of "Extreme Cruelty".

9. Divorce 🔑150(2)

The failure to follow precisely the terms of statute setting forth extreme cruelty as ground of divorce is immaterial where the acts found are such that as a matter of law they establish extreme cruelty. Civ.Code, § 94.

10. Divorce 🔑326

Where wife obtained separate maintenance decree in New York based on facts sufficient to establish extreme cruelty under California law and thereafter husband and wife lived apart, there was no attempt at reconciliation and evidence was uncontradicted that there was no connivance, collusion or condonation, it was a "question of law" whether there had been such an unreasonable lapse of time as would give rise to statutory presumption of connivance, collusion, condonation or full acquiescence in the same with intent to continue the marriage relation so as to preclude wife from setting up husband's conduct as a recriminatory defense in husband's action in California for divorce brought some ten years after the cause of divorce relied upon by wife as recriminatory defense. Civ.Code, §§ 94, 122, 124, 125, 126, 127.

11. Action 🔑63

"Laches" implies a failure to do something that a party should have done.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

12. Divorce 🔑202, 289

In divorce action where substituted service of process is relied upon, court does not have jurisdiction to award alimony or any allowance for support of child.

13. Divorce 🔑326

Where wife obtained separate maintenance decree in New York, based on facts sufficient to establish extreme cruelty under California law, and thereafter husband and wife lived apart, there was no attempt at reconciliation, husband was in China for several years, it would not have been until late in 1930 that wife could have proceeded in New Jersey, to which state she had removed, for divorce, but she could not have obtained full relief in New Jersey and husband's action for divorce was brought in California in 1935, wife was not barred by "laches" from setting up acts of cruelty committed by husband as a recriminatory defense. Civ. Code, §§ 94, 122, 124, 125, 126, 127.

14. Divorce 🔑53

The "recrimination doctrine" is based on the concept that he who seeks redress for the violation of a contract resting upon mutual and dependent covenants must himself have performed the obligations on his part. Civ.Code, § 122.

See Words and Phrases, Permanent Edition, for all other definitions of "Recrimination Doctrine".

15. Equity 🔑65(1)

He who comes into equity must come with clean hands.

16. Constitutional law 🔑70(3)

It is not for the courts to determine the rightness or wrongness of a doctrine declared by legislature, since such function is for the legislature and not for the courts.

17. Divorce 🔑326

Where findings of New York court in separate maintenance proceeding were sufficient to establish that a time decree was entered, wife had a cause of action for divorce, under California law, against husband on ground of extreme cruelty and there was nothing occurring after the decree from which condonation or a reconciliation or an attempt to effect one could be inferred, the separate maintenance decree established recriminatory defense against husband's action for divorce. Civ.Code, §§ 94, 122.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Suit for divorce by Roland M. Comfort against Helen E. Comfort. From a judgment for plaintiff, defendant appeals.

Reversed.

For prior opinion of District Court of Appeal, see 105 P.2d 166.

Monta W. Shirley, Jones & Snow, and George W. Nilsson, all of Los Angeles, (Edward V. Jones, of O'Neals, and Taylor H. Snow, of Los Angeles, of counsel), for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

PER CURIAM.

This case is before this court as the result of an order granting a hearing after decision in the District Court of Appeal, First Appellate District Division One. After a review of the record and consideration of the legal propositions involved, we have decided to adopt as the decision of this court, the opinion prepared by Mr. Presiding Justice Peters when this case was before the District Court of Appeal, with the modifications as will hereinafter appear.

"Defendant wife appeals from a judgment granting plaintiff husband an interlocutory judgment of divorce on the ground of extreme cruelty. The decree awarded custody of the son of the parties to the defendant, with provision for $125 per month for his support. The defendant is a resident of New Jersey, but appeared in and contested the action.

"The parties were married on November 11, 1919, in Washington, D. C. The child was born in 1922. The respondent is a graduate of Annapolis and is a commander in the United States Navy. He has had a long and distinguished career in the navy. The parties legally separated in March of 1924. In 1923 the wife was living abroad with her family, the husband then being on sea duty. Early in 1924, in response to cabled requests from her husband, the wife returned to New York. The day after her arrival the husband notified his wife that he intended to institute annulment proceedings. Thereafter, in March of 1924, annulment proceedings were instituted by the husband in the state of New York, the then residence of the parties. In that proceeding the husband charged that his wife was afflicted with epilepsy and that she was disloyal to the government of the United States. Judgment went for the wife in the annulment suit, and this judgment was affirmed on appeal without a written opinion. (Comfort v. Comfort, 217 App.Div. 752, 216 N.Y.S. 814.) While that action was pending on appeal, the wife, in January, 1925, instituted an action in New York for divorce from bed and board, which, in this state, would be tantamount to an action for separate maintenance. In December of 1928 judgment was entered in favor of the wife in the separate maintenance action, the decree granting the wife a divorce from bed and board, awarding her the custody of the child and $50 per week for the support of herself and the child. This judgment was affirmed on appeal. Comfort v. Comfort, 227 App.Div. 1, 236 N.Y.S. 544.

"A short time thereafter the wife moved to Vineland, New Jersey. The husband was transferred to sea duty and spent some time in China. While in China he failed to send to his wife the weekly award for her support and the support of the child. In June of 1933 he was transferred to California. In September of 1935 he instituted the present action for divorce on the ground of extreme cruelty. Shortly thereafter the wife commenced an action in New Jersey for an injunction to restrain the husband from further prosecution of the present divorce action. Notice of this action was given the husband by personal service in California. The husband failed to appear and a final decree restraining the husband from maintaining or prosecuting the California divorce action was entered in New Jersey.

"The complaint in the present action charges the wife with various acts which, it is claimed constitute extreme cruelty. Some of these charges were abandoned on the trial, and as to others the trial court found in favor of the wife. On several of the charges, however, the trial court found in favor of the husband.

"Substituted service was made on the wife. She appeared in the action. By her answer she denied that the husband was a resident of California, and denied, generally and specifically, each and every allegation of cruelty set forth in the complaint. In addition, the answer set forth numerous affirmative defenses. Among other things, she alleged that the California court had no jurisdiction over the subject matter of the action, for the reason that the marital res is in Vineland, New Jersey; that the action in California is barred by the New

York separate maintenance decree; that New Jersey has enjoined the prosecution of the action; that the husband has been guilty of laches; that in fact defendant, based on the facts found by the New York decree, has a cause of action for divorce against the husband. The prayer of the answer was that the complaint be dismissed; that plaintiff be restrained and enjoined from prosecuting the divorce action or from molesting or bothering defendant and the minor child; that defendant be allowed reasonable attorney's fees and costs, and such other relief as may be equitable and just.

"After a trial at which the major evidence was based on depositions, judgment was entered for the husband. The trial court found against all of the affirmative defenses. It also found that the husband was a bona fide resident of California and of the county of Los Angeles for the requisite period; that 'since the marriage of plaintiff and defendant, the said defendant has treated plaintiff in a cruel and inhuman manner and has wrongfully inflicted grievous bodily injury and grievous mental suffering on plaintiff herein * * *'. The court also found that the plaintiff and the defendant are fit and proper persons to have the custody of the child, but that it is to the best interests of the child to remain in the custody of the mother; that the plaintiff should pay $125 per month for the support, maintenance and education of the child; that plaintiff is eight months delinquent in the payment of the alimony and support awarded the defendant by the New York decree.

"On this appeal many contentions are made by appellant. The cause has been exhaustively and ably briefed by counsel for both parties. Appellant urges at great length that, because of the New York separate maintenance decree, and, because of the New Jersey injunction, California has no jurisdiction over the divorce proceeding even though the husband is a resident of California. Appellant also urges that, by reason of the New York decree, as a matter of law, she has a perfect recriminatory defense. It is also contended that the acts of alleged cruelty as found by the trial court, and as they appear from the evidence, do not constitute extreme cruelty within the code definition of those terms. These points will be considered in order.

"Is the respondent husband precluded from maintaining the present action by virtue of the New Jersey injunction?

"In the present action the trial court found that the New Jersey court was without jurisdiction to render the injunction decree. The husband was not served in the injunction proceedings in New Jersey, and at no time had he been a resident of that state. He was personally served in Los Angeles.

[1, 2] "An injunction is obviously a personal decree. It operates on the person of the defendant by commanding him to do or desist from certain action. It is a fundamental rule of jurisdiction that constructive service on a nonresident is not effective so as to permit a court to render a valid judgment in personam which will be within the protection of the full faith and credit clause, or, in fact, that will be valid in the state where rendered. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; In re Culp, 2 Cal.App. 70, 83 P. 89.

[3] "Appellant recognizes this doctrine, but contends that the New Jersey injunction operates upon the res, that is, the marital status; that she being the innocent party, according to the New York decree, the marital domicile followed her to New Jersey; that New Jersey had jurisdiction over the res, and had jurisdiction to protect it by rendering the personal injunction decree; that this decree is entitled to recognition in California. Appellant cites cases from New Jersey which indicate that in that state the courts will grant injunctions restraining prosecution of divorce actions in other states although the defendant has not been personally served or has not appeared in New Jersey. Gross v. Gross, 180 A. 204, 13 N.J.Misc. 499; Haring v. Kauffman, 13 N.J.Eq. 397, 78 Am.Dec. 102; Perlman v. Perlman, 113 N.J.Eq. 3, 165 A. 646; Di Brigida v. Di Brigida, 116 N.J.Eq. 208, 172 A. 505; Knapp v. Knapp, 173 A. 343, 12 N.J.Misc. 599. It is quite significant, however, that appellant cites no case holding that other states must or will give recognition to such a decree under the full faith and credit clause. Whatever effect the New Jersey decree might have on the husband were he to be found within the confines of the state of New Jersey, we are confident that such a decree, not based on personal service within the jurisdiction, is not entitled to full faith and credit under the Constitution, and should not be

recognized as a matter of comity as against one of our own citizens.

"Does the New York separate maintenance decree, coupled with the fact that appellant wife is a resident of New Jersey, deprive the courts of California of jurisdiction of the present proceeding?

"Appellant argues that the California courts have no jurisdiction over the marital res for the reason that the New York separate maintenance decree conclusively established that she was the innocent party, and that under the cases, the marital domicile follows that of the innocent party. Great reliance is placed on the case of Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 86 A.L.R. 1321. In that case a wife brought an action for divorce in California. The husband defended on the ground that he had secured a Pennsylvania divorce. The last place the parties had lived together as husband and wife was California, and this state was still the domicile of the wife. The Supreme Court held that, even though the husband had been a bona fide resident of Pennsylvania at the time he secured his divorce, such decree having been secured by constructive service on the wife, was not entitled to full faith and credit and would not be recognized under the doctrine of comity, until California first determined for itself who was the innocent party. It was held that the plaintiff wife in the California action could establish in that action the invalidity of the Pennsylvania decree by proving that she was the innocent party, and that defendant husband, plaintiff in the Pennsylvania action, had in effect, perpetrated a fraud on the wife and on the Pennsylvania court in procuring a divorce in that state. The California Supreme Court also held that if, in fact, the wife was the innocent party, the marital res remained with her in this state, and that, under such circumstances, the decree of the Pennsylvania court, so far as this state was concerned, was void because of lack of jurisdiction over the subject matter. The court held, and this is the doctrine relied upon by appellant in the instant case, that when the parties separate the marital res follows the domicile of the innocent party.

[4] "There are obvious factual and legal distinctions between the Delanoy case and the instant one. In the case now before the court it is not the plaintiff, a resident of California, as it was in the Delanoy case, who is attempting to attack the foreign decree. Rather, it is the defendant, a nonresident of California, who seeks to make use of the rule of the Delanoy case for the purpose of establishing her point as against a resident of California, that this state has no jurisdiction of the marital res, which necessarily follows her because she was adjudged the innocent party by the New York decree entered in 1928. In the Delanoy case service on the wife in the Pennsylvania action was by publication, and she did not appear therein. In the present case the wife has appeared in the California action. Although it is true that by answer she objected to the jurisdiction of the California court, she also answered on the merits, and requested affirmative relief. If we assume that the marital res attached itself to the innocent party—the wife—as a result of the New York decree, and followed her to New Jersey when she changed her domicile, the real question would seem to be whether by coming into this state and contesting the action on its merits, and asking for affirmative relief, she has conferred jurisdiction over the marital res on the courts of this state. Suppose that in the Delanoy case the wife was the innocent party, but nevertheless she appeared in and contested the Pennsylvania action and asked for affirmative relief, and, further, suppose the Pennsylvania court had decided against her. Could she then have attacked the Pennsylvania decree by bringing an action in California and proving to the satisfaction of the California court that she was the innocent party? It would seem that she could not.

"Appellant wife urges that she has not submitted the marital res to the jurisdiction of the California court, even if that could be done by appearing generally without objection to the jurisdiction of the California court, for the reason that by answer she objected to the jurisdiction of the California court as well as contesting on the merits. She contends that this was the only legal method of raising the point that the court had no jurisdiction over the subject matter. The trial court held that by appearing in the action and seeking affirmative relief, she had estopped herself from asserting that the California court was without jurisdiction.

"There is another fundamental fallacy in appellant's argument on this point. She assumes that, once having been adjudicated the innocent party, the marital domicile forever follows her, and that her husband can never, under any circumstances, secure a divorce for causes arising after the entry of the separation decree. If the husband can secure a divorce from the wife, after the wife has secured a decree of separate maintenance, for causes arising after the entry of the separate maintenance decree, it must be because the marital domicile is then with the husband.

[5] "It must be remembered that in the present action the trial court did not treat the separate maintenance decree as a nullity. It found that the decree was final and conclusive as to the matters adjudicated by it. But the trial court also found that the wife was guilty of various marital offenses after the separation. This is of considerable importance. The separate maintenance decree entered by the New York court in 1928, so far as this point is concerned, simply established that in 1928 and prior thereto the wife was the innocent party. It could not, and did not, establish her continued innocence subsequent to that date. If it is the law that a husband may acquire a cause for divorce after a separate maintenance decree has been secured by his wife for causes arising after the entry of such decree, then it necessarily follows that under such circumstances the marital domicile is no longer exclusively attached to her. In the subsequent divorce action the court must determine that the husband is then the innocent party and has been purged of his former misconduct. Under some circumstances, the husband, in such a situation, must be able to acquire an independent residence for purposes of divorce, and that court must be deemed to have jurisdiction of the marital res. Since this is so, the California court in the present action had jurisdiction to ascertain whether, after the separation, the wife had committed a marital offense, and whether the circumstances were such that the husband could lawfully secure an independent domicile which would also be the marital domicile. If jurisdiction over the marital res follows the domicile of the innocent party, and, if the husband can lawfully become the innocent party by reason of acts occurring after his wife secures a separate maintenance decree, clearly California has jurisdiction to determine whether the facts exist to give it jurisdiction. This is in exact accord with the doctrine of the Delanoy case.

[6] "There can be no doubt that in this state, under some limited circumstances, the husband may secure a divorce from his wife for causes arising after the wife has separated from him. It is true that in Mayo v. Mayo, 3 Cal.2d 51, 43 P.2d 535, the Supreme Court announced a contrary doctrine, but in Stitt v. Stitt, 8 Cal.2d 450, 65 P.2d 1297, the Mayo case, on this point, was expressly overruled. In the Stitt case a divorce was granted the husband for acts of cruelty occurring after the parties had separated. The opinion intimates that the original separation was based on misconduct by the wife. But in Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, the wife secured a separate maintenance decree in California based on the cruelty of the husband. About eight years later the husband secured a Nevada divorce on grounds of extreme cruelty. The instant action was to terminate the allowance for alimony awarded the wife in the separate maintenance decree on the ground the parties were divorced. The court held that in the absence of a showing to the contrary it would be presumed that the acts of alleged cruelty upon which the husband relied occurred subsequent to the date of the separate maintenance decree, and, further, that the evidence was capable of the construction that a condonation of the husband's offense had taken place.

"Does the New York separate maintenance decree establish a recriminatory defense?

"From what has been said it is clear that the California court had jurisdiction of the divorce proceeding. But this is not decisive of the present appeal. Among the other affirmative defenses pleaded by appellant wife was the defense of recrimination. She pleaded the New York separate maintenance decree and now urges that it establishes, as a matter of law, a perfect recriminatory defense. Under the facts of this case, we agree with that contention.

"Recrimination is defined in section 122 of the Civil Code as follows: 'Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.'

"It is the theory of appellant wife that the New York decree of 1928 conclusively established that she was entitled to a divorce at that time, and that such cause of divorce, judicially established, constitutes, as a matter of law, a recriminatory defense. Respondent's answer to this contention is two-fold. First, he contends, and the trial court found, that the judgment of the New York court in the separate maintenance action is not a recriminatory defense for the reason that it was not a showing by the wife 'of any cause of divorce' against the husband within the meaning of section 122 of the Civil Code. Secondly, it is contended, and the trial court found, that an unreasonable length of time had elapsed since the occurrence of the matters determined in the separate maintenance action, and that such acts were therefore barred as a recriminatory defense. Neither of these contentions is sound.

"The New York decree was based on desertion by the husband and upon his cruelty. In reference to desertion the New York court found:

"'That although the plaintiff has always conducted herself towards the defendant as a faithful, loving and obedient wife, the defendant disregarding his duty as a husband, and without plaintiff's consent, has been wilfully and continuously absent from the plaintiff for more than eight months prior to the commencement of this action, without any cause or justification therefor, and with intention not to return; and that the defendant has abandoned and deserted plaintiff.'

[7] "Of course, in this state desertion must continue for one year to constitute cause for divorce (sec. 107, Civ.Code). The separate maintenance suit was filed in January of 1925. The trial was not had and the decree was not entered until December of 1928. The finding was that the husband had deserted the wife for eight months prior to the commencement of the action." Inasmuch as the decree purported to cover a period of only eight months rather than a year, we will not, for the purposes of this case, determine whether or not there was such a desertion as would constitute a ground for divorce and thus a lawful defense of recrimination.

"However, whether the desertion finding is sufficient to constitute grounds for divorce in this state is immaterial for the reason that the findings in reference to the cruelty of the husband clearly establish 'extreme cruelty' as these terms are defined in section 94 of the Civil Code. The New York findings on the issue of cruelty are as follows:

"'5. That since the said marriage between the plaintiff and the defendant, the defendant has treated the plaintiff in a cruel and inhuman manner, and that it has by reason of the premises become unsafe and improper for the plaintiff to live and cohabit with the defendant.

"'6. That in the month of January, 1924, the defendant cabled to the plaintiff who was at that time living abroad, requesting her in substance to come to America for the purpose of rejoining and living with the defendant, who prior to that time had been on duty at sea, aboard a battleship of the United States Navy, pursuant to his profession as a naval officer; that pursuant to the said request the plaintiff did return to America in or about the month of March, 1924.

"'7. That thereafter, to wit, in the month of March, 1924, and after plaintiff's arrival in America with the child of the parties hereto, the defendant selected a boarding house on Columbia Heights, Brooklyn, N. Y., for the plaintiff to live with her said child.

"'8. That thereupon the defendant refused to live with the plaintiff at the said boarding house selected by him.

"'9. That thereafter the defendant instituted or caused to be instituted by his attorney in the Supreme Court, Kings County, an action against the plaintiff for an annulment of the marriage between the parties hereto, alleging under oath, among other things that the plaintiff was an epileptic; that the plaintiff knew at the time of her marriage to the defendant that she was an epileptic; that the plaintiff had fraudulently concealed from the defendant the said alleged epilepsy; that the plaintiff has represented herself to be a physically sound and fit person to marry to the defendant; that the plaintiff was disloyal to the United States of America; that she fraudulently represented herself to be loyal to the United States of America prior to said marriage; that the plaintiff was guilty of acts of disloyalty to the United States both before and after said marriage to the defendant; that all of said representations were false and were known to the defendant to be false at the time when made.

"'10. That thereafter the said action for annulment brought by the defendant against the plaintiff came on for trial at a Special Term, Part II of the Supreme Court, Kings County on the 17th day of

November, 1924, and that the defendant did then and there under oath testify in support of said allegations against the plaintiff, and did then and there encourage and cause others to testify against the plaintiff under oath in support of his said allegations against the plaintiff; that after the conclusion of said trial certain Findings of Fact and Conclusions of Law were made by the Trial Justice, finding in substance that all of the defendant's said allegations against the plaintiff were without foundation in fact, and that thereafter, to wit, on the 4th day of December, 1924, a final judgment was entered in said annulment action dismissing the complaint upon the merits.

" '11. That in the complaint in said annulment action brought by the defendant against the plaintiff, and upon the said trial, the defendant did charge the plaintiff with being an unfit person to have the care and custody of the child of the parties hereto; and that in said Findings of Fact made upon the trial of said action, a judicial finding was made that such allegations made by the defendant against the plaintiff were without foundation in fact, and that the plaintiff was and is a fit and proper person to have the care and custody of the child of the parties hereto.

" '12. That all of the said charges and allegations made by the defendant against the plaintiff as aforesaid were and are without foundation in fact, and were false and untrue, and that the same were made by the defendant against the plaintiff with malicious intent and for the sole purpose of freeing the defendant from his marital bond to the plaintiff and to avoid his obligation to support and maintain the plaintiff and with the purpose and design of taking from the plaintiff the custody and control of the child of the parties hereto.

" '13. That by reason of the premises, the plaintiff has suffered great mental anguish, pain and suffering, and has been humiliated, and plaintiff has been by reason of the premises under a great nervous, physical and mental strain, and that by reason of the premises it has become entirely unsafe and improper for the plaintiff to live and cohabit with the defendant, and the plaintiff has been and is in fear of acts of conspiracy and violence at the hands of the defendant in the event that she should not live and cohabit with the defendant.'

"The New York Supreme Court, Appellate Division, in affirming the separate maintenance decree, after reviewing the evidence and findings stated (Comfort v. Comfort, *227* App.Div. 1, at page 3, 236 N.Y.S. 544, at page 547):

" 'I am of the opinion that the prior action brought by this defendant against the plaintiff to annul their marriage, on the ground of epilepsy and of disloyalty to the government of the United States, was not only unjustified, but was based upon false and malicious charges. This constituted cruelty, a sufficient basis for sustaining the judgment in this action. Further, the defendant abandoned the plaintiff and his child at the time of the commencement of the annulment action, and the only contribution to their maintenance and support has been under the order and direction of the Supreme Court. It seems obvious to me that the defendant and his family have higher matrimonial ambitions than the plaintiff in this action, from whom he seeks to rid himself. The extent to which the defendant will go to accomplish his purpose is evidenced by the means to which he has resorted.'

[8-10] "Section 94 of the Civil Code defines extreme cruelty as 'the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage'. Respondent contends that the above-quoted findings are insufficient to establish extreme cruelty because they fail to follow the precise terms of section 94, supra, in that there is no finding that the acts caused 'grievous' mental suffering. The finding, above quoted (finding No. 13) is that the acts complained of caused 'great mental anguish, pain and suffering'. Clearly, the acts found by the trial court in the New York action constitute extreme cruelty in this state. Polakoff v. Polakoff, 51 Cal.App. 359, 196 P. 778; Cooper v. Cooper, 88 Cal. 45, 25 P. 1062; MacDonald v. MacDonald, 155 Cal. 665, 102 P. 927, 25 L.R.A.,N.S., 45. The failure to follow precisely the terms of the statute is immaterial where the acts found are such that as a matter of law they establish extreme cruelty. Polakoff v. Polakoff, supra.

"From what has been said it follows that appellant wife established, by the New York separate maintenance decree, that in 1928, under California law, she had a 'cause of divorce' against her husband within the meaning of section 122 of the Civil Code, supra.

"Respondent contends, however, and the trial court found, that the cause of divorce thus established by his wife was barred by lapse of time and by her laches. Section 124 of the Civil Code provides that: 'A divorce must be denied: * * * Three. In all other cases when there is an unreasonable lapse of time before the commencement of the action.' Section 125 of the Civil Code provides: 'Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offense.' Section 126 of the Civil Code provides: 'The presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action.' Section 127 of the Civil Code provides: 'There are no limitations of time for commencing actions for divorce, except such as are contained in section one hundred and twenty-four.' Respondent points out that the cause of divorce relied upon by his wife as a recriminatory defense is predicated on acts occurring prior to January of 1925—some ten years before the husband filed the present action. He also points out that most of the acts he relies on as establishing a cause of divorce against his wife occurred in 1932, and thereafter. Under such circumstances, he contends, the wife's cause of action is barred by the lapse of an unreasonable length of time. Respondent urges that under the cases whether a recriminatory defense is barred is a question of fact, and relies on such cases as Kenniston v. Kenniston, 6 Cal.App. 657, 92 P. 1037, where a delay of ten years was held to defeat a cause of action for divorce, and Johnston v. Johnston, 21 Cal.App. 181, 131 P. 81, where the same result was reached predicated on a six-year delay. Other cases are collected in 9 California Jurisprudence, page 692, section 60. The point involved in those cases was that under the facts surrounding the delay there involved there was at least a permissible inference that there had been 'connivance, collusion, or condonation', * * *" or full acquiescence in the same, with the intent to continue the marriage relation notwithstanding the commission of such offense. "But no such inference or presumption is possible in this case." The facts are uncontradicted that "Here the acts upon which the New York decree is predicated occurred in 1924. Immediately thereafter, in January of 1925, the wife filed her action for separate maintenance. That was the only relief she could secure in New York. The decree was entered in 1928. Since filing the separate maintenance decree it is admitted that the parties have lived separate and apart. There has been no attempt at a reconciliation. The New York decree established the appellant's right to live separate and apart from her husband." There is not one word of testimony to support an inference or presumption of connivance, collusion, condonation or full acquiescence. "The evidence is positive and uncontradicted that there was no connivance, collusion or condonation," and the evidence being uncontradicted on these propositions it is a question of law whether or not there has been such an unreasonable lapse of time as would give rise to the presumption under section 125 of the Civil Code of connivance, collusion, condonation, or full acquiescence in the same, with intent to continue the marriage relation. This is true regardless of whether the intent to continue the "marriage relation" be considered as merely a marital status or as actually living together as husband and wife.

[11, 12] "The appellant cannot be charged with laches. Laches implies a failure to do something that a party should have done. What could appellant have done that she did not do? She acted promptly upon the occurrence of the acts constituting cruelty. She secured from the New York court all of the relief that court had power to grant. She could not sue her husband again on the same set of facts so as to procure any additional or different relief than that already obtained." Even assuming that, after she had resided for a time in New Jersey, she could have sued for divorce there, the circumstances must be remembered that respondent was in China for several years, and since 1933 has been in California; it would not have been until late in 1930 that she could have proceeded in New Jersey, where, according to respondent's claim, she would have had a cause of action on the ground of desertion after two years' residence. The action here was instituted in 1935, between four and five years later. Furthermore, she could not have obtained full relief in an action in New Jersey because respondent being absent from that state, she would

have to rely on substituted service of process, in which event the court would not have had jurisdiction to award her alimony or any allowance for the support of the child of the parties. De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am.St.Rep. 165. "For several years he was in China and since 1933 he has been in California. This case is entirely different from cases where the husband commits acts of cruelty, and the parties separate, the wife seeking no legal redress for the wrong committed. Many years later the husband sues for divorce and she sets up the acts committed by her husband as a recriminatory defense. In such case the trial court may properly indulge in the presumption that there has been 'connivance, collusion, or condonation of the offense, or full acquiescence in the same' within the meaning of section 125 of the Civil Code, supra." But where, as here, the evidence is uncontradicted there has never been such an unreasonable lapse of time as will cause the presumption to arise.

[13-15] "Respondent husband contends that such a doctrine will forever bar him from securing a divorce because of his misdeeds of 1924. That may be true. The doctrine of recrimination is based on the concept that he who seeks redress for the violation of a contract resting upon mutual and dependent covenants must himself have performed the obligations on his part. 9 Cal.Jur., p. 689, § 58. It is part of the general equity doctrine that he who comes into equity must come with clean hands. The legislature has seen fit to make the doctrine an integral part of the law of this state. It is not for the courts to determine the rightness or wrongness of the doctrine so declared. That is a legislative and not a judicial function.

[16] "While it is true, as already pointed out in this opinion, that under some limited circumstances a husband may secure a divorce for acts occurring after his wife has secured a separate maintenance decree, those circumstances do not exist in the instant case. In Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, there was evidence from which the trial court could reasonably infer not only a condonation, but also that the parties had actually resumed marital relation after the wife secured the separate maintenance decree. In every case cited by respondent there was either direct evidence or evidence from which an inference could be drawn that, after the wife secured her decree, there was either a reconciliation or a bona fide attempt to effect one. There is no such evidence in the instant case. Under such circumstances it must be held that, as a matter of law, the appellant has established a recriminatory defense." * * *

In view of this conclusion we do not find it necessary, nor would it serve any useful purpose, to review the sufficiency of the evidence in respect to cruelty found to have been inflicted by the wife.

The judgment appealed from is reversed.

SMITH v. KERN COUNTY MEDICAL ASS'N et al.

Civ. 2504.

District Court of Appeal, Fourth District, California.

April 19, 1941.

Rehearing Denied May 19, 1941.

Hearing Granted June 16, 1941.

1. Physicians and surgeons 🔑9

Where only 19 of 38 members of county medical association, by-laws of which adopted rules of order requiring presence of majority of members of organization to constitute quorum, were in attendance at meeting thereof when motion to sustain its directors' action in expelling member thereof was put to vote, there was no quorum present, motion was not carried, and such member was not expelled, though association's constitution and by-laws did not specify number of members who must be present at meeting to constitute quorum.

2. Associations 🔑7

Beneficial associations 🔑12

Generally, courts will not interfere with internal economy and rules of membership, procedure or discipline of strictly fraternal or social unincorporated voluntary organization, members of which have no severable or divisible proprietary interest in any portion of its property, but only interest therein as incident of membership, unless there has been unreasonable and arbitrary invasion of private rights, in which case inquiry will be limited to question whether society has violated its own rules of procedure.

3. Associations 🔑5
Beneficial associations 🔑5(1)

The constitution and by-laws of strictly fraternal or social unincorporated voluntary association constitute contract between association and its members.

4. Contracts 🔑7

A person may "waive" his legal rights by contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Associations 🔑10

The courts will not interfere with voluntary association's expulsion of member thereof after fair trial on charges against him before society's tribunals according to procedure established by it.

6. Associations 🔑10

The proceedings before trial committees of voluntary associations are not bound about by technicalities.

7. Associations 🔑10
Beneficial associations 🔑10(6)

In determining whether strictly fraternal or social unincorporated voluntary society violated its rules of procedure in expelling member thereof, strict rules of procedure and interpretation are not applied.

8. Associations 🔑8
Beneficial associations 🔑8

Membership in strictly fraternal or social unincorporated voluntary association is not a right which can be demanded, but a privilege which may be granted or withheld on terms and conditions imposed by association.

9. Associations 🔑10

An illegal motive will not render unlawful a lawful act, such as voluntary association's expulsion of member thereof.

10. Physicians and surgeons 🔑9

A physician, whom board of directors of county medical association voted to expel as member thereof pursuant to report of committee on grievances, is not entitled to reinstatement on ground that members of committee and board were so prejudiced against him as to disqualify such bodies from conducting proceedings for his expulsion, in absence of any other body with power to conduct hearings.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Joe Smith for a writ of mandamus to compel the Kern County Medical Association and others to reinstate petitioner as a member of such association. Judgment for defendants, and petitioner appeals.

Reversed.

Borton, Petrini, Conron & Borton, of Bakersfield, for appellant.

Alfred Siemon and Bennett Siemon, both of Bakersfield (Hartley F. Peart and Howard Hassard, both of San Francisco, of counsel), for respondents.

MORAN, Justice pro tem.

This is an action to compel the reinstatement of petitioner as a member of the Kern County Medical Association (hereinafter called the defendant) after his expulsion for a purported breach of the rules of that association. Judgment went for defendants and this appeal followed.

The Kern County Medical Association is an unincorporated, voluntary association of the licensed physicians in Kern county who may be admitted to its membership under its rules. It has its own constitution and by-laws and rules for admission and expulsion of its members. It is one of those associations in which membership is not a matter of right, but of grace extended to qualified applicants.

Dr. Joe Smith, the petitioner, had been a practicing physician of Kern county and a member of the association for seventeen years prior to his expulsion in November, 1935. He had been superintendent of the Kern County General Hospital, the county hospital operated by Kern county, for a number of years and in that employment lay the germ of the dispute that led to his expulsion.

Defendant was affiliated with the California Medical Association and the American Medical Association. Individual membership in the state and national associations required membership in the county association. Petitioner had been a member of the three associations as well as the American College of Surgeons which also required membership in some or all of the other associations as a qualification for its members.

A controversy had existed for a number of years between a large majority of the members of defendant and plaintiff and others on the staff of the Kern County General Hospital and those responsible for its management over the policy of its management and the treatment of patients there. See, Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510.

On March 17, 1932, the membership of defendant adopted the following resolution:

"Whereas, the Program and policy of the Kern General Hospital and its governors is inimical to the best interests of the public health and subversive of the established tenets and of the standards and procedures of the medical profession; and

"Whereas, the principles of medical ethics of the American Medical Association expressly provide that it is unprofessional for a physician to dispose of his service under conditions which make it impossible to render adequate services to his patient or which interfere with reasonable competition among the physicians of a community; therefore be it

"Resolved, by the Kern County Medical Society that any and all members of this Society shall resign from the staff of the Kern General Hospital immediately and shall refrain from all work in the Kern General Hospital as soon as is expedient, having due regard at all times for the welfare of such patients as may be in their charge, until such time as the institution is so conducted as to make it eligible to apply for an Accredited Hospital rating from the Council on Medical Education and Hospitals of the American Medical Association and of the Committee on Hospitals of the American College of Surgeons; and be it further

"Resolved, that failure on the part of any member of the Kern County Medical Association to resign from the staff of said hospital within a reasonable time, while present unsatisfactory conditions exist in the said hospital shall be construed as a violation of ethics, and shall make such member or members liable to such disciplinary action as the Constitution and By-Laws permit and as in the judgment of the Kern County Medical Society may be deemed proper."

Resolutions similar in import were adopted in the summer of 1931, and almost annually thereafter until 1939. A resolution adopted on April 18, 1935, of similar import, contained the following:

"* * * Be It Further Resolved that this resolution be made a part of the principles of professional conduct of the K. C. M. S., and

"Be It Further Resolved that the secretary be instructed to mail a copy of this resolution to every member of the K. C. M. S."

On March 28, 1932, written charges were filed against petitioner based on the earlier resolutions. A hearing was had before the board of censors of defendant but no disciplinary action was taken. Other charges were filed in February, 1933, but no action was taken.

The charges which resulted in the expulsion of petitioner were filed on September 16, 1935, and contained the following:

"The undersigned makes the following charges of unprofessional conduct against Dr. Joe Smith, a member of your Society:

"That Dr. Joe Smith has been guilty of the violation of Section 2, Article VI, Chapter II, of the Principles of Medical Ethics of the American Medical Association; of Section 4 (second paragraph), Chapter 1 of the By-Laws of the California Medical Association; and of subdivision (b) of Section 1 of Chapter 1 of the By-Laws of the Kern County Medical Society; in the following respect:

"He is guilty of disposing of his services under conditions that make it impossible to render adequate service to his patients and he is guilty of disposing of his services under conditions which interfere with reasonable competition among physicians in the community where he lives and practices." (Emphasis ours.)

"All of which has been committed and is being committed as follows": That Dr. Smith was guilty of specified conduct in the Kern County General Hospital which resulted in "interfering with reasonable competition among physicians of the community".

"That such course of conduct on the part of Dr. Joe Smith was and is followed, carried on, and maintained as a result of contact with the County of Kern through the Board of Supervisors of said county whereby the said Dr. Joe Smith disposed of his services to the county of Kern when such policy resulted and results in said hospital being so overcrowded with patients and so understaffed that it became and is and always has been impossible to render adequate service to all the patients he and the physicians and surgeons so associated with him were employed to attend, and said hospital is so poorly operated that many patients therein are frequently neglected and mistreated and it is impossible for said Dr. Joe Smith and the physicians and surgeons associated with him to render adequate service to the patients of said hospital, * * *."

The principles of medical ethics of the defendant association, summarized in the italicized portion of the foregoing quotation, are adopted from the Principles of Medical Ethics of the American Medical Association. The California Medical Association has similar Principles of Medical Ethics.

These charges were served on petitioner and October 3, 1935, was fixed as the time for hearing by the Committee on Grievances of defendant. Petitioner was notified of the time and place of hearing. He filed a written answer to the charges but did not appear at the hearing.

The by-laws of defendant require the committee to give both the accused and the accuser ample opportunity to be heard and after the hearing to report in writing to the board of directors within thirty days, accompanying the report with a typewritten report of the testimony and proofs offered.

The committee met to take evidence, but, as we have observed, petitioner did not appear at the hearing. No oral evidence was taken at the hearing, but probably documentary evidence was submitted which has been omitted from the record under a stipulation that it shall not be deemed material to any point that may be raised on this appeal. The committee on grievances submitted its written report to the board of directors which, after notice to petitioner, proceeded to act on it on November 12, 1935.

Petitioner again failed to appear at this hearing. Parol evidence was taken before the board, some of which was hearsay. Evidence was received to the effect that the Kern County General Hospital was understaffed and that patients there had been neglected and given insufficient medical attention for that reason.

The board of directors sustained the charges against petitioner and as a penalty voted his expulsion from defendant. These findings were reported to the association which on November 21, 1935, by a vote of twenty "Yes" to two "No" sustained the action of the Board of Directors and expelled petitioner.

Petitioner correctly maintains that three purported members who voted were not qualified members as they had not signed the constitution and by-laws, which act was made a prerequisite to membership. It is clear that there were only nineteen members of defendant present at the time of the vote to expel petitioner. The records of the association show forty-two members who were signers of the constitution and by-laws. Three of these had been suspended and the by-laws prohibited petitioner from voting.

As was permitted by the rules of the associations petitioner appealed his case to the California Medical Association and to the American Medical Association. Both appeals were decided adversely to him. This action (mandamus) was then instituted to compel defendant to reinstate him to membership.

[1] The constitution and by-laws of defendant do not specify the number of members who must be present at a meeting to constitute a quorum. The by-laws do adopt Roberts Rules of Order which require a majority of the members of an organization to be present to constitute a quorum. As there were only nineteen of the members of the association in attendance at the meeting when the motion to expel petitioner was put to vote, there was not a quorum present even though we regard the membership of the association at that time as only thirty-eight by regarding the suspended and expelled members no longer members of the association. The presence of a quorum is necessary for the transaction of business. It follows that no motion to sustain the action of the board of directors in expelling petitioner was carried. The by-laws provide that "In case the action of the board is not sustained, the matter shall be returned to the board of directors for further consideration". As the membership did not sustain the action of the board of directors, it follows that petitioner was not expelled.

[2-9] It is generally accepted law in California that the courts will not interfere with the internal economy, rules of membership, rules of procedure or discipline of members of a strictly fraternal or social unincorporated voluntary organization in which the members have no severable or divisible proprietary interest in

any portion of its property and where the members' interest in its property is only an incident of membership as the courts have no standard by which to determine the propriety of such rules as those things pertain solely to the internal economy of the organization. It is only when there has been an unreasonable and arbitrary invasion of private rights that the courts will interfere and then generally the inquiry will be limited to an investigation of the question of whether or not the society has violated its own rules of procedure. Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400. In making such inquiry the courts will be governed by these well-established rules; that the constitution and by-laws of such voluntary association constitute a contract between the association and its members (Dingwall v. Amalgamated Ass'n, etc., 4 Cal.App. 565, 88 P. 597); that a person may, by contract, waive his legal rights (Levy v. Magnolia Lodge, 110 Cal. 297, 42 P. 887); that when the accused has been given a fair trial before the tribunals of the society according to the procedure established by it, the courts will not interfere (Josich v. Austrian Benevolent Society, 119 Cal. 74, 51 P. 18); that the proceedings before trial committees are not bound about by technicalities (McConville v. Milk, etc., Union, 106 Cal.App. 696, 289 P. 852); that strict rules of procedure and interpretation are not applied (Robinson v. Templar Lodge, 117 Cal. 370, 49 P. 170, 59 Am.St.Rep. 193); that membership in such an association is not a right that can be demanded but is a privilege that may be granted or withheld on the terms and conditions imposed by the association (Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823; 3 Cal.Jur. 350); that an illegal motive will not render a lawful act unlawful. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Boyson v. Thorn, 98 Cal. 578, 33 P. 492, 21 L.R.A. 233; Greenwood v. Building Trades Council, supra.

[10] Petitioner raises another question which perhaps should be noticed. He urges that the members of the committee on grievances and of the board of directors were so prejudiced against him as to disqualify those bodies from conducting the proceedings against him. As those bodies were the only ones in existence with power to conduct the hearings, we think the rule of necessity, discussed in Nider v. Homan, 32 Cal.App.2d 11, 89 P.2d 136, is sufficient answer to this argument.

As it appears from the record that the rules of defendant were not followed in the proceedings which resulted in petitioner's expulsion as there was not a quorum present in the meeting when the vote to expel was taken, and consequently, as petitioner was never expelled, the judgment can not be sustained.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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44 Cal.App.2d 267

PHILLIPS v. GONZALES et al.

Civ. 11579.

District Court of Appeal, First District, Division 2, California.

April 17, 1941.

Rehearing Denied May 17, 1941.

Hearing Denied June 16, 1941.

1. Executors and administrators 🔑443(1)

In action for personal injuries and damage to plaintiff's automobile as result of collision with automobile driven by one defendant and owned by one who died on next day, count of complaint, mentioning only plaintiff and defendant driver, did not state facts sufficient to constitute cause of action against codefendant executrix of deceased owner's estate.

2. Abatement and revival 🔑54

A cause of action against automobile owner for personal injuries to driver of another automobile as result of collision alleged to have been caused by such owner's tortious act abated with his death.

3. Abatement and revival 🔑54

The statute declaring motor vehicle owner liable for death of or injury to person or property as result of negligence in operation of vehicle by any person with owner's express or implied permission did not abrogate doctrine that cause of action against such owner for injuries alleged to have been caused by his tortious act abates with owner's death. Vehicle Code, § 402, St.1937, p. 2353.

4. Executors and administrators ⚷443(1)

In action for personal injuries and damage to automobile as result of collision with another automobile driven by one defendant, count of complaint, alleging that such other automobile was owned by one who died on day after collision, that his wife, who was made codefendant, was appointed executrix of his estate, and that she rejected plaintiff's claim for damages, stated facts sufficient to constitute cause of action against estate for damage to automobile, though not for personal injuries.

5. Pleading ⚷416

In action against automobile driver and executrix of estate of deceased owner of automobile for personal injuries to driver of, and damage to, another automobile as result of collision with decedent's automobile, plaintiff's claim to property damages was not "waived" by his failure to amend complaint after court sustained executrix' demurrer thereto on ground that cause of action against decedent abated with his death, as plaintiff was not bound to amend complaint in order to recover property damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Pleading ⚷204(2), 205(2)

A general demurrer to complaint challenges its sufficiency to state any cause of action and must not be sustained if complaint states facts from which any liability results, though not for some or all of relief sought.

7. Pleading ⚷204(2)

A pleading stating grounds for relief, either legal or equitable, will stand test of general demurrer.

8. Pleading ⚷204(2)

A complaint containing allegations essential to statement of any one cause of action is sufficient, though abortive attempt be made to state facts calling for other and different relief.

9. Abatement and revival ⚷73

In action for personal injuries and damage to automobile as result of collision with automobile driven by one defendant and owned by one who died on next day, where executrix of decedent's estate admitted plaintiff's right to sue estate for property damages, she was properly joined as defendant, though cause of action against decedent for personal injuries abated on his death.

10. Appeal and error ⚷232(1)

In action for personal injuries and property damages, defendant executrix' contention, not presented by any allegation in her demurrer to complaint, that plaintiff should have pleaded such claims for damages separately, need not be considered. Code Civ. Proc. § 430, subd. 5.

11. Pleading ⚷52(2)

One suing automobile driver and executrix of deceased automobile owner's estate for damages resulting from collision between such automobile and automobile driven by plaintiff was not bound to plead claims for personal injuries and damages to automobile separately. Code Civ.Proc. § 427.

◆

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Jr., Judge.

Action by C. B. Phillips against August Gonzales, Bernice Scagliotti, as executrix of the estate of William H. Scagliotti, deceased, and others, for personal injuries and damage to plaintiff's automobile. Judgment for defendants, and plaintiff appeals.

Reversed.

Hearing denied; CARTER, J., dissenting.

James A. Walker, of Salinas, and John T. Lewis, of Hollister, for appellant.

James S. Byers, of Gilroy, and Theodore Tamba, of San Francisco, for respondent.

STURTEVANT, Justice.

The trial court sustained a demurrer to plaintiff's complaint without leave to amend. Later it entered a judgment that the plaintiff take nothing by this action. From that judgment the plaintiff has appealed.

On the 4th day of December, 1938, at a point about one-half mile south of San Benito river bridge, on Highway 101, the plaintiff's automobile collided with another automobile being driven by August Gonzales. For his personal injuries and also for injuries to his automobile the plaintiff commenced this action to recover damages. He pleaded his cause of action in two counts. The first cause of action was directed against August Gonzales who was driving the other automobile. No other person than the plaintiff and August Gonzales is mentioned therein. Appropriate allegations were inserted to recover damages for personal injuries in the sum of $65,298.23. Other allegations were inserted to recover damages for injuries to the automobile in the sum of $400.

In the second cause of action the plaintiff by reference pleaded all of the allegations in the first cause of action. Continuing he pleaded the fact that William H. Scagliotti was the owner of the automobile which Gonzales was driving; that Scagliotti died the next day; that Bernice, his wife, has been appointed executrix of his estate; that on the 23d day of December, 1938, she first published notice to creditors; that on the 4th day of May, 1939, plaintiff filed his claim, and that the claim was rejected.

[1] Later he commenced this action. Among others he served process on Bernice Scagliotti as executrix of the estate of her deceased husband. In due time she appeared and filed a demurrer. Among other grounds therein stated she alleged that the first cause of action did not state facts sufficient. Obviously it did not. Neither this defendant nor her deceased husband is mentioned directly or indirectly in the first cause of action.

[2, 3] As recited above, the second cause of action was pleaded against both Gonzales and this defendant. The plaintiff pleaded damages for personal injuries in the sum of $65,298.23 and damages for injuries to his automobile in the total sum of $400. The gross sum prayed for was $65,698.23. The defendant alleged in her demurrer that the second cause of action did not state facts sufficient, because, as she contends, the tortious act alleged to have been committed by her deceased husband for injuries to the person of the plaintiff abated with the death of her husband. Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L.R.A.1916A, 1142; De La Torre v. Johnson, 200 Cal. 754, 254 P. 1105. That is true. The plaintiff contends the doctrine stated in De La Torre v. Johnson, supra, has been abrogated by section 402 of the Vehicle Code, St.1937, p. 2353. However, a careful reading of that statute shows it does not speak on the subject of abatement and survival of actions against the estate of a deceased person.

[4-8] But she admits the plaintiff had the right to sue for damages to his automobile, that is, for the value of his property destroyed by the act of the decedent. Prob. Code sec. 574; George v. McManus, 27 Cal.App. 414, 150 P. 73. It follows that the second cause of action stated facts sufficient as to the claim for damages to the plaintiff's automobile and that the demurrer was not well founded in so far as it alleged said count did not state facts sufficient. But the defendant contends the plaintiff waived his claim to property damages because he did not amend. He was not bound to do so. However the decisions do not adopt the defendant's contention as applicable to the facts before us. The general rule is stated in California Trust Co. v. Cohn, 214 Cal. 619, 621, 7 P.2d 297. The cross-complaint in that case attempted to plead a cause of action for breach of trust and a cause of action for damages. The court examined the pleading and found that it stated a cause of action warranting a reformation of a written contract. On page 628 of 214 Cal., on page 300 of 7 P.2d, the court said: "It is unnecessary therefore that we determine whether the cross-complaint alleges facts sufficient for the declaration of a trust or the imposition of damages. A general demurrer challenges the sufficiency of the pleading to state any cause of action and must not be sustained if the pleading states facts from which any liability results, although not for some or all of the relief sought to be obtained. Hall v. Bell, 143 Wis. 296, 299, 127 N.W. 967. If the pleading states grounds for relief, either legal or equitable, it will stand the test of a general demurrer. Swan v. Talbot, 152 Cal. 142, 144, 94 P. 238, 17 L.R.A. (N.S.) 1066. It is sufficient if the pleading contains the allegations essential to the statement of any one cause of action, even though an abortive attempt be made to state facts calling for other and different relief." See, also, Pacific Mut. Life Insurance Co. v. Shepardson, 77 Cal. 345, 19 P. 583; Nelson v. Merced County, 122 Cal. 644, 646, 55 P. 421; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 685, 688, 200 P. 601; Kelley v. Cameron, 72 Cal.App. 660, 663, 237 P. 819.

[9] We find no merit in the claim that the defendant was improperly joined as a defendant. As stated above she now admits the plaintiff had the right to sue the estate of the decedent for property damages as distinguished from damages for personal injuries. It follows that she was properly named as a defendant.

[10, 11] The defendant contends the plaintiff should have pleaded separately his claim for damages for personal injuries and his claim for damages for property destroyed. There are two answers to that contention. She did not present the point

by any allegation contained in her demurrer. Code Civ.Proc. sec. 430, subd. 5. Furthermore, the plaintiff was not bound to plead the claims separately. The last paragraph of section 427 of the Code of Civil Procedure so provides.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

44 Cal.App.2d 296

SCHUETTE et al. v. LARSON.

Civ. 2585.

District Court of Appeal, Fourth District, California.

April 17, 1941.

1. Carriers ⇨76

Where plaintiff was in possession of goods when they were delivered to operator of truck transporting business for shipment, in absence of evidence to indicate a contrary situation, presumption existed that plaintiff was the owner of the goods entitled to maintain an action for damages thereto. Code Civ.Proc. § 1963, subds. 11, 12.

2. Carriers ⇨134

In shipper's action for destruction of merchandise against owner of automobile which collided with the truck and trailer, evidence supported finding that the shipper delivered the goods for transportation, that the goods were burned and destroyed as result of the defendant automobile owner's negligence, and that the shipper was damaged thereby, and supported judgment for shipper for the amount of the damages. Code Civ.Proc. § 1963, subds. 11, 12.

3. Appeal and error ⇨882(5)

Where a pleading is ambiguous or susceptible of two interpretations, and all parties to action apparently adopt an interpretation that sustains jurisdiction of court, losing party cannot on appeal for first time insist upon different interpretation of the pleading.

4. Appeal and error ⇨882(5)

Where case was tried on theory that plaintiff was transporting goods on another's equipment and that the other had possession of them as bailee, contention that allegation of plaintiff that at time of collision he was transporting on equipment belonging to the other a cargo of merchandise as bailee of the same disclosed that plaintiff was merely a forwarder not entitled to maintain action for damages could not be made for first time on appeal, since the allegation was susceptible of the interpretation that the other had possession of the goods as bailee and the entire matter could have been cleared up if called to the attention of the trial court.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action for damages to truck and trailer and for destruction of load of merchandise by Francis G. Schuette and others against Adolf Larson, wherein the defendant filed a cross-complaint. From an adverse judgment, defendant appeals

Affirmed.

Chester O. Hansen, and John Said, both of Fresno, for appellant.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, James H. Phillips, of Oakland, and Shepard & Shepard, of Fresno (Jean M. Blum, of San Jose, of counsel), for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising from a collision between a truck and trailer owned by the plaintiff Schuette and an automobile owned and operated by the defendant. The complaint sets up two causes of action. In the first, the plaintiff Schuette seeks to recover for the damage to his truck and trailer and in the second, the plaintiff Woolley seeks to recover for the destruction of the load of merchandise which was being transported on the truck and trailer. The defendant filed a cross-complaint. After trial by the court without a jury, a judgment was entered awarding the plaintiff Schuette $1,145 and the plaintiff Woolley $1,328.59, and denying relief to the cross-complainant.

While the defendant has appealed from the entire judgment the award of damages in favor of Schuette is in no way attacked, the briefs and arguments being directed entirely to that part of the judgment which is in favor of Woolley.

The only point raised is that a bailee of personal property who is not in actual possession thereof cannot maintain a cause of action in his own name against a tort-feasor for damage to said property. In support of this contention it is stated in appellant's brief that no part of the cargo in question was owned by Woolley, but that the merchandise belonged to various third parties and had been shipped by Woolley acting merely as a forwarder. On the other hand, the respondents' brief states that this merchandise was owned by and had been shipped by Woolley.

[1, 2] There is no evidence in the record supporting appellant's contention that this merchandise was owned by third parties. The only evidence having any bearing on this situation is the testimony of the driver of the truck and trailer, who testified that Schuette was engaged in the business of transporting merchandise by truck and that "Woolley shipped the cargo that was on this truck". Woolley was in possession of these goods when they were delivered to Schuette and to ship them would be to exercise an act of ownership over them. Under such circumstances, and in the absence of any evidence to indicate a contrary situation, there is a presumption that Woolley was the owner of the goods. Sec. 1963, subds. 11 and 12, Code Civ.Proc. The court found that Woolley delivered these goods to Schuette, for transportation on behalf of Woolley; that the goods were burned and destroyed as a result of the appellant's negligence; and that Woolley was thereby damaged in the sum of $1,328.59. The evidence, with the reasonable inferences that may be drawn therefrom, together with the existing presumptions, support the findings and judgment.

The appellant points to no evidence to support his contention, but relies entirely on an allegation in the second cause of action of the complaint, which reads: "That at the time of said collision plaintiff was transporting on the equipment belonging to plaintiff Francis G. Schuette a cargo of merchandise as bailee of the same." While this is somewhat ambiguous it does not certainly appear therefrom that it was intended to allege that Woolley, as bailee, was transporting these goods on Schuette's equipment. It may have been intended as an allegation that Woolley was transporting the goods on Schuette's equipment and that Schuette had possession of them as bailee. The case seems to have been tried on the latter theory, it seems not to have been questioned by the court or counsel that the goods belonged to Woolley, and so far as the transcript discloses it was never in any way called to the court's attention that the appellant made any claim that Woolley was not the owner of the goods, or that he was not in a position to maintain the action.

[3] It is a general rule of law that questions of this character may not be raised for the first time on appeal. (Bloxham v. Tehama County Tel. Co., 29 Cal.App. 326, 155 P. 654; Westphal v. Arnoux, 51 Cal.App. 532, 197 P. 395; Morris v. Warner, 207 Cal. 498, 279 P. 152; Blanc v. Connor, 167 Cal. 719, 141 P. 217; Kline v. Guaranty Oil Co., 167 Cal. 476, 140 P. 1; Marxen v. Herron, 129 Cal.App. 479, 18 P.2d 1002. In Bartnett v. Hull, 19 Cal.App. 91, 124 P. 885, 886, the court said: "Where, as in this case, a pleading is perhaps ambiguous and uncertain, or susceptible of two interpretations as to its meaning, and all parties to the action apparently adopt and acquiesce in an interpretation that sustains the jurisdiction of the court as to the subject-matter of the action, the losing party in such court should not be allowed upon appeal for the first time to insist upon a different interpretation of the pleading—one that will oust the court of its jurisdiction."

[4] This rule of law is peculiarly applicable here, where the entire matter is one which could so easily have been cleared up if called to the attention of the trial court. Evidence could have been produced to show one situation or the other with respect to these goods and, if necessary, the complaint could have been amended to conform to the proof. This was a simple case in which all of the issues should have been presented and tried at one time and the appellant should not be permitted, after taking his chances on submitting the case on its merits, to raise on appeal this technical matter which could and should have been raised in the trial court, where the actual facts could have been readily established and found.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

HATFIELD et al. v. LEVY BROS. et al.

Civ. 11501.

District Court of Appeal, First District, Division 2, California.

April 17, 1941.

Hearing Granted June 12, 1941.

1. Negligence 🔑131

In action for injuries sustained when plaintiff slipped and fell on waxed floor in defendants' store, evidence that defendant company stopped waxing the floor after the accident happened was inadmissible.

2. Negligence 🔑131

Evidence of precautions taken or repairs made subsequent to happening of accident is inadmissible to show negligence at the time of the accident.

3. Trial 🔑191(7)

Instruction authorizing recovery for injuries sustained by plaintiff when she fell on waxed floor in defendants' store, if injuries were sustained without plaintiff's fault and were proximately caused by the dangerous condition of floor, and that dangerous condition was known or in exercise of reasonable care should have been known to defendants, and danger if any was not obvious and was not known to plaintiff, was erroneous, on ground that it assumed that floor was in a dangerous condition, since whether floor was in such condition was one of main issues.

4. Appeal and error 🔑1060(1)
Trial 🔑127

Where references to insurance carried by a party litigant can have no legitimate purpose, it is prejudicial misconduct in a close case deliberately to elicit or make reference to insurance solely for purpose of obtaining damaging effect of such reference on minds of jurors.

5. Evidence 🔑155(1)

The statutory rule that where part of a conversation is given in evidence the whole conversation on the same subject may be inquired into, may not be extended further than to cover parts of the conversation tending to explain or qualify the part first given in evidence. Code Civ.Proc. § 1854.

6. Trial 🔑127

In action for injuries wherein defendants' witness who was not a party to the action testified concerning conversations had with plaintiff and did not refer to statement witness had made to plaintiff that defendants were insured, plaintiff was not entitled on cross-examination to elicit testimony concerning that part of the conversation relating to insurance which was not on the same subject as the testimony given by the witness and did not tend to explain or qualify the part of the conversation given. Code Civ.Proc. § 1854.

7. Trial 🔑133(6)

Instruction that no insurance company was a party to action for injuries sustained by plaintiff and that jurors should disregard any reference to insurance did not offset prejudicial misconduct of plaintiff's counsel in deliberately bringing before the jury without legitimate purpose testimony to effect that defendant company actually carried insurance.

8. Appeal and error 🔑1050(1), 1060(1), 1064(1)

Where there was evidence to sustain verdict for plaintiff, but the case was an exceedingly close one, errors in admission of evidence and in instructions given and misconduct occurring at the trial, taken together, required reversal.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Frank R. Hatfield and another against Levy Brothers and others for injuries sustained by plaintiff Pearl Hatfield when she fell on polished waxed floor in defendants' store. From an adverse judgment, the defendants appeal.

Reversed.

Edmund Scott, of Redwood City, and Myrick & Deering and Scott, of San Francisco, for appellants.

Francis N. Foley, of San Mateo, for respondents.

SPENCE, Justice.

Plaintiffs, who are husband and wife, sought damages resulting from personal injuries sustained by plaintiff Pearl Hatfield. Judgment upon the verdict in the sum of $10,000 was entered in favor of plaintiffs and from said judgment, defendants appeal.

Mrs. Hatfield sustained her injuries when she slipped and fell upon a polished waxed floor in the store of the defendants. It was alleged in the complaint that defendants negligently and carelessly caused and permitted said floor to become slippery and unsafe.

Defendants rely upon the rules laid down in Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, and contend that the evidence in the present case was insufficient to sustain the verdict against defendants. There was some conflict in certain phases of the evidence and there was some evidence, adduced by plaintiffs, which tended to distinguish this case from the Mautino case. Our review of the record leads us to the conclusion that, disregarding conflicts and considering only the evidence most favorable to plaintiffs, there was sufficient evidence to sustain the verdict but the case was an exceedingly close one and we are of the opinion that a reversal of the judgment is required upon other grounds.

[1, 2] Defendants contend that it was prejudicial error to admit testimony showing that the defendant company stopped waxing the floor after the accident happened. Such testimony was admitted over defendants' objection and we are of the opinion that the trial court erred in admitting such testimony. It is well settled that evidence of precautions taken or repairs made subsequent to the happening of an accident is inadmissible to show negligence at the time of the accident. Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 P. 487; Helling v. Schindler, 145 Cal. 303, 78 P. 710; Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 P. 176, 49 L.R.A. 33; Morris v. Sierra, etc., Power Co., 57 Cal.App. 281, 207 P. 262; 10 Cal.Juris. 829, sec. 115.

Defendants further contend that the trial court committed prejudicial error in the giving of the following instruction: "If you believe from the evidence that plaintiff, Pearl Hatfield, at the time and place in question, was in the building of defendants at its invitation, express or implied, and that she sustained injuries without fault upon her part, and that such injuries were proximately caused by the dangerous condition of said floor at the place in question, and that such dangerous condition of said floor was known to defendant or in the exercise of reasonable care should have been known to defendants and that said danger, if any, was not obvious, and was not known to plaintiff, then you are instructed that plaintiff is entitled to recover damages from defendants therefor."

[3] The last-mentioned contention is based upon the claim that, in giving said instruction, the trial court assumed as an undisputed fact that the floor was in a dangerous condition. We are of the view that the giving of said instruction constituted error. One of the main questions in dispute was whether the floor was in fact in a dangerous condition and it was error for the trial court to instruct the jury as above set forth.

Defendants further contend that plaintiffs' counsel was guilty of prejudicial misconduct in deliberately eliciting testimony indicating that the defendant company was insured. The testimony in question was elicited from the witness Caro Meyers, who was one of defendants' witnesses and an employee of the defendant company. Said witness had assisted Mrs. Hatfield and had had a conversation with her immediately after the accident occurred. Said witness was not a party to the action. She had apparently stated to Mrs. Hatfield in the course of said conversation that the company was insured. It appears without contradiction from the affidavits used on the motion for new trial that counsel for both sides had interviewed said witness on one or more occasions before the trial of the cause. The affidavit of plaintiffs' counsel shows that the witness had informed him before the trial that defendants' counsel had requested her to omit the reference to insurance at such time as she might give her testimony concerning the conversation and that plaintiffs' counsel had then advised said witness to disregard said request of defendants' counsel. Upon the trial, said witness testified to the conversation when called as a witness by defendants and she was then cross-examined by plaintiffs' counsel. Under repeated questioning upon cross-examination, plaintiffs' counsel finally elicited from the witness the fact that she had said to Mrs. Hatfield that the company was insured. At a session held in chambers and out of the presence of the jury, the conduct of plaintiffs' counsel was assigned as prejudicial misconduct and the trial court was asked to declare a mistrial. This motion was denied.

[4] It is entirely apparent from the record that counsel for plaintiffs had deliberately sought to elicit this testimony concerning insurance. It is further apparent that such testimony could not have been elicited for any legitimate purpose. We are well aware of the fact that there are circumstances under which it has been held that certain references to insurance may

serve some legitimate purpose in the trial of personal injury actions but the damaging effect of any reference to insurance has long been recognized. The authorities are uniform in holding that where such references to insurance can serve no legitimate purpose, it is prejudicial misconduct in a close case to deliberately elicit or make references to insurance solely for the illegitimate purpose of obtaining the damaging effect of such references upon the minds of the jurors. Squires v. Riffe, 211 Cal. 370, 295 P. 517; Citti v. Bava, 204 Cal. 136, 266 P. 954; Nichols v. Smith, 136 Cal.App. 272, 28 P.2d 693; Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995; Sischo v. City of Los Banos, 26 Cal.App.2d 642, 80 P.2d 116, 1020; Rising v. Veatch, 117 Cal.App. 404, 3 P.2d 1023; Peacock v. Levy, 114 Cal.App. 246, 299 P. 790; Mangino v. Bonslett, 109 Cal.App. 205, 292 P. 1006.

[5, 6] An attempt is made to justify the eliciting of such reference to insurance upon the ground that part of the conversation had been introduced in evidence by defendants and that plaintiffs were therefore entitled to introduce the entire conversation. The rule embraced in section 1854 of the Code of Civil Procedure and relied upon by plaintiffs is limited by its own terms to those portions of the conversation which are "on the same subject" (Zibbell v. Southern Pacific Company, 160 Cal. 237, 250, 116 P. 513, 519) and the rule is not to be extended further than to cover those portions of the conversation which tend to "explain or qualify the part first given in evidence." Granite Gold Mining Co. v. Maginness, 118 Cal. 131, 135, 50 P. 269, 271. The portion of the conversation relating to insurance, which was deliberately elicited, was not in any fair sense "on the same subject" nor did it in any way tend to explain or qualify the part of the conversation first given in evidence. We therefore conclude that the deliberate eliciting of said reference to insurance cannot be justified upon the ground stated.

[7] Plaintiffs further call attention to the fact that the trial court, of its own motion, instructed the jurors in the general charge that no insurance company was a party to the action and that the jurors should disregard any reference to insurance that may have been made during the course of the trial. While this instruction may be properly given and may serve a useful purpose under certain circumstances, we are of the view it cannot serve to offset prejudicial misconduct in deliberately bringing before the jury, without legitimate purpose, testimony to the effect that a defendant actually carries insurance.

[8] In dealing with defendants' contentions with respect to alleged prejudicial errors in the admission of evidence and in the instructions given, we concluded that there were errors but we did not discuss the question of whether such errors were sufficiently prejudicial to require a reversal. As above stated, the case was a close one and of that class of cases in which any error or misconduct would be likely to be prejudicial. Our review of the record leads us to the conclusion that said errors and misconduct taken together resulted in such prejudice to defendants as to deprive said defendants of a fair and impartial trial and that a reversal is required.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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44 Cal.App.2d 301

PEOPLE v. O'CONNOR.

Cr. 2143.

District Court of Appeal, First District, Division 2, California.

April 18, 1941.

1. Criminal law ⚷1178

An appellate court should not be called upon to speculate with respect to the points which an appellant desires to present and is ordinarily justified in ignoring bald assertions of error which are not supported by argument or citation of authority.

2. Criminal law ⚷572

Conflicting evidence sustained conviction for committing lewd or lascivious acts upon a child as against defense of alibi. Pen.Code, § 288; St.1937, p. 1033, § 702.

3. Criminal law ⚷1170½(4)

Although a different oath is ordinarily administered upon voir dire examination conducted for the purpose of determining com-

petency of a proffered witness, fact that oath administered to 6½-year-old prosecuting witness before voir dire examination was the same as the oath administered before she began to testify regarding facts of case was not prejudicial error, where the oath used was substantially in the form prescribed by statute for use upon the regular examination of a witness. Code Civ.Proc. § 2094.

4. Criminal law ⚿1153(2)
Witnesses ⚿40(2)

The competency of 6½-year-old prosecuting witness to testify in prosecution for committing lascivious acts upon a child was a question for the determination of the trial court in the exercise of a sound discretion, and trial court's determination would not be disturbed in the absence of a showing of an abuse of such discretion. Pen.Code, § 288; St.1937, p. 1033, § 702.

5. Criminal law ⚿1144(12)

The fact that record showed no affirmative answer on the part of prosecuting witness when oath was administered to her was not prejudicial error, because, under rule that every presumption is in favor of regularity of proceedings in the trial court, it would not be assumed that trial court permitted prosecuting witness to testify without the assent of the witness to the taking of the oath having been in some manner manifested.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

James O'Connor was convicted of a violation of section 288 of the Penal Code and a violation of section 702 of the Welfare and Institutions Code, and, from the judgment of conviction and order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was found guilty by a jury of a violation of section 288 of the Penal Code and a violation of section 702 of the Welfare and Institutions Code, St.1937, p. 1033. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

[1] In his briefs, his argument is divided under seventeen numbers but there are no headings showing the nature of the questions to be presented or the points to be made. Under each of several numbers, defendant merely makes the assertion in two or three lines that the trial court erred in a certain respect but he makes no argument and cites no authority in support of such assertion. Under each of certain other numbers, it is impossible to ascertain the claim of error which defendant is attempting to present. An appellate court should not be called upon to speculate with respect to the points which an appellant desires to present and such court is ordinarily justified in ignoring bald assertions of error which are not supported by argument or citation of authority. People v. Foss, 7 Cal.2d 669, 62 P.2d 372; Bradley v. Butchart, 217 Cal. 731, 20 P.2d 693; People v. Spahn, 28 Cal.App.2d 294, 82 P.2d 474; People v. Epstein, 21 Cal.App.2d 488, 69 P.2d 454. We have nevertheless reviewed the record and find no prejudicial error.

[2] A reading of the record leaves no doubt whatever concerning the guilt of the defendant. The alleged acts were committed in the room of the defendant upon a young girl of the age of six and one-half years. He gave the child thirteen cents and told her not to tell anyone. The child immediately returned to her home crying very hard and related what had happened. A woman friend of the family asked the child to take her to the room of the man who had committed the acts and she did so. There was no response to the knock at the door of the room and the woman and child left. The police were notified and the child was immediately given a physical examination. Her private parts were found to be inflamed and irritated. Shortly thereafter the police accompanied the child and her parents to the room where the child had stated that the man had committed the acts. The defendant was identified by the child and all of the story previously told by the child to her parents and the police and later told by the child on his trial was borne out by the situation found to exist in said room. The child had previously described the clothing and underclothing worn by the defendant, the furniture in the room, the presence of a bottle of whiskey, the presence of a bottle of "white medicine" which was used upon her and which proved to be vaseline, and the fact that she had gotten wet and the

bed had gotten wet. A wet stain was found on the sheet which was later found upon examination to contain epitheleal cells and spermatozoa. One of the officers said to the defendant on that evening, "If you had to see a woman for goodness sakes, why did you pick out a six year old girl when there is many other women running around the streets?" Defendant said, "I have been drinking for the past two or three days and I don't know just what I have been doing." The officer said, "That is no excuse for a thing like this", and the defendant made no reply. It would serve no useful purpose to relate the testimony in greater detail. Defendant denied practically everything at the trial and produced certain friends in an attempt to establish an alibi and to establish his good reputation. The alibi testimony was far from convincing and the character testimony proved disastrous. It appeared from the cross-examination of the character witnesses that defendant had on various occasions discussed with them his previous criminal record.

[3] There is but one authority cited by appellant in his brief and that is People v. Portlock, 118 Cal.App. 566, 5 P.2d 920. That case is not in point for in the present case the trial court administered an oath to the child substantially in the form prescribed by section 2094 of the Code of Civil Procedure both before the voir dire examination of said child and before the child started to testify regarding the facts of the case. The transcript shows the following statement by the court, "Doris, will you hold up your right hand for me? You solemnly swear that the evidence you are about to give in the matter now pending before this court will be the truth, the whole truth and nothing but the truth?" Defendant states in his reply brief that respondent counsel "does not get the nature of the first question raised by appellant"; that "the point raised by appellant is that the trial court administered the wrong oath to the prosecutrix upon her voir dire examination" and that neither the trial court nor counsel for respondent "realizes the difference between the oath upon a voir dire examination and the oath that is administered under section 2094 Code of Civil Procedure to the witness". It may be conceded that a different oath is ordinarily administered for the purpose indicated but we cannot declare that the failure to administer a different oath constituted prejudicial error in the present case.

[4] Defendant apparently further claims that the voir dire examination did not show that the child appreciated the meaning of an oath or that she was capable of receiving just impressions or of relating them truly. While the examination of the child might well have been more fully developed along these lines, the question of the competency of the child was a question for the determination of the trial court in the exercise of a sound discretion and the trial court's determination will not be disturbed in the absence of a showing of an abuse of such discretion. People v. Morcumb, 28 Cal.App.2d 465, 82 P.2d 714; People v. Freeman, 24 Cal.App.2d 619, 75 P.2d 640. We find no abuse of discretion in the present case.

[5] Defendant apparently further complains because the record shows no affirmative answer on the part of the child when the oaths were administered to her. But every presumption is in favor of the regularity of the proceedings in the trial court and it cannot be assumed that the trial court permitted the child to testify without the assent of the child to the taking of the oath having been manifested by the nodding of her head or otherwise. We know of no authority requiring that the assent to the taking of the oath must be audibly given and defendant has cited no authority to that effect.

We find no other definite points raised by defendant and presented in such manner as to require consideration. As above indicated we are satisfied from a reading of the record that the trial court committed no prejudicial error.

The judgment and order denying the motion for a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

44 Cal.App.2d 226

MARTIN et al. v. TULLY et al.

Civ. 11357.

District Court of Appeal, First District, Division 1, California.

April 16, 1941.

Rehearing Denied May 16, 1941.

Hearing Denied June 12, 1941.

1. Trial 🔑165

On motion for nonsuit, truthfulness of plaintiff's evidence must be assumed and every reasonable inference drawn therefrom to support his position.

2. Trial 🔑139(1)

A nonsuit or directed verdict may be granted only when, disregarding conflicting evidence, giving plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference therefrom, there is no evidence of sufficient substantiality to support a verdict for plaintiff.

3. Appeal and error 🔑989

In action for fraud in purchasing plaintiffs' stock in corporation, of which defendants were president and directors, without informing plaintiffs of defendants' negotiation and completion of deal advantageous to corporation, Court of Appeal, in determining on appeal from judgment of nonsuit whether there was evidence that deal was corporate transaction, may examine evidence in light of negative answer to such question, and consider whether contrary conclusion is reasonably deducible therefrom or would be mere surmise or conjecture.

4. Mines and minerals 🔑104

In action for fraud in purchasing plaintiffs' stock in oil company, of which defendants were president and directors, without informing plaintiffs of defendants' negotiation and completion of deal with another corporation for profitable oil and gas sublease, evidence *held* sufficient to take to jury question whether deal was corporate transaction or personal matter of president and director making initial payment to lessee.

5. Appeal and error 🔑997(2)
Trial 🔑139(1)

On motion for nonsuit, neither trial court nor appellate court weighs evidence.

6. Trial 🔑165

On motion for nonsuit, all evidence in conflict with plaintiffs' evidence must be disregarded.

7. Corporations 🔑320(11)

In action for fraud in purchasing plaintiffs' stock in corporation without informing them of defendant president's and directors' negotiation and completion of deal advantageous to corporation, it was incumbent on plaintiffs to present substantial evidence of difference between actual value of stock purchased and actual value of that received in exchange therefor in order to recover damages. Civ.Code, § 3343.

8. Fraud 🔑57

Ordinarily, method of ascertaining damages for fraud in exchange of properties is to present proof of market value of properties, but if such proof is unobtainable, proof of actual or intrinsic value thereof may be offered.

9. Trial 🔑165

In action to recover damages for fraud in exchange of properties, proof of actual or intrinsic value thereof need not be closely scrutinized on motion for nonsuit, if it shows prima facie case of difference in value, from which reasonable inference may be drawn that plaintiff was damaged.

10. Mines and minerals 🔑104

In action for fraud in purchasing plaintiffs' stock in oil company without informing them of defendant president's and directors' negotiation and completion of deal for acquisition of profitable oil and gas sublease by such company, evidence, including company's fiscal statement and factors making up price paid for stock, *held* sufficient to take to jury question as to value of stock, unaffected by sublease.

11. Mines and minerals 🔑104

In action for fraud in purchasing plaintiffs' stock in oil company without informing them of defendant president's and directors' negotiation and completion of deal for acquisition of profitable oil and gas sublease by company, evidence *held* sufficient to take to jury question of value of company's holdings, including sublease, as basis for finding of damages in amount of difference between value of stock and amount plaintiffs received therefor.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by H. T. Martin and others against Jasper W. Tully and others for fraud in purchasing plaintiffs' stock in the Reserve Oil & Gas Company. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Courtney L. Moore and Harold E. Haven, both of San Francisco, for appellants.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, Frederick D. Anderson, of Los Angeles, and Chickering & Gregory, of San Francisco (Boice Gross, of San Francisco, of counsel), for respondents.

WARD, Justice.

This is an appeal by plaintiffs from a judgment of nonsuit in favor of defendants, and from an order denying plaintiffs' motion for a new trial. The complaint which charged fraud on the part of defendants, through the medium of which one of them was successful in purchasing the stock holdings of plaintiffs in that company, was dismissed as to all but two of the defendants, and it was in favor of these that the nonsuit, the subject of this appeal, was granted.

The Reserve Oil and Gas Company, hereinafter called the Reserve, was incorporated in 1932, the plaintiffs acquiring their interests in the corporation by turning over to it certain lands and oil leases in Colusa and Yolo counties and accepting stock therefor, and the defendants by outright purchase of stock. The properties were non-producing and the capital originally subscribed was soon exhausted, necessitating further financing of the company by the sale of stock contributed by the stockholders. The money thus turned over to the corporation was considered in part as donations and in part as loans. In addition the corporation borrowed from defendant Tully and others to meet its expenses. There had been some discussion as to further financing, the plaintiffs who were not in a position to contribute claiming that under previous arrangements the money required for such purpose was to be furnished by defendants Tully and the Lincoln Petroleum Company of which defendant Bering was president and general manager. This discussion led, on August 16th, to Tully suggesting that he might be willing to buy out plaintiffs' interests.

On October 15, 1934, the board of directors of the Reserve consisted of defendants Tully, Bering, Sherman and Turner, also Stanley Pedder, attorney for the company, and the plaintiffs, Tully being the president. On this date, Bering, who lived in Los Angeles, learned that an oil and gas lease was about to be made to Hall-Baker & Co., Ltd., a Los Angeles firm dealing in oil lands and leases, covering approximately 5,600 acres of land on El Tejon Ranch in Kern county, and he asked to be given an opportunity to deal on part of the land, to which Baker agreed. Bering then telephoned Tully suggesting that the Reserve take over this available interest; that in order to take advantage of the excellent opportunity, however, they would have to work fast. Tully agreed to have the geologist who had done work for the Reserve go into the matter. The next day, October 16th, the plaintiffs called on Tully who definitely offered to purchase plaintiffs' interests in Reserve for $1,000 each and outright interests in certain of the company's properties. The offer was rejected.

On October 17th, Bering, who had come to San Francisco for the purpose, discussed the Hall-Baker deal with Tully, and on the 19th both further discussed the matter with Baker, who had also come north for the purpose. Bering and Baker returned to Los Angeles and at a meeting they had on October 22nd, Baker told Bering that he would have to have a definite answer regarding the Tejon deal. Bering then telephoned Tully advising him of this conversation and Tully agreed to consider the matter further and wire him. His wire of the same date is as follows: "Authorize you to close deal Hall-Baker terms discussed Friday including one-sixth royalty three-fourths acreage one-eighth royalty one-fourth acreage subject Armstrongs final approval when Hall's report is completed." On receipt of the telegram, Bering had the geologist Armstrong write his approval of the geology on the telegram which he then turned over to Baker "as evidence of the deal".

The title to the El Tejon Ranch stood in the name of the Title Insurance & Trust Company which, as trustee under a bond issue, agreed to execute a "master lease" to Hall-Baker. This master lease was to permit subleases to designated parties, and it was in connection with this permissive subleasing that Hall-Baker was to sublease 2,800 acres to Reserve. On October 26th, Tully called Baker over the telephone and discussed with him the proposed master lease, copy of which had in the meantime been received by Tully in San Francisco, Reserve being named therein as one of approximately twenty subleases. Referring to this telephone conversation, Baker wired Tully on the 27th as follows: "Your careful analysis of the lease and the resultant suggestions made in our telephone conversation of yesterday are sincerely appreciated."

In the meantime, there is evidence that shortly after October 22nd, in connection with a discussion on the matter, Baker displayed to Bering a proposed draft of agreement between Hall-Baker and the Reserve as sublessee. With reference to this agreement, in the letter of October 27th, mentioned in the preceding paragraph, Baker advised Tully "There will be some delay in forwarding the proposed agreement between ourselves * * *. I hope to forward the agreement Tuesday."

On October 30th, Tully wrote Baker with regard to the Hall-Baker Reserve contract as follows: "Bob Bering tells me you and he will arrive in San Francisco Thursday with draft of our agreement so I am looking forward to seeing you then." There is evidence that when Baker called at Tully's office on November 1st, the latter was busy and Baker was turned over to Pedder. In going over the draft of the agreement "between Hall-Baker Co., Ltd., and Reserve Oil and Gas Company", Baker and Pedder had a violent discussion as to one point and upon taking the matter up with Tully he decided with Baker. So that, on that date, both the master lease and the agreement between Hall-Baker and Reserve had been submitted to the parties. From this evidence alone a jury could have found that Tully intended the transaction to be corporate business and not a personal matter.

On October 30th, also, Tully sent the following wire to plaintiffs: "When will you be in San Francisco Stop We have payments to make on Thursday November first." From the evidence it appears that none of the other directors or stockholders were similarly advised. The plaintiffs did not come to San Francisco until November 7th, when they were advised by Tully that he wanted to clear up the situation; that he would have to have other people on the board who could keep up their payments; that he would give them $1,000 apiece for their stock in addition to an outright interest in certain lands belonging to Reserve; that the company being indebted to him would have to acquiesce in such an arrangement; that the Reserve expected to develop in the neighborhood of the lands proposed to be conveyed to plaintiffs and that he [Tully] would take an option to purchase the conveyed lands at $1,000 an acre. No mention was made of the Tejon transaction, although plaintiffs were the only directors at that time ignorant of the negotiations in that regard, and Bering had discussed with Tully the matter of disposing of sufficient of the Tejon lands subleased to Reserve by Hall-Baker to pay for the development work on the balance. Plaintiffs testified that Tully had prepared different agreements for them to sign, but they protested many times that they were very anxious to retain their stock and were not satisfied with his offers; that, so far as contributions necessary for the running expenses of the company were concerned, they still contended the obligation was not theirs.

At a directors' meeting called by Tully on November 16th, he made demands that the principal holdings of the company be turned over to him for the advances of cash made by him; he refused all compromises offered by the plaintiffs; said he wanted a "clean sweep" and would throw the company into bankruptcy unless his offers were accepted. The plaintiffs still refused his offers until they could talk with their attorney. Following this meeting, plaintiffs talked with defendant Bering, who advised them, in response to their inquiry as to why it was desired to get rid of them as stockholders, that for the good of the company it would be advisable to have men with money in their places; that the company would then develop its lands in the neighborhood of those proposed to be conveyed to plaintiffs so that the Martins would ultimately reap the benefit of such development work of Reserve; that "we have no other deal; there is no other deal".

On November 23, 1934, Tully called another directors' meeting. At this time the master lease between Hall-Baker and the title company, dated November 15, 1934, and in which Reserve was named as one of the permissive sublessees, had been acknowledged by Hall-Baker on the 21st of November and by the title company on November 22nd. At the November 23rd meeting, at which all of the directors were present, and which lasted from 10 o'clock in the morning until approximately 5 p.m., a gloomy picture of the prospects of the company was presented; the necessity for money was stressed; director Bering stated that Tully had rendered valuable services to the company, which, however, on the suggestion of Pedder, were not being discussed; Tully complained to the gathering that an agreement with plaintiffs which he stated had been arrived at by negotiation on November 7th had not been consummated. The plaintiffs were advised and urged by Tully and other directors to sell, but they made every effort to retain all or at least a portion of their stock, although even at this time they were not cognizant of the Tejon deal. Every compromise offered by the Martins was refused, and finally at the conclusion of the meeting Tully drew up a memorandum between himself and the plaintiffs setting forth terms acceptable to the parties, which memorandum was initialed by the Martins. While the meeting was in progress a note was handed Tully stating that Baker was in an outer office and Tully withdrew from the meeting and delivered to Baker the $15,000 initial payment required in connection with the sublease to Reserve, which amount was advanced half by Tully and half by director Turner.

On November 27th, Baker wrote Pedder, the attorney for Reserve and one of its directors, requesting that the approval of the title report be signed by "Reserve Oil and Gas Company". Pedder testified he did nothing in this connection, however, "because it had not been determined by the Reserve Oil and Gas Company that they would take this property". On this same date Pedder prepared the formal documents consummating the Martin sale of 28,440 shares of stock to Tully; they were not executed, however, until December 1st. And on December 5th, the sublease from Hall-Baker to Reserve was formally executed.

From the above it appears that preliminary drafts of both the master lease and the sublease to Reserve had been prepared prior to October 30th, and that the master lease naming Reserve, not Tully, as one of the permissive sublessees, had been executed prior to the November 23rd meeting of the Reserve board of directors, at which time the terms of the sale of the Martin stock to Tully were agreed upon. The sublease from Hall-Baker to Reserve, formally executed on December 5th, had been approved some time before and was identical with its draft of November 15th, except that the provision for the initial payment of $15,000, which was made Baker while the Reserve directors' meeting was in session, was eliminated. It will be apparent from the foregoing that when the Martins sold to Tully, all details in connection with the Tejon deal, contemplating Reserve as a sublessee, had been fully worked out and the papers partly executed.

Appellants contend the question is factual, to-wit: "Was there such a lack of evidence of sufficient substantiality as to justify the trial court in granting a motion for a nonsuit", it having been shown that the president of a corporation, assisted by its directors, in various meetings, both private and corporate, deliberately misrepresented to plaintiffs, also stockholders and directors, the condition of the corporation; that they represented the amount offered for plaintiff's stock to be more than its actual value, and so persuaded, induced and misled plaintiffs to sell all of their stock for much less than its actual worth; that information of negotiation and completion of a deal advantageous to the corporation was withheld from plaintiffs, with the result that the president was enabled to purchase their holdings at a nominal price.

Respondents claim the Reserve had no proprietary interest or expectancy in any of the Tejon property on November 23rd when the terms of the purchase of the Martin stock were agreed upon; that the Tejon lease was not in fact the property of Reserve until December 3, 1934; that the Reserve was unable financially to handle the deal, and Hall-Baker was unwilling for such reason to sell it; that therefore the officers of the corporation were within their rights in making the purchase for themselves; that the deal from its inception was to be handled by Tully for himself as sublessee and that only on account of the importunities of Bering, who, through the Lincoln Petroleum Company was a large holder in Reserve, did he consent after November 23rd to transfer the interest to Reserve.

With reference to allegations of the complaint relative to threats of forcing the corporation into bankruptcy, the evidence demonstrates without contradiction that the company was either in or on the verge of insolvency. In a reply to respondents' supplemental brief appellants fairly and frankly state the real question involved on this appeal as follows: "This whole appeal fundamentally narrows itself down to a determination of one question, namely: Was the Tejon deal a corporate transaction or a private deal of Tully's. If it was a corporate transaction, or if there was substantial evidence tending to prove that it was a corporate transaction, then Tully and Bering fraudulently concealed the existence of such a transaction from the Martins, and actively misrepresented to them that there was no such transaction."

[1-6] On motion for a nonsuit, the truthfulness of a plaintiff's evidence must be assumed, and every reasonable inference drawn therefrom to support his position. The right to a nonsuit is similar to the right to a directed verdict. In Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579, 580, the court said: "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' Newson v. Hawley, 205 Cal. 188, 270 P. 364; Perera v. Panama-Pacific Int.Exp. Co., 179 Cal. 63, 175 P. 454; Estate of Sharon, 179 Cal. 447, 177 P. 283; Estate of Gallo, 61 Cal.App. 163, 175, 214 P. 496; 24 Cal.Jur., pp. 912—918." Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; Estate of Arnold, Cal.Sup., 107 P.2d 25; Id., Cal.App., 99 P.2d 376. In determining whether there is evidence that the Tejon deal was in fact a corporate transaction with Reserve, we may examine the evidence in the light of a negative answer to the question—which would of course support the trial court's action in granting the motion for nonsuit—and, as throwing light thereon, consider whether a contrary conclusion is reasonably deducible therefrom or whether such conclusion would be a mere surmise or conjecture. An affirmative answer requires that the evidence presented affords a reasonable inference to that effect rather than one that it was a personal matter of Tully and Turner who made the initial payment. To substantiate the conclusion that it was a corporate transaction, it is only necessary to bear in mind that from its inception and contінously throughout Bering intended and treated it as such. Whatever Tully's original intention may have been, the evidence shows that prior to the time the stock transfer by the Martins to him had been agreed upon, Tully knew that Hall-Baker had prepared the sublease to Reserve; his acts and conduct evidence an acquiescence and approval thereof, and this inference is not dispelled as a matter of law by clear, positive and uncontradicted evidence. It is not intended herein to convey an impression that this court is convinced that there was in fact culpability on the part of respondents Tully and Bering. On motion for nonsuit, neither the trial court nor the appellate court weighs the evidence. The rule is that all evidence in conflict with plaintiff's must be disregarded.

[7-10] Respondents further contend that plaintiffs have failed to establish damages, the difference between the true value of the stock and the amount received by each plaintiff in cash and land, $3,500. To recover, it was incumbent upon plaintiffs to present substantial evidence of the difference between the actual value of the stock parted with and the actual value of that received in exchange. Civil Code, sec. 3343. Ordinarily, in an action for damages as the result of fraud in the exchange of property, the method of ascertaining such damages is to present proof of market value. If this is not obtainable, proof may be offered of actual or intrinsic value, which, upon a motion for nonsuit, need not be closely scrutinized if in fact it shows a prima facie case of difference in value from which a reasonable inference may be drawn that a party has been damaged. Peek v. Steinberg, 163 Cal. 127, 124 P. 834. If there is no proof of value, the damage has not been proved. The recovery sought in this case is not the stock but the value thereof less payment already received. Hahn v. Wilde, 211 Cal. 52, 293 P. 30. Proof of certain circumstances standing alone might not be sufficient to determine value. However, the evidence herein given includes Reserve's fiscal statement dated July, 1934, and the factors making up the price paid for the stock, from which can be determined the approximate value thereof. Based upon this evidence the jury could have reached a conclusion on the value of the stock transferred by the Martins unaffected by the Tejon holding. Neher v. Hansen, 12 Cal.App. 370, 107 P. 565; Dicker v. Italo-American Oil Corp., 119 Cal.App. 451, 6 P.2d 550; People v. Burns, 128 Cal.App. 226, 16 P.2d 1015.

[11] The next question is the value of Reserve holdings inclusive of the Tejon property. There is testimony that while no oil was produced on this property, leasehold interests were sold therein to other companies at $100 an acre; that the market value for all purposes as of December 5, 1934, was "about $110 an acre"; that the acquisition cost of the Tejon holding consisted of the initial payment of $25,000, and in addition the cost of drilling two wells approximately $100,000. From this testimony it would appear that the Tejon leasehold increased the net value of Reserve stock by $183,000, or, based upon the issued capital stock of the company of 100,000 shares, $1.83 a share over what the Martins received for their 28,440 shares. Had a jury returned a verdict in favor of plaintiffs upon the foregoing evidence, it could not be said that a finding of damages "would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law." Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579, 581.

The judgment appealed from is reversed.

We concur: PETERS, P. J.; KNIGHT, J.

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44 Cal.App.2d 258

RUTLAND, EDWARDS & CO. v. COOKE et al.

COOKE v. RUTLAND, EDWARDS & CO.

Civ. 11566.

District Court of Appeal, First District, Division 2, California.

April 17, 1941.

Hearing Denied June 12, 1941.

1. Husband and wife 🔑232(3)

Where husband and wife commenced dealings with stock broker and wife ordered broker to buy stock certificates which were made out in wife's name and held by broker in husband's account, and husband thereafter ordered other stock on "when, as and if" issued basis, but failed to pay for stock when delivery was tendered, that wife asked the broker to obtain certificates in her name was not sufficient to defeat finding of "joint adventure" on part of husband and wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

2. Appeal and error 🔑1011(1)

Where broker sought to recover from husband and wife balance due on a brokerage account and wife sought to recover from the broker for the failure to deliver stock allegedly bought and paid for by the wife, conflict, if any, in the evidence as to whether there was a joint adventure between husband and wife was for trial court sitting without jury.

3. Appeal and error 🔑1011(1)

Trial court's findings on conflicting evidence would not be disturbed.

4. Frauds, statute of 🔑84

Where buyer ordered broker to buy certain stock which broker bought and placed in buyer's account, transaction was a "brokerage contract" and was not required by statute of frauds to be in writing. Civ.Code § 1624a.

See Words and Phrases, Permanent Edition, for all other definitions of "Brokerage Contract".

5. Frauds, statute of 🔑144

Where buyer instructed broker to purchase shares of stock on a "when, as and if" issued basis, and the broker purchased the stock on the supposition that the contract would be carried into execution, buyer was "estopped" to deny validity of contract under statute of frauds. Civ.Code, § 1624a; Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

6. Frauds, statute of 🔑89(3)

Where buyer ordered stock from broker who purchased the shares on the supposition that contract was to be carried into execution and broker became obligated to New York brokers for purchase price and thereafter notified buyer and wife that stock had increased in market value and could be sold at a profit, and buyer and wife instructed the broker to hold the stock in anticipation of a higher raise, buyer and wife by words and conduct intended to become owners of specific stock and could not deny existence of a valid contract under the statute of frauds. Civ.Code, § 1624a.

7. Brokers ⚿**24(1)**

Where buyer ordered stock on "when, as and if" issued basis when it was known that certificates of free stock were not available because of a pool through which evidences of stockholders' interests were issued in form of voting trust certificates and after pool was dissolved, broker, by letter, notified buyer and wife that firm had ready for delivery "certificates evidencing the ownership" of the stock, tender of delivery of such certificates as were issued at that time was good "tender" under contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Tender".

8. Brokers ⚿**24(1)**

Where buyer ordered stock on "when, as and if" issued basis when it was known that certificates of free stock were unavailable because of a pool through which evidences of stockholders' interests were issued in form of voting trust certificates and after pool was dissolved broker tendered delivery of "certificates evidencing the ownership" of stock ordered, and no objection at the time was made to form of certificates, objection which was not raised until action was brought was too late and could not be considered. Code Civ.Proc. § 2076.

◆

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action involving a brokerage account by Rutland, Edwards & Co. against Paul E. Cooke and others, consolidated for trial with another action involving the same account by Olivette Cooke, against Rutland, Edwards & Co. From an adverse judgment, Paul E. Cooke and Olivette Cooke appeal.

Affirmed.

H. C. Millsap and W. E. Lady, both of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

From a judgment in favor of the plaintiff in litigation involving a brokerage account the defendants have appealed.

In April, 1936, Paul E. Cooke and Olivette Cooke, his wife, commenced dealings with Rutland, Edwards & Co., a corporation, which was acting as a securities broker in the city of Los Angeles. After that date many different transactions were had. Among others on February 28, 1937, Mrs. Cooke ordered the plaintiff to purchase 200 shares of Richfield Oil, new. The certificate, under the directions of Mrs. Cooke, was made in the name of Mrs. Cooke and when received was, under the directions of Mrs. Cooke, held by the plaintiff in Mr. Cooke's account. On March 2d Mr. Cooke ordered the plaintiff to purchase 100 shares Baldwin Locomotive Works. The purported certificate was made in the name of Mr. Cooke and when received was also placed in his account. On March 9, 1937, Mr. Cooke ordered the plaintiff to purchase 500 shares Baldwin Locomotive Works. The purported certificate was made in the name of Mr. Cooke and when received was placed in his account. On the 22d day of March, 1937, Mrs. Cooke ordered the plaintiff to purchase 500 shares of Occidental Petroleum. Under the directions of Mrs. Cooke the certificate was made in her name and when received was, under her directions, placed in Mr. Cooke's account. On September 21, 1937, the plaintiff offered to deliver the certificates to Mr. and Mrs. Cooke and demanded the payment of $19,220 claimed to be due and payable. On the 24th day of September Mrs. Cooke, through her attorney, wrote to the plaintiff denying responsibility for the amount due on the Baldwin Locomotive Works stock. In that connection it may be said that cash payments had been made to the plaintiff and that the amount remaining unpaid on the entire account, $19,220, coincided with the purchase price of the Baldwin stock. After receipt of the letter written by Mrs. Cooke negotiations between the parties ceased. On the 19th day of June, 1937, Mrs. Cooke commenced an action in the municipal court against the plaintiff. She pleaded two counts. In each she sought to recover $1,510. In the first count she pleaded a cause of action for money had and received. In the second count she pleaded a cause of action for breach of contract for failure to deliver 100 Richfield Oil, new, and 500 Occidental Petroleum alleged to have been bought and paid for. On June 30, 1937, the plaintiff filed an answer in the municipal court pleading the contract relating to the sale of the Baldwin stock hereafter referred to. Still later, on October 1, 1937, it filed this action. In the first count it pleaded the facts showing the purchase of the several items of stock above mentioned, the failure of defendants to pay the balance due, its demand made, a sale for defendants' account at a price of $8,436.96, and a balance due of $10,783.04. It also pleaded the pendency of the action in the municipal court. In its second cause of action it pleaded a common count as for moneys laid out and expended for the account of the defendants. The defendants answered the plaintiff's complaint. Thereafter the trial court made an order consolidating the two actions for trial. On the trial, after fully hearing both parties, the trial court made findings in favor of Rutland, Edwards & Co., and from the judgment entered Mr. and Mrs. Cooke have appealed.

[1-3] The trial court made a finding that the facts showed a joint adventure. The defendant, Mrs. Cooke, contends that the evidence does not support that finding. We think her contention may not be sustained. The fact that she asked the plaintiff to obtain certificates in her name is not sufficient to support her present contention. All the other facts, and they are numerous, tend to support the finding made by the trial court. The conflict, if any, was addressed to the trial court and may not be disturbed by this court.

In their closing brief the appellants for the first time argue that the contract for the sale of the Baldwin stock was unenforceable because of the statute of frauds. Section 1624a of the Civil Code is the particular section relied on. This section reads in part: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods * * * or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. * * * There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

[4] The record is clear that the transaction regarding 100 shares of the Baldwin stock was a brokerage contract. It was not necessary that it should have been in writing. Kutz v. Fleisher, 67 Cal. 93, 7 P. 195; A. L. Jameson & Co. v. Redfield, 118 Cal.App. 59, 61, 62, 4 P.2d 817. There are three equally sound answers to appellants' argument as to the sale of the five hundred shares—their failure to raise the issue, their waiver of the defense, and their acceptance of the goods sold.

The complaint of Rutland, Edwards & Co. alleges that on March 9, 1937, the defendants "instructed plaintiff to purchase and to sell to defendants, through the said account of defendants, five hundred (500) additional shares of new Baldwin Locomotive Works common stock on a 'when, as and if issued' basis". The answer pleads that, on the day stated "an oral agreement was made and entered into between plaintiff and defendant, Paul E. Cooke, by the terms of which plaintiff agreed to sell and Paul E. Cooke agreed to buy (said amount of Baldwin stock) at the price of Thirty-two and 50/100 (32.50) Dollars per share, payable upon delivery of said stock". If this may be deemed a sufficient pleading to raise the defense of the statute it was not so treated by the pleader during the trial and no suggestion of the issue was made to the trial court and no finding was made thereon. The same situation was presented in English v. Shipley, 71 Cal.App. 45, 49, 234 P. 334, where we held that the defense of the statute of frauds may not be raised for the first time on appeal. Here the circumstances are somewhat more compelling since the question was not raised except in appellants' closing brief.

[5, 6] But, if we overlook the time and manner of presentation, we cannot escape the conclusion that the question is without merit for these two reasons: (1) The appellants by their language and conduct led the respondent to make expenditures in the purchase of the shares of stock upon the supposition that the contract was to be carried into execution and for that reason they are estopped to deny the contract. Section 1962, subdivision 3 of the Code of Civil Procedure. (2) After the respondent had purchased the shares on the New York market and had become obligated to the New York brokers for the purchase price thereof they notified the appellants that the stock had increased on the market and that a sale could then be made for appellants' profit. The appellants instructed the respondent at the time to hold the stock for them in anticipation of a higher raise. One hundred shares of the Baldwin stock had been purchased by respondent for appellants at $29.50 a share, and five hundred shares had been purchased at $32.50 a share. Some time in March, 1937, the two appellants came to the office of respondent and enquired about the market quotations of the stock at that time. One of the employees of the defendant testified: "I told them that this stock was bid at 33¾ and that was a profit to them on all their stock, and they said, 'Well, the profit is not big enough. It is more like chicken feed', as I remember the statement." This alone is sufficient to bring the case within the exception of section 1624a of the Civil Code as an expression of "by words or conduct his assent to becoming the owner of those specific goods".

The appellants attack the findings that respondent purchased the six hundred shares of Baldwin stock as directed, and tendered it to appellants who refused to accept it. The material circumstances relating to these findings are that all parties agreed that this stock was to be purchased and sold on a "when, as, and if issued" basis; that it was known at the time that certificates of free stock were not being dealt in, but that a pool was in force through which evidences of the stockholders' interests were issued in the form of voting trust certificates. This pool was broken on September 1, 1937, but, on September 24th the New York brokers delivered to respondents voting trust certificates for the full six hundred shares. On September 21st, and before such delivery was made, the respondent tendered the stock to the appellants. The form of the tender, which was in writing, reads:

"Mr. and Mrs. Paul E. Cooke
"607 South Dunsmuir Avenue
"Los Angeles, California.
"Dear Mr. and Mrs. Cooke:

"We now have ready for delivery to you certificates evidencing the ownership of 600 shares of the new Baldwin Locomotive Works common stock.

"We now make demand upon you and each of you for the payment of the sum of $19,220 in payment for same.

"Unless said payment is made within five days from delivery hereof to you, we shall dispose of said stock and all other holdings in your accounts and expect payment of the balance remaining due us without further notice.

"Very truly yours,
"(Signed) F. J. Rutland
"F. J. Rutland,
"President"

The only reply was made by Mrs. Cooke through her attorney. This reads:

"Rutland, Edwards & Co.,
"630 West 6th Street,
"Los Angeles, California.
"Gentlemen:

"Receipt of registered letters Nos. 226935 and 229636 addressed to Mr. and Mrs. Paul E. Cooke in care of this office is acknowledged.

"I do not represent and at no time have represented Mr. Cooke and have no authority to act for him in any capacity whatever. I have heretofore instituted an action on behalf of Mrs. Cooke against the Rutland, Edwards & Co. to recover certain stock, or the value thereof, which Mrs. Cooke claims was sold to her.

"I have advised Mrs. Cooke of receipt of this letter and I am authorized to state that she, at no time, entered into any contract or agreement for the purchase of certificates evidencing the ownership of 600 shares of the new Baldwin Locomotive Works common stock, or any contract or agreement of any kind relating to Baldwin Locomotive Works stock and she denies that she is indebted to you in any sum on account of any such contract and likewise denies your right to sell or dispose of any stock for the sum alleged or claimed by you to be due and unpaid for the purchase of said Baldwin Locomotive stock or otherwise.

"Very truly yours,
"(Signed) H. C. Millsap."

It will be noted that no objection was made to the form of the "certificates evidencing the ownership" of the shares. In fact no objection was made to their form at any time until this litigation arose. It is a matter of common knowledge that when the pool should be broken these voting trust certificates could be transferred on the books of the corporation with little difficulty. The pool having been broken on September 1st and the tender made on September 21st the respondent could have effected the transfer if it had known that certificates of stock were desired by the appellants. The sale having been made on a "when, as and if" basis the appellants become liable for the shares "as" issued, that is to say, when the tender was made on September 21st the contract was complete so far as respondent was concerned and a tender of delivery of such certificates as were issued at that time was a good tender under the terms of the contract calling for the shares "when, as, and if" issued. But the question as to the tender is answered by the express provision of section 2076 of the Code of Civil Procedure, which reads: "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

[7, 8] With this principle in mind the conclusion follows that the findings of the trial court are supported because of either one or both of the following circumstances—if under the terms of the contract it should be said that respondent was required to deliver certificates of shares of stock free from any voting trust the evidence clearly demonstrates that none of the contracting parties mentioned that fact to the other at any time during the transactions; that, if the appellants had so interpreted the contract and had expressed that view either before or at the time of the tender, the respondent could have fulfilled the contract under those terms. Secondly, the evidence discloses that during the several months in which these transactions were had the parties were dealing in numerous other stocks which sales were marked "free"; that the Baldwin stock sale was marked "when, as and if issued". It is inconceivable that the parties did not know that there was some difference, and so when the transaction was marked "when, as and if issued" the parties contemplated and understood just what the plain words implied—that the sale was on that basis and would be deemed complete upon delivery of such evidences of ownership "as" should be issued and sold on the market.

Furthermore, it is in the evidence that the respondent, acting upon the instructions of appellants, went into the New York stock market and purchased one hundred shares of Baldwin stock on March 9, 1937, and five hundred shares on March 11, 1937; that confirmation of these purchases was immediately made to the appellants disclosing the name of the New York brokers and that the stock was "new common" taken on a "when, as, and if issued" basis; that certificates of stock free from the trust pool were not on the market for sale until some time in September, 1937, and after the pool was dissolved; that, on June 30, 1937, the respondent pleaded in its answer filed in the municipal court action the fact that the stock had not then been issued, and no objections were raised by appellants to the form of the certificate, or the sufficiency of the tender, until these actions were tried in May, 1938. The transcript plainly discloses that the trial court did not accept the testimony of the appellants either upon the issue of their joint adventure, or upon the issue of the interpretation of the contract.

The judgment is affirmed.

I concur: SPENCE, J.

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44 Cal.App.2d 305

EGILBERT v. HALL et al.

Civ. 6490.

District Court of Appeal, Third District, California.

April 18, 1941.

Rehearing Denied May 17, 1941.

Hearing Denied June 16, 1941.

1. Appeal and error ⊂⇒1008(1)

In action on note, whether note was paid was for the trial court.

2. Bills and notes ⊂⇒499

In action on note, burden of rebutting presumption of nonpayment was on defendants.

3. Bills and notes ⊂⇒92(1)

Where loans and advances represented by note were made in the interest of the preservation of realty in which the makers of the note had an interest, the note was supported by sufficient "consideration" within the provisions of the Civil Code. Civ.

Code, § 1605; Code Civ.Proc. § 1963, subds. 21, 39.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

4. Bills and notes 🔑516

In action on note which was given for advances to preserve ranch and personalty, and which was to be due when ranch became the property of the "heirs" of the makers' stepfather, evidence showed that note was due, where at time note was signed the signers were the owners, subject to a life estate, of a portion of the ranch, and there was no showing that named individual had any heirs at law. Civ.Code, §§ 1647, 1649; Code Civ.Proc. § 1865.

The common concept of the term "heir", as distinguished from its legal definition, is far more broad and inclusive, and is frequently used to indicate those who come in any manner to the ownership of any property by reason of the death of the owner. The term "heir" means one who inherits, or is entitled to succeed to the possession of, any property after the owner's death, and one on whom the law bestows the title or property of another at the death of the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir".

5. Bills and notes 🔑36

Mere indefiniteness of note as to time of payment does not defeat the obligation of the makers, since equity will decree payment on lapse of a reasonable time from and after execution and delivery of the note.

6. Appeal and error 🔑181

A party cannot urge, for the first time on appeal, objections which could have been obviated if made in the court below; the doctrine being founded partly on a sort of estoppel.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action on a note by Norman A. Egilbert, etc., against Ruby Jewell Hall, etc., and others. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Preston & Gibson and Harry W. Falk, Jr., all of Ukiah, for appellants.

Walter S. Brann and Edgar H. Rowe, both of San Francisco, for respondent.

TUTTLE, Justice.

Plaintiff brought this action to recover upon a promissory note, executed by defendants, and reading as follows:

"Know All Men By These Presents

"That we, the undersigned, Ruby J. Codding, Ida Jewell D'Egilbert, George Jewell, and Grace B. Hood, owners or parties in interest of the Hood ranch and personal properties in Batchelor Valley, Lake County, California, are legally indebted to William D'Egilbert of San Juan, Puerto Rico, in the sum of two thousand, one hundred and forty-six dollars and $^{35}/_{100}$ cents for loans or advances made in the interest of the preservation of the said property, as per agreement of the parties hereto. That various sums, to-wit: $50.00 in 1930; $723.45 in 1931; $785.00 in 1933; $50.00 in 1934— or a total sum of $1608.45 have been advanced and with interest calculated annually, and not compounded at the rate of six percent per annum, in the sum of $537.90 has accrued as of this date; and

"Further that we the undersigned owners or heirs in said Batchelor Valley ranch do hereby agree to pay the said sum of two thousand one hundred and forty-six dollars and $^{35}/_{100}$ cents, when the said ranch is divided, or becomes the property of the heirs of the late George Hood or whenever the said heirs in majority vote decide.

"Furthermore, that the said indebtedness will continue to carry an interest charge of six percent per annum as and from the first day of June, 1935, up to which date interest on the present indebtedness is calculated. And,

"Furthermore, any sums hereafter advanced for the benefits of the said property shall bear the same rate of interest and be subjected to the same procedure as is intended to be followed in the case of the previous advances herein acknowledged.

"Given under our hands and seals the day and year hereafter written—the thirteenth day of April, nineteen hundred and thirty-five—at Witters Springs, Batchelor Valley, California.

"Ruby J. Codding
"Ruby J. Codding
"Grace B. Hood
"Grace B. Hood
"Ida Jewell D'Egilbert
"Ida Jewell D'Egilbert
"———G. B. Jewell."

Findings were made and judgment was entered against appellants for the principal sum mentioned above, with interest as provided in said note. The appeal is from the judgment.

Appellants contend that the finding to the effect that the note was not paid lacks evidentiary support. Respondent relies upon the presumption stated as follows in 19 Cal.Jur. pp. 1046, 1047, par. 180:

"* * * the burden of proof is upon the defendant to prove his affirmative allegation of payment; and possession by plaintiff of the instrument itself bearing no indorsement or other evidence of payment, raises a presumption that the instrument is wholly unpaid. This presumption, in the absence of proof of other facts reasonably warranting an inference of payment, prevails, and, in fact, may outweigh positive testimony in reference to payment.

"The burden of proving payment resting on defendant, he must introduce evidence which warrants the conclusion, not only of the mere delivery of money to the creditor, but also of the delivery of money on account of the particular obligation in suit, for this is involved in the term 'payment' when applied to any particular obligation."

Appellants point to certain testimony relating to prior financial transactions between the payee of the note and the makers, from which they insist the court could draw but one conclusion—that the note was paid. We have examined the record in this respect, and hold that the facts come squarely within the ruling in the case of Bank of Italy, etc., Ass'n v. Bettencourt, 214 Cal. 571, 7 P.2d 174, 177. There it was held that the presumption of nonpayment was not overcome by the evidence adduced by appellants. The court said: "If evidence be produced, tending to warrant an inference of payment, an issue of fact is presented to be decided by the court or jury. Light v. Stevens, 159 Cal. 288, 113 P. 659. The court in the instant case, in the absence of sufficient rebuttal evidence to overthrow the presumption of nonpayment of said notes, held that said payments made in the manner described in the evidence could not be applied to the chattel mortgage notes in this action. The question being one of disputed fact, this court cannot disturb the finding."

[1, 2] And so here, the question as to whether or not certain of the transactions mentioned were actually intended as payment of the note was one for the trial court, the burden of proof being upon the appellants. We are satisfied that the record presents merely a conflict, with the presumption on one side, and the testimony mentioned on the other. This being true, the finding cannot be disturbed by this court.

[3] It is next contended by appellants that they were mere guarantors, and that there was no consideration received by them for the note. They point out that the uncontradicted evidence is to the effect that the money received upon the note all went to their co-signer, Grace Hood, and that none was received by them. There is evidence, however, through recitals in the note, that the loans and advances which are included therein were made in the interest of the preservation of certain real property in which appellants had an interest. This was sufficient consideration. As stated in section 1605 of the Civil Code: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

Furthermore, section 1963, Code of Civil Procedure, subdivisions 21 and 39, respectively, provide as follows:

"21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration;"

"39. That there was a good and sufficient consideration for a written contract."

It is next contended by appellants that the evidence fails to show that the note was due. The obligation was to be due upon the happening of all or any one of three contingencies: 1. When their Batchelor Valley Hood Ranch was divided; 2. When it became the property of the heirs of the late George Hood; 3. When the heirs in majority vote decided it was due.

[4, 5] We are of the opinion that the second contingency had happened prior to the filing of the complaint. The trial judge aptly and correctly disposes of this contention in the following language appearing in his Order for Findings:

"It is readily apparent that the children of Grace B. Hood by a former marriage are not the heirs at law of George Hood, the step-father. The note, however, does not employ the term 'heirs at law'. It recites:

'We * * * do hereby agree to pay * * * when the said ranch is divided *or becomes the property of the heirs* of the late George Hood or whenever *the said heirs* in majority vote decide.' The common concept of the term 'heir'—as distinguished from its legal definition—is far more broad and inclusive and is 'frequently used to indicate those who come in any manner to the ownership of any property by reason of the death of the owner'. Home Acc. Ins. Co. v. Berges, 9 Cir., 30 F.2d 759, citing 29 C.J. 292. Webster's International Dictionary defines the term 'heir' as 'One who inherits, or is entitled to succeed to the possession of, any property after the death of its owner; one on whom the law bestows the title or property of another at the death of the latter.' It will be readily perceived that the first portion of the definition is in accord with the use of the word used by those unfamiliar with its legal limitations. The question therefore arises in what manner did the parties to the note employ the term 'heirs', for in the intent and meaning with which they used the word must rest the proper construction of the instrument. Civ.Code, secs. 1647, 1649; C.C.P. sec. 1865. As heretofore several times stated at the time the note was signed the signers were the owners, subject to a life estate, of a portion of 'the Hood ranch', formerly owned by George Hood, and were, within the common usage of the term, heirs of George Hood. That the parties so used the word 'heirs' in the note in question becomes more readily apparent upon a further examination of its provisions. The third alternative condition precedent to payment reads, 'or whenever the said heirs in majority vote decide'. Obviously the parties agreed and understood that in the event neither of the other conditions precedent occurred that the note should be payable when the promisors therein so determined by majority vote. There is not the slightest reason to believe that it was the intent of the parties that strangers to the instrument—the heirs of George Hood (if any there be)—should determine by majority vote when the promissory note should be payable. Nor is there any testimony indicating that there were 'heirs' of George Hood other than the parties herein mentioned. That—regardless of the technical implication of the term—they regarded themselves as 'heirs' and so designated themselves, is clearly evident from the instrument itself considered in conjunction with all of the surrounding circumstances heretofore noted. It follows that plaintiff is properly entitled to judgment by reason of the occurrence according to the understanding of the parties of the second condition precedent to payment as specified in the note.

"It might be added that in the event the court is in error in its views hereinabove expressed concerning the second condition precedent and that the condition has not occurred then by reason of its very indefiniteness the note would nevertheless constitute a valid evidence of indebtedness between the parties thereto. In such case mere indefiniteness as to the time of payment would not, could not, and ought not defeat the obligation for equity will decree payment upon the lapse of a reasonable time from and after the execution and delivery thereof. That a court must so conclude upon the facts as presented herein is supported by an abundance of authority. Weaver v. Grunbaum, 31 Cal.App.2d 42, page 51, 87 P.2d 406, and cases cited."

[6] Finally, it is contended by appellants that the court erred in computing the amount due. It is claimed that the trial court failed to credit appellants with certain payments, and that interest was erroneously computed. This objection was not presented to the trial judge. We cannot say, from the statement of appellants, that there was no evidence to sustain the finding with reference to the amount due. Furthermore, as stated in 2 California Jurisprudence, page 248, section 74: "It is a well settled rule that a party cannot urge, for the first time on appeal, objections which could have been obviated if made in the court below. This doctrine is founded partly upon a sort of estoppel, for where the objection is one which could, if made in the court below, have been obviated, it would be clearly unjust for a party to withhold his objection until upon appeal, when it is too late to correct the defect."

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

44 Cal.App.2d 327

RAY et al. v. MERCANTILE ACCEPTANCE CORPORATION OF CALIFORNIA.

Civ. 6516.

District Court of Appeal, Third District, California.

April 19, 1941.

1. Chattel mortgages ⚷176(4)

Evidence sustained judgment for conversion of utility trailer by chattel mortgagee on ground that at a time prior to date installment of interest on the indebtedness became due, mortgagee refused to permit mortgagor to remove the trailer from garage where it had been taken for repairs.

2. Chattel mortgages ⚷169

Mortgagor could not be precluded from maintaining action for conversion of mortgaged utility trailer by mortgagee because of fact that mortgagor made no physical effort to take trailer from garage to which it had been taken for repairs, after garage keeper refused to grant possession to mortgagor, where garage keeper's refusal was affirmed in a telephonic conversation between mortgagor and mortgagee.

3. Appeal and error ⚷909(5)

Where mortgagor brought conversion action against mortgagee based on refusal to permit mortgagor to remove mortgaged utility trailer from garage in Sonoma county where it was taken for repairs, and trial court refused to order forfeiture of trailer on ground of mortgagor's violation of provision of mortgage that property should not be removed from Mendocino county where mortgage was executed, reviewing court in absence of evidence to contrary would assume that trailer was taken to Sonoma county for sole purpose of having repair work done and would not declare such forfeiture upon the facts before it.

4. Sales ⚷477(6)

Conditional seller's acceptance of overdue installments on purchase price of tractor and acceptance of partial payment of installments due on truck did not constitute "waiver" of provision of conditional sales contracts for forfeiture for nonpayment of installments, where contracts provided that time was of the essence thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by William S. Ray and others against the Mercantile Acceptance Corporation of California for conversion of a tractor, a utility semi-trailer and a truck. From the portion of the judgment in favor of the defendant as to the tractor and truck, the plaintiffs appeal, and from the portion of the judgment in favor of the plaintiffs as to the utility semi-trailer, the defendant appeals.

Affirmed.

Taft & Spurr, of Ukiah, for appellant.

Preston & Gibson, of Ukiah, for respondents.

PER CURIAM.

This is an action for a conversion of a V-8 tractor, a utility semi-trailer, and a GMC truck, based upon the unlawful repossession thereof by defendant finance company.

Sometime prior to July 1, 1937, plaintiffs were purchasing, under conditional contracts, the tractor and the GMC truck. On May 11, 1937, plaintiffs, being the owners of the utility trailer, executed a chattel mortgage thereon in favor of the Acceptance Corporation, as security for the payment of $504, repayable in twelve monthly installments of $42, beginning June 15, 1937.

On June 24th, plaintiffs paid defendant Acceptance Corporation $200, of which $42 was credited on the chattel mortgage payment due June 15th, and the balance was applied to other obligations from plaintiffs to defendant.

Some time in July, the exact date being one of the issues in this case, defendant re-possessed all three pieces of equipment on the ground plaintiffs were in default or had violated the terms of their contracts.

Plaintiffs then brought this action in conversion, claiming defendant had acted unlawfully in such seizures, and after a hearing thereon, judgment was entered in favor of defendant as to the tractor and the truck, the court finding that as to that equipment plaintiffs were in default under their contracts, but as to the utility trailer the judgment was in favor of plaintiffs.

Each side has appealed from that portion of the judgment adverse to them, defendant claiming it took possession of the trailer under the terms of the chattel mortgage, and plaintiffs as to the tractor and truck, contend that the vendor of a conditional sales contract, after default in a monthly installment, cannot accept a partial payment and then claim a forfeiture prior to the due date of the next monthly installment.

Directing our attention first to the appeal of the Acceptance Corporation as to the utility trailer, the record discloses the execution of the chattel mortgage and the payment of the June installment on June 24th.

According to the testimony of defendant the trailer was re-possessed in Petaluma, sometime after July 15th, either July 17th or July 19th. The entry on the books of the company shows a re-possession entry as of July 19th, so it may be assumed the actual retaking was at a time prior thereto.

Elgin Ray, one of the plaintiffs, testified he took the trailer to the Sanderson Garage for some repair work on June 28, 1937. At a time subsequent thereto he called at the garage to get the trailer, but he was refused possession, Sanderson telling him the Acceptance Corporation had an attachment against it. Ray fixes the time as July 6th. Defendant contends the testimony of Ray as to this date is too uncertain upon which to base a finding, but in answer to the question—"When did you go back after the * * * utility trailer"—Ray answered, "On the 6th day of July". He also testified a man named Monte Reid took the trailer from the Sanderson Garage "just about July 12th". Ray also called the Acceptance Corporation in San Francisco from Petaluma by telephone, the date not being specified, although it may be inferred that he called at the time possession was refused by the garage keeper, the testimony being that he went to get the equipment but was told the corporation had an attachment on it, that he saw no papers, and he was asked, "Was any of the representatives of the Mercantile Acceptance Corporation there at that time that you know of?", and he answered—"Well, I called them up in San Francisco, the San Francisco office", and he was refused permission to remove the trailer from the garage.

[1] The time of this attempted removal of the equipment from the Sanderson Garage is fixed by the witness as July 6, 1937, and he recalls that date as being after the Fourth of July holiday, and after his uncle's funeral, which was prior to July 4th. He also went to Petaluma before he went to Eureka, and the testimony is he went to Eureka about the 10th day of July. Such testimony would seem sufficiently definite upon which the court could base a finding, and is ample to establish the fact that the utility trailer was re-possessed, or at least a conversion took place some time prior to July 15th, which was the date the installment of interest became due.

[2] It is true that plaintiff made no physical effort to take the trailer from the garage, but in view of the fact the garage keeper refused him possession, which refusal was affirmed in a telephonic conversation with defendant in San Francisco, it is sufficient, under the circumstances, to excuse plaintiff from attempting by force to recover physical possession of his property.

It is pointed out by defendant that the chattel mortgage was executed in the county of Mendocino, and that the plaintiffs, mortgagors, resided in that county, and that the mortgage specifically provided that the mortgaged property should not be removed from the county in which the mortgage was executed, and for that reason defendant justified its seizure of the trailer.

[3] The court has impliedly found against this contention of defendant. Plaintiff testified he took the trailer to the garage at Petaluma to have some work done on it. We may assume, in the absence of evidence to the contrary, plaintiff took the trailer from Mendocino county to the adjoining county of Sonoma for the sole purpose of having certain repair work done thereon, and the trial court not having ordered a forfeiture of the trailer for that reason, this court will not now declare such forfeiture upon the facts before us.

As to the appeal by plaintiffs from that portion of the judgment in favor of defendant as to the tractor and GMC we find no error by the trial court.

[4] The GMC was sold to plaintiffs under a conditional sales contract dated May 11, 1937, whereby plaintiff agreed to pay a balance due at the rate of $150 per month for seven months. This equipment had previously been sold to one Carter under a contract, and under that contract Carter was in arrear $250, which plaintiffs paid about June 2, 1937. The tractor was purchased on December 24, 1936, upon

payments of $64.62 payable monthly. The full installment payments on the GMC and the tractor were not made, and the records of payments actually received support the statement of the court that "the evidence justifies the conclusion that on April 24, 1937, an installment on the Ford tractor became due, and that this installment was paid on June 28, 1937; that at the time of re-possession, the installments which became due on May 24, 1937, and on June 24, 1937, remained unpaid; * * * that on the GMC truck and trailer an installment of $150 matured on June 2, 1937, on account of which $92.78 was paid on June 28, 1937. Another installment matured on July 2, 1937, and this was not paid. It seems clear that as to the Ford tractor and the GMC truck, plaintiffs were in default at the time of the re-possession, unless such default had been waived. Time here being of the essence of the agreement, there was no such waiver. Stoody Co. v. Valley Pipe & Welding Co., 20 Cal.App.2d 580, 67 P.2d 747; Pacific Finance Co. v. Pierce, 48 Cal.App. 600, 191 P. 1115; Liver v. Mills, 155 Cal. 459, at page 462, 101 P. 299."

The judgment is affirmed. Each side to bear their own costs.

* * *

44 Cal.App.2d 349

ANDERSON v. SAN FRANCISCO EXAMINER et al.

Civ. 11607.

District Court of Appeal, First District, Division 2, California.

April 21, 1941.

As Corrected on Denial of Rehearing May 21, 1941.

Hearing Denied June 19, 1941.

1. Automobiles ⇨244(11, 43)

Evidence warranted inference that street intersection collision was due to defendant's act in unlawfully cutting corner in attempt to beat plaintiff across intersection, and that plaintiff was not negligent in assuming that defendant would proceed in usual manner to center button before attempting to make left-hand turn.

2. Automobiles ⇨245(80)

In action for injuries sustained in collision between automobiles at street intersection, whether plaintiff was guilty of contributory negligence was for jury.

3. Negligence ⇨136(9)

Contributory negligence is a "question of law" only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to negligence of plaintiff contributing to his injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Harold J. Anderson against San Francisco Examiner and others for injuries allegedly sustained in an automobile collision. From a judgment for plaintiff, defendants appeal.

Affirmed.

George M. Naus and Donald Seibert, both of San Francisco, for appellants.

Hugh K. McKevitt and Newell J. Hooey, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

In a trial before a jury plaintiff had a verdict for $6,000 for damages for injuries arising out of a collision of two motor vehicles—one operated by plaintiff, the other by defendant Davis in the course of his employment by his codefendant. The trial court denied defendants' motion for a nonsuit, a directed verdict, and for a new trial. In denying the latter motion the trial court reduced the verdict to $2,500. The sole error assigned in the defendants' appeal from the judgment relates to the claim that plaintiff was guilty of contributory negligence as a matter of law.

The facts, which are without material dispute, but which will be stated in the light most favorable to the respondent, are: the collision occurred in the southeast quarter of the intersection of Geary boulevard and Stanyan streets in the city of San Francisco. Geary boulevard is 81 feet wide from curb to curb. Stanyan street is 63 feet wide and intersects Geary boulevard on its southerly line, but does not extend across the boulevard. Commonwealth avenue intersects Geary boulevard on the north side about 140 feet east of the terminus of Stanyan street, but does not cross the boulevard. At about 3:15 a. m. of the night of January 10, 1940, defendants' vehicle was being operated southerly along Commonwealth avenue to Geary boulevard, thence westerly to the intersection with Stanyan street, thence southerly to the point of collision. Respondent's vehicle was being operated easterly along Geary boulevard about five feet from the southerly curb line, across the intersection of Stanyan street, to the point of collision. This point was about five feet west of the prolongation of the easterly line of Stanyan street, and about five feet north of the southerly curb line of Geary boulevard. All witnesses gave the usual variation in their estimates of the speed of both vehicles, but the speed is not a material element. All agreed that the respondent did not change his course of travel easterly close to the southerly curb line of Geary boulevard. All agreed that, as appellants' vehicle was operated westerly on the boulevard it turned sharply to the left, easterly of the center button, and "cut the corner" into Stanyan street.

Following the collision appellants' vehicle lay on its side in the extreme southeasterly portion of the intersection partly upon the sidewalk at that corner. Some evidence was offered that the respondent had failed to see the approach of the other vehicle until immediately before the time of impact. The appellants stress this fact as showing his negligence in failing to observe the danger. But evidence was also offered that it was raining at the time, and though the visibility was said to be good, and no other traffic impeded the view of either driver, the defendant Davis testified that he did not see the respondent's vehicle until after the impact.

[1] Upon the statement of the evidence it is apparent that the jury might well have drawn the inference that the collision was due to appellant's act in unlawfully cutting the corner in his attempt to beat respondent across the intersection, and that the latter was not negligent in assuming that appellant would proceed in the regular and usual manner to the center button before attempting to make the left-hand turn.

[2, 3] But the jury having found by its verdict that respondent was not guilty of contributory negligence there is just one legal principle controlling the decision and that is stated in Reaugh v. Cudahy Packing Co., 189 Cal. 335, 343, 208 P. 125, 128, as follows: "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury."

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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43 Cal.App.2d 563

CLARK v. STANDARD ACCIDENT INS. CO. OF DETROIT, MICH.

Civ. 12280.

District Court of Appeal, Second District, Division 1, California.

April 19, 1941.

Hearing Denied May 15, 1941.

1. Trial ⚷395(5)

The trial court in making its findings should have set forth the ultimate facts with sufficient particularity as to show the grounds upon which its judgment rested.

2. Insurance ⚷527

Whether there is a loss of the practical use of an eye within meaning of an accident policy providing indemnity for loss of sight, when peripheral vision exists, depends on the facts of each individual case.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

On petition for rehearing.

Petition for rehearing denied.

Prior opinion, 111 P.2d 353.

Joseph Brenner, of Los Angeles, for appellant.

Paul Nourse, of Los Angeles, for respondent.

PER CURIAM.

Respondent has petitioned for a rehearing of the cause herein, contending that the trial court made a proper finding of ultimate fact upon the issue of the loss of sight of appellant's eye and that this court has erred in holding said finding a mere conclusion of law and in holding that the trial court had failed to make a proper finding of fact upon the issue.

[1] Respondent argues that the interpretation by the trial court of the meaning of the phrase "entire loss of sight of one eye" did not present a question of fact but purely one of law, and that it was only necessary that the court find the ultimate facts; that the court was not required to make any finding upon the issue of law as to the meaning of the policy but could reflect that finding in its findings of the ultimate fact. With this proposition there is no disagreement. The difficulty in the instant case, however, is that, in the light of the record presented and the evidence adduced, it is impossible to determine upon what theory the trial court made its finding as to loss of sight. In which regard, it should be pointed out that respondent, in its answer, affirmatively alleged in one paragraph that "the plaintiff was totally without any practical use or sight in his right eye"; and in the paragraph of its answer immediately following, respondent alleged that "the plaintiff did sustain an injury which then resulted in the irrecoverable and entire loss of sight of his right eye". Both such allegations are of ultimate fact; but it is apparent that in order to prove such allegations, the latter requires different proof than the former. The distinction between such allegations has already been made in the original opinion herein, where it is said: "If an individual is able to see at all it cannot be said as a matter of fact that the entire sight of the eye is lost, although it might well be concluded as a matter of law that such individual would be entitled to recover indemnity as for an entire loss, because the vision had been so greatly impaired." 111 P.2d 353, 354. Furthermore, at the trial, respondent's counsel indicated to the court that it was respondent's contention that in order to be of practical use the injured eye must be of some practical use and benefit in the occupation in which the plaintiff was used to working. As may be seen from the original opinion herein, such a contention does not correctly reflect the law on the subject. From the finding of the court upon the issue of loss of sight, it is impossible to say that the trial court in considering the evidence did not adopt the view advanced by respondent, and, if this were so, the finding was based upon an erroneous theory of law. From all that appears herein, the finding in question might have been based upon any one of three grounds: 1. That appellant was in fact totally blind in the injured eye; 2. That appellant had lost the practical use and benefit of the eye in his occupation; and 3. That appellant had lost the practical use and benefit of the eye in his daily life. It was for the trial court in making its findings to set forth the ultimate facts with sufficient particularity as to show the grounds upon which its judgment rested. Frascona v. Los Angeles Railway Corp., 48 Cal.App. 135, at 137, 138, 191 P. 968.

The pleadings herein presented two questions of ultimate fact to be answered by the trial court; first: Had appellant actually lost the entire sight of the eye; and, second: If appellant had not actually lost the entire sight of the eye, had the vision been so greatly impaired as to destroy practical use of the eye? The evidence did not support an affirmative finding upon the first issue, and the trial court failed to make any finding upon the second.

The authorities cited by respondent upon the question stand for no more in that respect than the proposition that findings need be of ultimate fact only and may be couched in the language of the pleadings where the pleadings sufficiently state the ultimate facts. A few of respondent's authorities, notably Miller v. Gusta, 103 Cal. App. 32, 283 P. 946, directly support the view taken by this court and the contentions of appellant.

[2] It may be well to state here, also, that in view of the undisputed evidence of the existence of peripheral vision in the injured eye, whether practical use of the eye has been lost presents a very close question. See Powers v. Motor Wheel Corporation, 252 Mich. 639, 234 N.W. 122, 73 A.L.R. 702. However, where questions of this nature arise, their determination depends so much upon the facts of each individual case that it would create a dangerous and undoubtedly harsh precedent to establish, as a rule of law, that the existence of peripheral vision in every case constituted existence of practical use of eyesight.

The petition for rehearing is denied.

44 Cal.App.2d 280

DAVIS v. DUNCAN et al.

Civ. 6507.

District Court of Appeal, Third District, California.

April 17, 1941.

1. Negligence 🔑135

Evidence that floor of a store, which was in process of being polished, was dangerously slippery, although it did not appear so, and that store employee, who fell thereon, was not aware that work was in progress nor warned of dangerous condition of floor, warranted finding that employee was not contributorily negligent so as to bar recovery against firm engaged in refinishing floor for injuries sustained in fall.

2. Negligence 🔑136(14, 26)

The general rule is that negligence and contributory negligence are questions for the jury and, unless trial court can say as a matter of law that negligence or contributory negligence have or have not been shown, it may not interfere with jury's finding with respect thereto.

3. Appeal and error 🔑996, 1002

Where there is a substantial conflict in the evidence or reasonable inferences that may be drawn therefrom, appellate court may not set aside jury's findings of fact.

4. Negligence 🔑134(8)

Evidence that floor of a store, which was in process of being polished, was dangerously slippery, although it did not appear so, and that store employee, who fell thereon, was not aware that work was in progress nor warned of dangerous condition, constituted substantial evidence sustaining recovery by employee against firm engaged in refinishing floor for injuries sustained in fall on theory that condition of floor was a latent danger, of which the firm was aware, but failed to exercise reasonable care to warn injured employee thereof.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Louise Davis against Hugh Duncan, Robert Duncan and others for injuries sustained when plaintiff fell on a floor of the store, in which she was employed, which was being waxed by defendants. From a judgment for plaintiff, Robert Duncan and others appeal.

Judgment affirmed.

Victor Hyatt, of Los Angeles, and John H. Fleming, of San Francisco, for appellants.

Downey, Brand & Seymour and Frederick R. Pierce, all of Sacramento, for respondent.

HELD, Justice pro tem.

In this action to recover damages for personal injuries, the jury returned its verdict in favor of plaintiff for the sum of $10,000. From the judgment entered on that verdict, defendants appeal, and contend that the evidence establishes as a matter of law that the injuries suffered by plaintiff were caused by her own negligence, and not by the negligence of defendants.

Respondent was employed as a saleswoman in the drapery department in the store of John Breuner Company, in Sacramento. Appellant Robert Duncan, doing business as Floor Service Company, entered into a contract with plaintiff's employer to sand, seal and wax certain floors in the rug department of the Breuner store. Appellant Roberts was an employee of appellant Duncan in performing the work called for by the contract. This work was done in three sections, that is, one portion of the floor was completed before another was entered upon, and the process involved the sanding and smoothing of the floor with a sanding machine, and the application of a composition known as Duro-Seal, to seal the wood against dirt. This composition was allowed to dry on the floor overnight, and the following morning the floor was rubbed down with a machine equipped with a steel-wool pad to remove the excess Duro-Seal from the floor. Thereupon a liquid wax finish known as I-C-E finish was poured upon the floor in streaks and spread with an applicator, a wooden block about sixteen inches long wrapped with a sheepskin cover, and having a handle about five feet long. After the wax finish had been spread, the floor was allowed to dry, and after the lapse of approximately thirty to forty-five minutes the floor was polished by the use of a machine.

The drapery department in which plaintiff was employed was to the west of, and separated from, the rug department by a partition, at the north and south ends of which were doors opening from one department to the other. Near the northeast corner of the rug department was a service desk, near which appellant Roberts, on the morning of April 7, 1939, was engaged in pouring and spreading I-C-E wax finish on the adjacent floor. Plaintiff had occasion to approach the service desk on an errand. Her course lay through the door at the south end of the partition, thence northerly along the partition and thence easterly in the direction of the service desk. As she neared the service desk she slipped and fell, and sustained the injuries complained of. Shortly prior to the accident, appellant Roberts had poured a quantity of the wax finish in the vicinity of the place where plaintiff fell, and, a few minutes before the accident, had completed the spreading of the finish over that area, and at the time was spreading the finish to the south.

That after the application of the wax finish and prior to the use of the polishing machine, the floor was in a dangerous condition was testified to by several witnesses. One said it was "very slick", another said that it was "quite slippery", and still another that it was "very slippery".

Defendants concede that they owed to plaintiff the duty of ordinary care, and that if there existed latent or hidden perils it was incumbent upon them to give plaintiff warning thereof, unless plaintiff was aware of the danger. The question then arises whether there was substantial evidence to sustain the implied finding of the jury that a latent or concealed peril existed, and that plaintiff had no knowledge thereof.

That appellants recognized the dangerous condition of the floor and their duty to give warning to those using it is clear from the testimony of the appellant Roberts and the witness John Duncan, a fellow-worker of appellant Roberts. Roberts testified that he had warned persons crossing the floor that "it was slippery and dangerous"; and the witness John Duncan warned some of the employees who walked across the floor that "they shouldn't be walking on there because that interfered with our work and it was very slick". Appellant Roberts, in explaining the circumstances of the accident shortly after it occurred, stated to Mr. Irwin Sibole, the assistant manager of the Breuner Company, that he had been trying to watch for people coming down the aisle toward the service desk, and to warn them that it was slippery, and that he had not seen plaintiff in time to give her warning.

[1] That warning was required is evident from the fact that although the floor was in fact slippery and dangerous, it did not so appear. The witness Beringer testified that the floor "looked a little deceiving because it had a dull effect. It didn't look slippery." To the plaintiff, the floor looked like an ordinary hardwood floor, and she noticed nothing unusual about the floor over which she was walking. Nor did the witness Mrs. Verne Pillsbury, another employee of the John Breuner Company, notice anything unusual about the floor in the area wherein plaintiff fell. She had passed over it shortly prior to the accident. The witnesses Beringer and Sibole who came upon the scene immediately after the accident, likewise saw nothing unusual about the appearance of the floor. It is uncontradicted that plaintiff was not even aware that the work was in progress, nor was she warned in any manner of the dangerous condition. The case of Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, is therefore not applicable. There was substantial evidence that the peril was hidden and latent, not obvious, and that plaintiff had no knowledge of its existence. The jury was justified in concluding that the peril was not such as she could have observed in the exercise of reasonable care.

[2, 3] The general and elementary rule is that negligence is a question for the jury, and unless the court can say as a matter of law that negligence has or has not been shown, it may not interfere with the conclusion arrived at by the jury. 19 Cal.Jur. p. 719. This rule applies equally to contributory negligence. 19 Cal.Jur. p. 735. And on appeal, the duty of the appellate tribunal stops when it has determined that there is some substantial evidence to support the finding of the jury. Anderson v. Hagen, 19 Cal.App.2d 714, 66 P.2d 168; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660. And if there is any real and substantial conflict in the evidence, or reasonable inferences that may be drawn therefrom, this court may not set aside the findings of fact made by the jury in the lower court. Ferguson v. Nakahara, 43 Cal.App.2d 435, 110 P.2d 1091.

[4] In view of the evidence in this case, this court may not hold that the implied finding of the jury, that defendants did not exercise ordinary care, and that plaintiff was not guilty of contributory negligence, does not find support in the evidence. Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

44 Cal.App.2d 299

DOS PUEBLOS RANCH & IMPROVEMENT CO. v. ELLIS et al.

Civ. 2625.

District Court of Appeal, Fourth District, California.

April 17, 1941.

1. Mines and minerals ⚷74

Where oil lease, under which assignees claimed, was canceled by decree of court for breaches of covenants, "profit a prendre in gross" created in the assignees by virtue of the assignments of interests in hydrocarbons produced under the lease was terminated by the cancellation.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit a Prendre in Gross".

2. Mines and minerals ⚷74

Where oil lease was canceled, interests of assignees in hydrocarbons produced under lease terminated and they could not complain of judgment against them quieting title in landowner.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action to cancel a lease and to quiet title by the Dos Pueblos Ranch & Improvement Company against Rollo Ellis and others. From a judgment entered after plaintiff's motion for judgment on the pleadings had been granted, D. E. Knieper and others appeal.

Affirmed.

P. Talbot Hannigan, of Los Angeles, for appellants.

Heaney, Price, Postel & Parma and Clarence A. Rogers, all of Santa Barbara, for respondent.

MARKS, Justice.

This is an appeal from a judgment entered after plaintiff's motion for judgment on the pleadings had been granted. It is an appeal in the same case, but by other defendants, as the appeal in the case of Dos Pueblos Ranch & Improvement Co. v. Ellis, 8 Cal.2d 617, 67 P.2d 340. The judgment in that case, entered after plaintiff's motion for judgment on the pleadings had been granted, cancelled the oil lease executed by the Dos Pueblos Ranch & Improvement Company to Rollo Ellis. That judgment has become final and that lease has been terminated by that judgment.

The same land and the same lease is involved here. Counsel for these appellants has stipulated that the only interest or claim of appellants in or to the leased property is through Ellis under the cancelled oil lease. He argues that the assignments of interests in the hydrocarbons produced under the Ellis lease to appellants created in them a present interest in real property which is a profit a prendre in gross, a vested interest in real property. See, Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237; Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822; Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 64 P.2d 1081; George v. Weston, 26 Cal.App.2d 256, 79 P.2d 110; Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035; Lever v. Smith, 30 Cal.App.2d 667, 87 P.2d 66; Pimentel v. Hallbaker Co., 32 Cal.App.2d 697, 90 P.2d 588; Sandrini v. Branch, 32 Cal.App.2d 707, 90 P.2d 593; Macklin v. Brittain, 37 Cal.App.2d 120, 98 P.2d 749.

[1, 2] The rule contended for by appellants is thoroughly established but its application here is not apparent. While the assignments or transfers from Ellis to appellants created in them a profit a prendre in gross, that profit could not survive the lawful cancellation of the lease under which they claim. Payne v. Callahan, 37 Cal.App.2d 503, at page 518, 99 P.2d 1050. As the main lease under

which appellants claim has been lawfully cancelled and terminated by decree of court because of breaches of covenants in the lease sufficient to terminate the entire leasehold estate, appellants' interest under that lease was terminated. City Investment Co. v. Pringle, 69 Cal.App. 416, 231 P. 355. As they have no interest under the lease in the leased property they cannot complain of the judgment against them quieting plaintiff's title to it.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

44 Cal.App.2d 356

BARLOW et al. v. CROME et al.

Civ. 2613.

District Court of Appeal, Fourth District, California.

April 21, 1941.

Hearing Denied June 19, 1941.

1. Automobiles ⚷245(80)

In action for injuries allegedly sustained in automobile collision which occurred at intersection of highways, whether plaintiff driver was guilty of contributory negligence was for jury.

2. Appeal and error ⚷662(1)

The District Court of Appeal was bound by record before it in determining whether an oral instruction, which as recorded by phonographic reporter contained verbal inaccuracies, was prejudicial

3. Appeal and error ⚷1064(4)

In automobile accident case, an oral instruction respecting meaning of contributory negligence was not so prejudicial as to require reversal of judgment for plaintiffs notwithstanding that instruction contained verbal inaccuracies, especially where evidence of defendants' negligence was admittedly convincing, and evidence of plaintiffs' contributory negligence was slight.

4. Trial ⚷228(1)

A trial court need not state all law applicable to a case in a single instruction.

5. Trial ⚷295(1)

In determining whether error exists with respect to instructions, the instructions must be read as a whole, and each instruction should be considered in connection with others, and if, without straining any portion of language, instructions harmonize as a whole and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to just criticism, or because a separate instruction does not contain all of the conditions and elements which are to be gathered from instructions as a whole.

6. Trial ⚷295(1)

In considering whether instructions are erroneous, the entire instructions should be given a fair and reasonable construction with a view to ascertaining their probable effect upon jury, and must be considered in light of issues raised by pleadings, and words employed in instructions will be construed in accordance with their natural and ordinary meaning.

Appeal from Superior Court, Kern County; Pat R. Parker, Judge.

Action by Clara R. Barlow and others against George B. Crome and others, wherein Clara R. Barlow and W. R. Barlow sought recovery for injuries allegedly suffered by them in an automobile accident, and E. S. Barlow, Jr., as administrator of the estate of Edward Sumner Barlow, deceased, sought damages by reason of deceased's death. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Chas. E. R. Fulcher, of Los Angeles, and Borton, Petrini, Conron & Borton, of Bakersfield, for appellants.

Edward West, of Bakersfield, for respondents.

GRIFFIN, Justice.

This is an action arising out of an automobile collision wherein the plaintiff Clara R. Barlow sought recovery for personal injuries suffered by her; W. R. Barlow sought damages for injuries suffered by him, and E. S. Barlow, Jr., as administrator of the estate of Edward Sumner Barlow, deceased, sought damages by reason of the death of said deceased. Upon trial of the action before a jury verdicts were rendered in favor of Clara R. Barlow for $10,000; in favor of W. R. Barlow for $1,000; and in favor of E. S. Barlow, Jr., as administrator, for the sum of $5,000.

Edison Drive is a public highway in the county of Kern, and runs in a northerly and southerly direction. At the time of the accident it had an oiled surface approximately 18 feet in width. It intersects Redbank Road, which runs in an easterly and westerly direction, at approximately right angles. Redbank Road is an unpaved dirt road. There were no traffic signs, such as boulevard stop signs, slow signs, or other directions posted at or near the intersections on either of the roads in question.

The accident occurred on May 31, 1939, at about 6 o'clock p. m., at a time when the sun was sinking in the western horizon, so that it cast its rays directly down Redbank Road into the face of the driver of the car approaching from the east. The appellant John Joseph Vincenti was driving a Chevrolet "pick-up" automobile in a westerly direction on Redbank Road.

It is admitted that at that time he was employed by the appellant Bakersfield Hardware Company and was acting within the course and scope of his employment. The respondent W. R. Barlow, a son of Clara R. Barlow and the deceased Edward Sumner Barlow, was driving a Packard automobile owned by the decedent in a southerly direction on Edison Drive. The two automobiles collided at the intersection of the two above-mentioned streets, the Chevrolet striking the Packard on its left side so that the most southerly portion of the Packard struck by the Chevrolet was about one-third of the distance back from the front of the Packard, and the collision occurred slightly west of the imaginary center line of Edison Drive and about the center line of Redbank Road. It is conceded by these appellants that the evidence was sufficient to establish negligence on the part of appellants.

The sole point upon the sufficiency of the evidence discussed here, pertains to the question of the contributory negligence of the respondents as a matter of law.

Vincenti testified that as he approached the intersection he was bothered in his driving by the sun, and admitted after the collision that he was blinded by it. We will therefore only review the evidence as to the acts and conduct of the driver Barlow. He testified generally that he was driving his car southerly on Edison Drive, and when about 100 yards from the intersection of Redbank Road, he looked to his left, i. e., to the east, and saw the appellants' "pick-up" at a distance not quite twice as far from the intersection as he was; that he (Barlow) was traveling at about 40 to 45 miles per hour and that during the time of his looking to the left and his observation of the appellants' "pick-up", he had approached to within about 50 yards of the intersection. He then looked to his right (to the west) and saw no oncoming traffic, then looked ahead to the south, saw no traffic facing him, and that by the time a brief period had elapsed, he was in the center of the intersection. He then again looked to the left and saw appellants' "pick-up" approaching approximately ten feet away.

[1] It is appellants' contention that the uncontradicted testimony shows that the respondent driver was guilty of contributory negligence as a matter of law in that he failed to use his sense of sight for the purpose of avoiding the collision, and failed to look or to observe what would have been perfectly apparent to a reasonable man under the same circumstances, and that therefore he was just as negligent as though he had not looked at all; that his duty to look was a continuing duty and was not met by looking once and then looking away, citing Wing v. Kishi, 92 Cal.App. 495, 268 P. 483; Chase v. Thomas, 7 Cal.App.2d 440, 46 P.2d 200; Berlin v. Violett, 129 Cal. App. 337, 18 P.2d 737. The facts here related do not bring this case within the rule announced in the cases cited nor make the question of contributory negligence of the driver, if any, one of law. The question was one of fact for the jury, and was decided adversely to appellants.

The only question of merit is whether prejudicial error was committed by the court in giving a certain oral instruction pertaining to the meaning of contributory negligence. After the court thoroughly, properly, and fully instructed the jury on the question of contributory negligence, the jury retired, and after some time returned with the statement that "there seems to be some confusion in the minds of the jurors in regard to the meaning of contributory negligence". The court then, according to the transcript, proceeded to say:

"Well, I will try to settle that now. Contributory—of course, we know the meaning of the word contributory, it means one thing, probably the same as it does in any language. One who contributes is a contributor and one who is actually contributing is a contributor. Now that may be a little bit indefinite too, but it means here 'one who aids or abets'. There is no word that—no word or definition that can carry the meaning or no other word but that, unless it means to some extent a concurring negligence where two parties are negligent. For instance you start off in this way: Plaintiff comes before the court and alleges that the defendant was negligent and in that event he assumes that burden. Now if he does prove that the defendant was negligent and as a result of that negligence the plaintiff were injured he is in here complaining that the defendant was the sole cause of the accident.

"Of course, if they prove at the same time that he was negligent too, and assume also that he shows evidence of negligence on his part and goes ahead and proves the defendant was negligent, the plaintiff has asserted that even if he were negligent that nevertheless the defendant was negligent too along with the negligence of the plaintiff. Concurring and contributing to, that is aiding to, that would be perhaps as good an illustration as I could use; contributing to—contributes and furnishes; he would add to the other's negligence and if they prove in any degree the contributory negligence to the accident or injury complained of then, of course, the plaintiff cannot recover.

"In contributory negligence there may be many phases. It is somewhat difficult to express in one word but its meaning is a joint negligence. That usually means working together and with the same purpose, but here, however, there would not be the same purpose.

"Juror: Now, Your Honor, I think the main part that is confusing is what the word negligence would mean in this case. In other words what bearing it would have upon—that is, what its bearing would have upon any damages that might be allowed."

The court then fully reiterated the previous written instructions on the imputation of the negligence of the driver Barlow to the other plaintiffs, including the administrator of the estate, appearing for the benefit of the heirs.

[2] Respondents, in their brief, recite "that the only difficulty existing in regard to the verbal instruction of which appellants complain, is that the phonographic reporter has badly garbled the language of the court", and that "the brilliant and precise English of the Honorable Judge Pat R. Parker is so well known to the bar and bench as to be institutional, and almost within the judicial knowledge of the court". However, it is argued that the instruction, although haltingly reported, still is sound in law, and in no wise prejudicial. This court, however, must accept and is bound by the record before it, and it is this record which we must consider in determining the question presented. Stevenson v. Fleming, 43 Cal.App.2d 641, 111 P.2d 420; In re Silva, 213 Cal. 446, 2 P.2d 341; Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715.

It is appellants' contention that instead of clarifying the previous written instruction properly given on the subject, the oral instruction was improper and only served to further confuse the jury, and that the oral instruction as given cannot be reconciled with established law on that subject.

[3-6] From a reading of the oral instruction as recorded by the reporter, although unhappily worded and containing some verbal inaccuracies, taken as a whole and considered with the written instructions which were admittedly proper, we do not feel impelled to reverse the judgment for such verbal inaccuracies, particularly so where the evidence of appellants' negligence is admittedly so convincing and the evidence of respondents' contributory negligence so slight. It has been often stated that a trial court is not required to state all the law applicable to a case in a single instruction. The instructions must be read as a whole, viz., each instruction should be considered in connection with the others and if, without straining any portion of the language, the instructions harmonize as a whole, and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to just criticism, or because a separate instruction does not contain all of the conditions and elements which are to be gathered from the instructions as a whole. The entire instructions should be given a fair and reasonable construction with a view to ascertaining their probable effect upon the jury, and must be considered in the light of the issues raised by the pleadings, and the words employed will be construed in ac-

cordance with their natural and ordinary meaning. Murphy v. National Ice Cream Company, 114 Cal.App. 482, 300 P. 91; Bleumel v. Kroizy, 113 Cal.App. 585, 298 P. 825; Von Stetten v. Yellow-Checker Cab Co., 100 Cal.App. 775, 783, 281 P. 95. The instructions here given, considered as a whole, come well within this rule.

For the reasons expressed, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

44 Cal.App.2d 311

WASHKO et al. v. STEWART et al.
Civ. 12341.

District Court of Appeal, Second District, Division 1, California.
April 19, 1941.

Rehearing Denied May 12, 1941.
Hearing Denied June 18, 1941.

1. Judgment 🔑153(3)

Where defendant's motion to vacate default judgment on ground that defendant was not served with summons was not served or filed until approximately 2½ years from time of entry of default and more than 1 year and 9 months from date of entry of judgment, and defendant did not seek relief from default until over a year after he knew of judgment, and no fraud was claimed, trial court was without jurisdiction to set aside default judgment. Vehicle Code, § 402, St.1935, p. 153; Code Civ.Proc. §§ 473, 473a, 2055.

2. Constitutional law 🔑309(1)
Judgment 🔑138(3)

If defendant was not served with summons, defendant had right irrespective of statute to move that default judgment be set aside, since defendant was thereby deprived of his property without "due process of law". Code Civ.Proc. §§ 473, 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

3. Judgment 🔑153(1)

Defendant's right to invoke aid of trial court through motion made in action to set aside default judgment on ground that defendant was not served with summons was conditioned upon defendant's making such motion within a reasonable time.

4. Judgment 🔑153(1)

A motion to set aside default judgment on ground that defendant was not served with summons may not be made beyond time limit specified in statute for making similar motions under such statute. Code Civ.Proc. § 473a.

5. Judgment 🔑419

When ordained period of time within which to make a motion to set aside a default judgment on ground that defendant was not served with summons has expired, aggrieved party has his remedy in a separate suit in equity. Code Civ.Proc. § 473a.

6. Judgment 🔑153(2)

Even though defendant claims that default judgment was obtained against him by extrinsic fraud, defendant should not be permitted to wait until more than a year after he concededly had actual notice of judgment before attacking it by motion to set judgment aside on ground that defendant was not served with summons. Code Civ.Proc. §§ 473, 473a.

7. Judgment 🔑153(1)

Defendant's time to move to set aside default judgment was not tolled pending final determination of appeals from other judgments in the action where no appeal was taken from judgment of default. Code Civ.Proc. § 473a.

8. Appeal and error 🔑900, 938(4)

The District Court of Appeal must indulge in every reasonable presumption to support trial court's orders, but, where presumptions would do violence to facts presented by trial court's record, court cannot indulge in such presumptions, and cannot ignore presumption that record reflects all matters material to a consideration of points presented.

9. Appeal and error 🔑933(5)

On codefendant's appeal from order granting defendant's motion for new trial by plaintiffs against codefendant, District Court of Appeal was not bound to assume that evidence establishing extrinsic fraud against defendant was introduced, where record showed that notice of motion stated as only ground therefor a claim that defendant had not been served with summons and that for such reason default judgment was void.

10. Judgment ⟹155

If setting aside default judgment as to defendant on ground that defendant was not served with summons gave defendant a right to attack judgment on merits exonerating codefendant from liability, so far as plaintiffs were concerned, by a motion for new trial by plaintiffs against codefendant, codefendant was a "necessary party" to defendant's motion to set aside default judgment and was entitled to notice of motion and opportunity to resist it, and, where no notice of motion was given codefendant, trial court was without jurisdiction to set aside default judgment, so far as codefendant was affected thereby. Vehicle Code, § 402, St. 1935, p. 153; Code Civ.Proc. §§ 473, 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Mildred Washko and others against Joel Stewart and others, to recover damages for the death of Albert B. Washko, who allegedly died as result of injuries sustained when he was struck by an automobile driven by defendant Joel Stewart. From an order granting a motion of codefendant John C. Binkert for a new trial to be had by plaintiffs against defendant Howard Automobile Company of Los Angeles, the Howard Automobile Company of Los Angeles appeals.

Reversed.

Hearing denied; CARTER, J., dissenting.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (Ira C. Powers, Frederic H. Sturdy, and Van C. Niven, all of Los Angeles, of counsel), for appellant.

Lasher B. Gallagher, of Los Angeles, for respondent John C. Binkert.

WHITE, Justice.

Defendant Howard Automobile Company, hereinafter referred to as Howard, appeals from an order granting the motion of a codefendant, John C. Binkert, for a new trial to be had by plaintiffs against defendant Howard.

The litigation with which we are here concerned was originally instituted by the plaintiffs as the personal representatives of Albert B. Washko, deceased, against Joel Stewart, John C. Binkert and Howard. By their complaint plaintiffs charged that the decedent died as the result of injuries sustained when he was struck by an automobile driven by defendant Stewart, who was allegedly operating the same as the agent and servant of Howard, and that defendant Binkert was the registered owner of the said automobile, which at the time of the accident was being operated and driven with such owner's consent.

Summons was issued on the 9th day of December, 1934, and was served on Howard December 12th and on Stewart two days later. When the return of service was made it also showed by affidavit that defendant Binkert was likewise served on December 14, 1934.

The joint answer of defendants Stewart and Howard, verified by an officer of Howard, denied that Stewart was acting as the agent or servant of Howard; alleged that on the contrary, in returning the automobile to Binkert he was acting as an independent contractor; denied any negligence on the part of defendant Stewart, and set up the plea of contributory negligence on the part of the deceased. Subsequently, on April 2, 1935, plaintiffs gave notice to the defendants Stewart and Howard of intention to move to set the cause for trial upon the ground that the same was at issue, and trial was set for May 10, 1935.

The defendant Binkert not having answered, plaintiffs' counsel on May 4, 1935, filed a request for the entry of the default of such defendant, and the clerk thereupon caused the said default to be entered. The case then came on for trial against the two remaining defendants before the court sitting without a jury, on May 17, 1935. Following trial of the cause the court found that Stewart was negligent in operating the automobile and absolved the deceased of negligence. The court further found that Stewart was not operating the automobile as the agent or servant or employee of Howard, but as an independent contractor, and that the automobile in question was owned by defendant Binkert. Following findings that the heirs of the decedent had been damaged in the sum of $12,000, judgment for that amount was entered against Stewart, while judgment was entered against Binkert as the owner of the car in the sum of $5,000, pursuant to the provisions of section 1714¼ of the

Civil Code (now section 402 of the Vehicle Code, St.1935, p. 153). Findings of fact and conclusions of law were filed January 20, 1936, and findings and judgment against the defendants Stewart and Binkert were entered two days later. On January 24, 1936, notice of entry of judgment was duly served.

On January 29, 1936, defendant Stewart filed a notice of intention to move for a new trial, and on February 1 plaintiffs filed a notice of intention to move for a new trial against Howard, and a motion under sections 663 and 663a of the Code of Civil Procedure to vacate the judgment in favor of Howard. All such motions were denied on March 3, 1936. On the 21st and the 31st of the same month, respectively, the plaintiffs appealed from the judgment against them and in favor of Howard, and the defendant Stewart appealed from the judgment in favor of plaintiffs and against him. On April 14, 1937, the District Court of Appeal affirmed both judgments (Washko v. Stewart, 20 Cal.App.2d 345, 67 P.2d 151; Id., 20 Cal.App.2d 347, 67 P.2d 144), and on June 10, 1937, petitions for hearing in the Supreme Court were denied, resulting in the *remittiturs* of the District Court of Appeal being lodged in the superior court on June 21, 1937.

On July 23, 1937, plaintiffs caused to be filed and served an affidavit and order for appearance of the defendant Binkert for examination as a judgment debtor. On August 26, 1937, by a stipulation signed by Binkert and his attorneys, the matter was continued to September 8. In the affidavit served upon Binkert as of date July 23, 1937, there was contained a recital that "judgment was entered therein on January 22, 1936, for plaintiffs and against John C. Binkert for $5,000 and costs". It further appears that Binkert's driver's license was suspended August 4, 1937, in accordance with the provisions of section 410 of the Vehicle Code, which provides for the suspension of such license in case of failure to pay a judgment. On September 23, 1937, defendant Binkert and his wife appeared in person and by attorney, were sworn, examined as judgment debtors, and discharged.

On November 2, 1937, defendant Binkert served upon counsel for plaintiffs a notice that he would move under section 473 of the Code of Civil Procedure to vacate and set aside the judgment entered against him upon the ground that the judgment was void for the reason that summons had never been served upon him, either personally or otherwise. It should here be noted that defendant Binkert did not serve the last-named notice upon counsel for either defendant Stewart or Howard. The record also indicates that at the trial of the cause, when defendant Binkert was called as a witness under section 2055 of the Code of Civil Procedure, the court, while Binkert was on the witness-stand, announced in his presence that he was a party defendant and that his default had been entered.

In his affidavit to vacate and set aside the judgment under section 473 of the Code of Civil Procedure, defendant Binkert stated that he did not learn of the entry of the judgment against him until October 22, 1936, which notice, he claimed, reached him in a letter from a collection agency, and which was attached as an exhibit to his affidavit, and which advised him of the entry of the $5,000 judgment against him as the owner of the automobile involved in the accident. Defendant Binkert accompanied his motion with a proposed answer to be filed on his behalf, admitting all the allegations of the complaint except that the deceased was injured through any negligence of Binkert and that Stewart was driving with Binkert's consent. On November 8, 1937, the last-named motion came on for hearing. While counsel for plaintiffs appeared, he made no opposition to the granting of the motion, nor did he file any counter-affidavits, and the motion was granted. Ten days later Binkert filed an answer in which he denied that the deceased was injured through the negligence of any of the defendants, denied that Stewart unlawfully operated said automobile; admitted that the same was owned by Binkert, but denied that it was being driven by Stewart with his acquiescence and consent; and alleged that Stewart was an employee of Howard.

On January 17, 1938, plaintiffs' counsel caused to be served on counsel for defendant Binkert a motion to set the case for trial. Two days later Binkert through his counsel filed an objection to setting the case for trial on the grounds that Howard was not then a party to the action, judgment having been entered in favor of Howard, after a trial on the merits; that plaintiffs were estopped from proceeding against Binkert, and that the appeal by plaintiffs from the judgment against them and in favor of Howard was pending and undetermined. It appears, however, as heretofore noted, that the appeal had been determined and the *remittitur* returned to the trial court on June 21, 1937. Binkert's objection to setting the cause for trial was sustained. On June 17, 1938, plaintiffs filed a second notice to set the cause for trial, and defendant Binkert making no objection thereto, the cause was set for November 7, 1938, being then continued to November 15th, upon which later date it was called for trial; but at that time, instead of proceeding to trial, it appears that Binkert filed a notice of intention to move the court to vacate and set aside the judgment in favor of Howard and against the plaintiffs and to grant plaintiffs a new trial against Howard, and at the same time there was filed a notice of motion for leave to file a cross-complaint against Howard, the notices of these motions being supported by affidavit of defendant Stewart, from which it might be inferred that at the time of the accident his relationship with Howard was in fact that of employee and that he was not an independent contractor. These motions were called for hearing on November 18th, defendant Binkert appearing by counsel and the defendant Howard being also represented, as was defendant Stewart. As grounds for its claim that the court was without jurisdiction to consider, pass upon or grant the motion of defendant Binkert for a new trial, defendant Howard asserted:

"(1) That the court had no jurisdiction to consider or grant the said matter for several reasons, which will be more fully stated hereafter.

"(2) That the plaintiffs were not entitled to a new trial.

"(3) That all rights, if any, that existed to move for a new trial had long since been lost by laches.

"(4) That the entire proceeding on its face was sham and collusive for the purpose of enabling the plaintiffs, through the assistance of Binkert as a defendant, to relitigate issues between the plaintiffs and Howard upon which there had been a final judgment between the parties."

Following argument and submission, the motion for a new trial was granted, and it is from that order that the defendant Howard prosecutes this appeal.

[1-5] We have no hesitancy in saying that because of the lapse of time between the entry of the default judgment and the application by defendant Binkert for relief therefrom, the court was without jurisdiction to set aside such judgment of default. The default against Binkert was entered May 4, 1935, and judgment upon such default was entered January 22, 1936, while the motion by defendant Binkert to vacate and set aside such judgment was not served or filed until November 2, 1937, a period of practically two and one-half years from the time of the entry of the default and more than a year and nine months from the date of entry of judgment thereon. It is also significant that defendant Binkert did not seek relief from the default until more than a year after he admittedly had knowledge of the existence of a $5,000 judgment against him predicated upon such default. Undoubtedly if Binkert was not served with summons he was absolutely within his rights in moving to have the judgment set aside, because he was thereby, in violation of a fundamental principle, deprived of his property without due process of law; and this right he possessed irrespective of sections 473 or 473a of the Code of Civil Procedure. However, his right to invoke the aid of the court through a motion made in the action itself is conditioned upon his making such motion within a reasonable time. By an unbroken line of judicial decisions it is established as the law of this state that a motion such as the one with which we are here concerned may not be made beyond the time limit specified in section 473a of the Code of Civil Procedure for making similar motions under that section. Smith v. Jones, 174 Cal. 513, 163 P. 890. Therefore, the motion not having been made within one year after rendition of the judgment, the court was without authority to grant the relief sought herein. Sepulveda v. Apablasa, 25 Cal.App.2d 390, 392, 77 P.2d 530; F. E. Young Co. v. Fernstrom, 31 Cal.App.2d, Supp. 763, 765, 766, 79 P.2d 1117. When the ordained period of time within which to make such a motion has expired the aggrieved party has his remedy in a separate suit in equity.

[6] It is true, as contended by respondent, that the rule just announced has been held inapplicable where the default was obtained by fraud (McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110), but in the case at bar there was no claim made at the time the motion was interposed to set aside the default that failure to serve the summons was the result of actual or intentional fraud on the part of

either plaintiffs or defendant Binkert or any of his codefendants. The motion was predicated solely upon the ground that service of summons had not in fact been made. Further, it clearly appears that the default of Binkert was not entered at the instigation or request of appellant Howard, but on motion of plaintiffs. The facts and circumstances present in the case before us do not warrant application of the rule laid down in McGuinness v. Superior Court, supra, but on the contrary, come squarely within the holding in the well-considered cases of Richert v. Benson Lumber Co., 139 Cal.App. 671, 34 P.2d 840, and Vaughn v. Pine Creek Tungsten Co., 89 Cal.App. 759, 761, 762, 265 P. 491. Even though respondent Binkert asserts that the default judgment was obtained against him by extrinsic fraud, he should not be permitted to wait as he did until more than a year after he concededly had actual notice of such judgment before attacking it. There must be a finality to litigation, and if a party may wait more than a year before seeking relief from a default judgment, then why may he not wait five, ten or more years?

[7] Respondent Binkert's claim that the judgment in the instant case had not become final by reason of appeals until the *remittiturs* were filed in the superior court on June 21, 1937, and that his time to move to set aside the default judgment was tolled pending final determination of such appeals, is answered by the statement that no appeal was taken nor was any appeal ever pending from the judgment of default against respondent Binkert.

[8, 9] Respondent urges that because of the rule which requires an appellate tribunal to indulge in every presumption in favor of the validity of the trial court's orders, we should assume that oral or documentary evidence establishing extrinsic fraud against Binkert was introduced on the hearing of his motion and that the order setting aside such default was predicated upon such evidence. True, we must indulge in every reasonable presumption to support the order made by the court, but there is a well-defined limit to an appellate tribunal's power in indulging in such presumptions. Where presumptions would do violence to the facts presented by the record of the inferior court, we cannot indulge in such presumptions. Nor must we ignore the presumption that the record reflects all matters material to a consideration of the points presented. The record before us shows that the notice of motion to set aside the default stated as the sole and only ground the claim that service of summons had never been made upon respondent and that for such reason alone the judgment against him was void. The motion specifically and unequivocally stated: "Said motion will be based upon this notice, the affidavit which is attached hereto and made a part of this motion, and upon the records and files of this action."

[10] There is another and compelling reason why the court was without power to set aside the default judgment against respondent Binkert so far as appellant Howard was affected thereby. Section 473 of the Code of Civil Procedure, where it provides for vacating void judgments, expressly requires notice to the adverse party. It is the theory of respondent that the setting aside of the default judgment and his re-establishment as a party litigant in the case gave him a right to attack and set aside the judgment rendered in favor of Howard fully exonerating Howard from any liability, at least so far as plaintiffs were concerned. If, as contended by respondent, such was the effect of setting aside the default judgment, then certainly Howard was a necessary party to the motion to set aside the default judgment and was entitled to notice of such motion and an opportunity to resist it. Because the rights of Howard would be affected by the order which the motion sought to secure, and concededly no notice having been given to Howard of such impending motion, the court was without jurisdiction to set aside the previously entered judgment so far as respondent Howard was affected thereby. McDonald v. Severy, 6 Cal.2d 629, 59 P.2d 98; Linstead v. Superior Court, 17 Cal.App.2d 9, 13, 61 P.2d 355. Being in default as to appellant Howard, respondent Binkert was not entitled to make a motion for a new trial.

The foregoing conclusions at which we have arrived render unnecessary a consideration or discussion of other points raised.

The purported order granting a new trial being a nullity so far as appellant Howard is concerned, it must be reversed. It is so ordered.

We concur: YORK, P. J.; DORAN, J.

44 Cal.App.2d 271

In re REINICKE'S ESTATE.
BOOGE v. REINICKE.

Civ. 12960.

District Court of Appeal, Second District,
Division 2, California.

April 17, 1941.

Hearing Denied June 12, 1941.

1. Executors and administrators 🔑504(2)

A judgment creditor of husband personally and holder of a lien against husband's interest in his deceased wife's estate was a "person interested in the estate" within statute authorizing any person interested in the estate to file exceptions to administrator's account, since the judgment creditor of the husband, who was practically the sole beneficiary under the wife's will, was vitally "interested" in seeing that the property of the estate was properly accounted for and distributed to the husband. Code Civ.Proc. § 561; Probate Code, § 927.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested" and "Person Interested in the Estate".

2. Executors and administrators 🔑505

In hearing on exceptions to administrator's account, the administrator should be called as a witness to verify the items of his account and to submit himself to cross-examination; and objector should be given an opportunity to cross-examine and to present evidence on his own behalf.

3. Executors and administrators 🔑504(7)

In considering exceptions to administrator's account, action of court in taking into consideration statements contained in unverified letter purportedly written by administrator to his attorney was improper.

4. Executors and administrators 🔑504(7)

Where exceptions were filed to account of administrator, in considering claim of administrator that his deceased wife had made him a present of a large sum of cash during her lifetime, presumption that decedent would contradict the testimony of living witness that during her lifetime she gave away her property was required to be taken into consideration.

5. Executors and administrators 🔑510(8)

Order approving administrator's account was required to be reversed where court improperly considered unverified letter of administrator to his attorney, hearing was conducted in improper manner, and difference existed between amount of cash mentioned in inventory and that mentioned in account and judgment creditor of the principal legatee labored under uncertainties as to his status before the court.

6. Executors and administrators 🔑506(3)

The rule that where account of administrator is full and fair on its face and in accordance with statutory requirements, a "prima facie case" is made in favor of accounting representative for settlement, could not be applied where account originally filed by administrator, after detailing charges of $103.59, stated that balance of cash on hand was $548.73, but also stated that total assets of the estate consisted of $694.88 in cash and certain described stocks and supplement to the account stated that the total assets of the estate in respect to cash consisted of $694.88, plus sum of $103.59.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

7. Appeal and error 🔑767(2)

Where appellant's reply brief contained statement that in order that most of the irrelevant matters which appeared in respondent's brief should not add to the confusion "we shall append to this brief an appendix, which we shall entitle 'The Unfounded and Scandalous Allegations and Assertions of the Respondent's Reply Brief'. We do not imagine that the court will need to refer to this appendix, but should any point arise wherein it may be useful, it will be there for the court's inspection", the appendix was ordered stricken from the files.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Else Lackner Reinicke, deceased, wherein J. H. Booge filed exceptions to the account of George R. Reinicke, administrator with the will annexed of the estate of Else Lackner Reinicke, deceased. From an order approving the account, J. H. Booge appeals.

Reversed.

Manierre & Cuthbertson, of Los Angeles, for appellant.

Laurence B. Martin, of Los Angeles (Samuel Reisman, of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Else Lackner Reinicke died on March 30, 1937, leaving a will by which her husband George R. Reinicke was given all of her property, with minor exceptions which need not be here detailed. The will was admitted to probate and Mr. Reinicke was appointed administrator with the will annexed. He filed his first account, to which exceptions were filed by appellant J. H. Booge, trustee. This appeal is prosecuted from the order of the court approving the account.

Appellant contends that the trial court erred in finding that appellant is not a "person interested in the estate" and therefore is not entitled to object or except to the account of the administrator. An action was commenced by appellant in the superior court of Los Angeles county on July 2, 1937, against Mr. Reinicke personally and on February 23, 1939, appellant recovered a judgment in that action in the sum of $5,310 and interest. The sum of $100 only has been paid on this judgment. On November 3, 1937, a writ of attachment was levied on the interest of Mr. Reinicke as heir, legatee or devisee of the estate of Else Reinicke in the manner required by section 561 of the Code of Civil Procedure. On May 22, 1939, a writ of execution was issued in the same action, which was levied upon Mr. Reinicke's interest in the estate. It appears therefore that appellant is a judgment creditor of Reinicke personally and the holder of a lien against his interest in the estate. It is provided in section 561 of the Code of Civil Procedure that the "interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ * * *". It is further provided that upon distribution of the estate distribution shall be ordered to such heir, legatee or devisee but delivery of "such property" shall be ordered to the officer making the levy.

[1] It is provided in section 927 of the Probate Code that upon the filing of an account by an administrator "any person interested in the estate may appear and file written exceptions to the account, and contest the same". No statutory definition has been given of the words "person interested in the estate". It has been held that the assignee or grantee of an heir is an interested person. Estate of Ross, 179 Cal. 358, 182 P. 303. In an early case Judge Coffey held that a judgment creditor of a devisee who had acquired title to realty inventoried in the estate under an execution upon a judgment is a party interested in the estate. Estate of Love, 1 Coffey Prob.Dec. 537. In the case entitled In re Lind's Estate, 1 Cal.2d 291, 34 P.2d 486, 487, a judgment creditor of William Lyons, the legatee under the will, had levied an execution on the interest of Lyons in the estate. When the petition for distribution came on for hearing the judgment creditor objected on the ground that the levy of execution on the interest of Lyons was not mentioned in the petition as provided in section 561 of the Code of Civil Procedure. Nothwithstanding the objection the trial court admitted the account and ordered distribution in accordance with the petition. Thereupon the objector moved the court to amend the decree of distribution by inserting therein an order directing sufficient of the cash legacy to Lyons to be delivered to the sheriff to satisfy the amount due on the judgment. This motion was denied. In reversing the order of the trial court the reviewing court held that "the judgment creditor properly called the attention of the court, on motion, to the omission, and the decree of distribution should have been made to provide for distribution to the legatee of the amount of the legacy, when the decree should become final, but that the delivery of the money be made to the officer making the levy, subject to the claim of the legatee or any person claiming under him". It is apparent that in this case the judgment creditor of the legatee was recognized as an interested person. In Garwood v. Garwood, 29 Cal. 514, it was said that any doubt as to the question of interest ought to be resolved in favor of the party claiming an interest in the estate. In the instant case the amount of appellant's judgment exceeds the total value of decedent's estate and it is manifest that the judgment creditor of the husband, practically the sole beneficiary under the will, is vitally interested in seeing that the property of the estate is properly accounted for and distributed to the legatee, the judgment debtor. To hold otherwise would be to refuse to give the word "interested" its generally accepted meaning.

Respondent points to the findings of the trial court and argues that although it was expressly held that appellant is not a "person interested" in the estate the court included in its findings statements that it had considered the account "in the light of the objections as well as wholly independent thereof" and that the account is true and correct. Respondent further asserts that full opportunity was given to appellant to present his objections and to offer evidence at the hearing. Appellant contends that he was not given such opportunity and that at the hearing the court took under advisement the question of his right to appear in the proceeding. He asserts that the matter was taken under advisement by the court for five or six months and that when he learned that the court proposed to make findings approving the account he attempted to have the matter reopened for the presentation of additional evidence, a statement of which he inserts in his brief. To properly consider the contentions of the parties a somewhat detailed relation of the various steps in the proceedings should be made.

In his petition for the probate of the will filed June 9, 1937, respondent stated that the estate consisted in part of "cash, approximately $2000". In the inventory which respondent filed on July 6, 1937, he listed as the property of the estate "cash approximately $2000" and certain corporate stocks of the appraised value of $1,211.25. In his first account, which was filed on May 29, 1939, respondent listed as cash in the estate the sum of $694.88. The first account also sets forth the sum of $146.15 which respondent credited to himself for expenditures made. It appears that on May 1, 1939, respondent was examined concerning his property on supplementary proceedings growing out of the litigation in which appellant's judgment was obtained and he was then confronted with his statement in the inventory concerning the $2,000 cash listed among the assets of his wife's estate. On June 2, 1939, respondent filed what he termed a supplemental inventory, in which he made this statement: "That in the original inventory filed by the administrator, it was stated that there was 'approximately' $2,000 in cash in the estate of Else Lackner Reinicke, the administrator's wife. That, however, this was an error. That the administrator is unaware as to precisely how said error occurred, except that he was in a hurry to make a trip to Germany and signed said inventory and statement of assets without checking the same carefully, with the result that through some oversight, typographical error, or misunderstanding, the cash indicated in the original inventory was, and is, erroneous. That since signing said inventory, the administrator had not seen a copy of said inventory or examined the same, until approximately one week ago, at the time of a supplemental hearing before the Honorable Kurtz Kauffman, at which time a portion of the inventory was read to him and he then and there recognized that there was an error, and thereafter consulted with his attorney for the purpose of clarifying said statement and of filing this supplemental inventory to set forth the true facts. That the total amount of cash which came into the hands of said administrator was and is the sum of * * * 694.88 * * *. That in any event, said error was entirely due to inadvertence and oversight. That further, on or about the 8th day of June, 1937, said administrator wrote a letter to his attorney in which he stated the amount of cash on hand, which was prior to the time of the signing of said inventory, but that apparently the matter of said letter was overlooked in the preparation of said inventory and that said error accordingly arose, as aforesaid. That a copy of said letter so sent to his attorney is attached hereto marked Exhibit A and expressly and by this reference made a part hereof as though set forth here in full." In the letter referred to as exhibit A, purporting to have been written by respondent to his lawyer, and which does not appear to have been signed, the statement is made that decedent left the sum of $4,659.04, that according to the arrangement made between decedent and respondent the sum of $255.89 representing household expenditures should be deducted from decedent's cash and that of the remaining sum of $4,403.15 decedent voluntarily offered to make a present of one-half thereof to respondent, who accepted it. In the exceptions filed to respondent's account appellant objects to the action of respondent in charging himself with the sum of $694.88 in cash instead of the sum of $2,000. It is claimed that the explanation made by respondent "is wholly inadequate to elucidate the discrepancies".

When the hearing on the petition for the approval of the account came before the court on July 31, 1939, respondent objected to the consideration of the exceptions filed by appellant on the ground that he was not an interested person and a lengthy discussion on this issue followed.

The court did not pass upon this objection at the hearing but both counsel discussed the merits of the account and respondent's explanation of the alleged error contained in the first inventory. During the course of this discussion counsel for appellant offered in evidence a copy of the transcript of the testimony of respondent given at his examination under supplementary proceedings before the commissioner of the court. No other evidence was offered by either party. Although respondent was present in court he was not called as a witness to swear that the account was correct or to submit himself to cross-examination on the question of the discrepancy between the amount of cash stated in the inventory and the amount stated in the account. There was further discussion between counsel relative to several small items with which respondent had credited himself in the matter of costs in certain litigation, whereupon the court said: "I will take the matter under submission". Counsel for appellant then asked, "May we say this, in the event there should be any doubt as to these figures the matter may be brought on further before Your Honor for any explanation?" To this the court replied, "Alright".

[2-5] The hearing in the lower court was not conducted in the manner in which proceedings of this nature are usually conducted. In the usual course the administrator should be called as a witness to verify the items of his account and to submit himself to cross-examination. The objector should be given a clear opportunity to cross-examine and to present evidence on his own behalf. It is to be noted that the court erroneously took into consideration statements contained in the letter purported to have been written by respondent to his attorney and that the contents of the letter were before the court without the support of any sworn statement that they were true. The statement of respondent in his supplemental inventory purports to excuse an error previously made and merely refers to an unverified letter which he had long before sent to his attorney. In considering the claim of respondent that his wife made him a present of a large sum of cash during her lifetime, it should be borne in mind that there is a presumption that decedent would contradict the testimony of a living witness that during her lifetime she gave away her property. Bard v. Kent, 35 Cal.App.2d 434, 95 P.2d 957. In view of the error of the court in considering the unverified letter, the unusual manner in which the proceeding was conducted, the challenged difference between the amount of cash mentioned in the inventory and that mentioned in the account, the uncertainties under which appellant labored as to his status before the court and the uncertainty appearing in the record as to the scope of the matter taken under advisement by the court, a reversal must be ordered to the end that the right of appellant to object be recognized and both parties be accorded a full and fair opportunity to present the various issues on legal evidence.

[6] Respondent contends that the account was full and fair on its face and that the court had the inherent right to approve it. He quotes from 11b Cal.Jur. page 592: "Generally the presentation of an account which is full and fair on its face and in accordance with statutory requirements will make a prima facie case, so far as it is uncontested, in favor of the accounting representative for settlement * * *". We cannot take the view that the account before us is full and fair on its face. In the account as originally filed respondent, after detailing charges of $103.59 and credits of $146.15, stated: "That the balance of cash on hand as above set out is the sum of $548.73". In the next paragraph he stated: "That the total assets of the estate consists of $694.88 in cash and the following described stocks". It is not clear how respondent can justify the statement that the cash on hand was $548.73 and also the statement that among the cash assets was the sum of $694.88. On June 16, 1939, respondent filed a document which he entitled "supplement to first account of administrator". In this document he stated: "That the total assets of the estate, in respect to cash, consist, as set forth on line 15 of page 2 of said first account, of $694.88, plus the sum of $103.59, set forth at line 29 of page 1. That in other words, the total cash assets aggregate the sum of $798.47, and that through oversight, in the first account these two sums were not added together, although they both appear correctly in the account". Even with the addition of the "supplement" the account is not clear. Moreover, it is apparent from the record that the court improperly took into consideration in passing upon the account the unverified statements in the letter of respondent to his counsel.

[7] In appellant's reply brief the following appears: "To discuss seriatim in the body of this brief, the various allegations of respondent's brief would be too suggestive of two fishwives, battling over a back fence. In order that most of the irrelevant matters which appear therein shall not add to the confusion we shall append to this brief an appendix, which we shall entitle 'The Unfounded and Scandalous Allegations and Assertions of the Respondent's Reply Brief.' We do not imagine that the court will need to refer to this appendix, but should any point arise wherein it may be useful, it will be there for the court's inspection". We see no propriety in adding this "appendix" to the brief. It is ordered that it be stricken from the files.

The order is reversed, appellant to recover costs from respondent.

We concur: MOORE, P. J.; McCOMB, J.

COUNTY FIRST NAT. BANK OF SANTA CRUZ v. COAST DAIRIES & LAND CO.

Civ. 11425.

District Court of Appeal, First District, Division 1, California.
April 23, 1941.

Rehearing Granted May 23, 1941.

1. Appeal and error 🔑987(1)

An appellate court has no power to weigh the evidence.

2. Appeal and error 🔑931(1)

All conflicts in the evidence must be resolved in favor of judgment of lower court.

3. Appeal and error 🔑931(1)

In passing on the evidence, all reasonable inferences therefrom must be indulged in to support the judgment.

4. Appeal and error 🔑842(7)

Where all the material facts were admitted and the question presented was whether the defendant corporation, as a matter of law, was liable on note executed by its employee, the question was a "question of law" rather than a "question of fact," so that rules regarding review of evidence were inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

5. Corporations 🔑425(4), 432(12)

Evidence disclosing that defendant corporation had a three-man board of directors, that the board permitted an employee to act as general manager, that between 1925 and 1934 such employee executed many renewal notes, that such employee's authority was not questioned by the corporation, that notes in substantial amounts executed by the employee had been paid, that large balances were carried in account in plaintiff bank and most if not all checks were signed by such employee, established that the employee had "implied authority" to execute notes or that the corporation was precluded by doctrine of "estoppel" from questioning the employee's authority to execute notes to plaintiff bank. Civ.Code, § 2316.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Implied Authority".

6. Corporations 🔑413

A lending agency, in accepting a note from a corporation, should normally insist on a corporate resolution authorizing the officer executing the notes to execute such instrument, but a failure to secure a copy of such resolution will not bar relief, where lending agency reasonably relies on a condition created by the borrowing corporation.

7. Principal and agent 🔑23(3)

An agency may be proved by evidence of facts showing that the alleged agent acted as such with the knowledge and acquiescence of the principal.

8. Principal and agent 🔑23(3)

Actual authority of an agent need not be shown by express agreement, but it may be shown by facts which demonstrate that the principal, by lack of ordinary care, led agent to believe, reasonably, that he possessed the power in question. Civ.Code, § 2316.

9. Corporations 🔑399(5)

Where directors of corporation knew the general scope of functions of employee acting as general manager and knew generally what he was doing, and from 1921 to 1934 with full knowledge and acquiescence of the directors the employee was in full charge of all money and finances of the corporation, and executed many notes which were paid, the employee had "ostensible authority" to execute note sued on by plaintiff bank. Civ. Code, § 2317.

See Words and Phrases, Permanent Edition, for all other definitions of "Ostensible Authority".

10. Principal and agent ⚷99

The statute defining "ostensible authority" embodies in statutory form one phase of the doctrine of estoppel. Civ.Code, § 2317.

11. Principal and agent ⚷99

The statute defining "ostensible authority" applies and an "ostensible agency" is created where the business done by the supposed agent, so far as open to observation of third party, is consistent with the exercise of an agency, and where as to the transaction in question, the third party was justified in believing that an agency existed. Civ.Code, § 2317.

See Words and Phrases, Permanent Edition, for all other definitions of "Ostensible Agency".

12. Principal and agent ⚷99

The essential elements of "ostensible agency" are that the third person must believe that the agent has authority and that such belief must be generated by some act or neglect by the person or company to be held. Civ.Code, § 2317.

13. Principal and agent ⚷123(4)

Evidence that similar acts of agent were approved by principal establishes ostensible authority, if the other essential element of belief is present. Civ.Code, § 2317.

◆

Appeal from Superior Court, Santa Cruz County; J. L. Atteridge, Judge.

Action by County First National Bank of Santa Cruz against Coast Dairies & Land Company on a note. From a judgment for defendant, plaintiff appeals.

Reversed.

Bias & Bias, Harry J. Bias, and W. A. Deans, all of Santa Cruz, for appellant.

John Ralph Wilson and Bertrand F. Lurie, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment in favor of defendant determining that defendant is not liable on a promissory note in the sum of $11,000 alleged to have been executed by defendant corporation by its general manager, L. Poletti. The trial court found that Poletti had neither express nor implied authority to execute the note; that the defendant had not ratified its execution; and that defendant was not estopped to deny such lack of authority. Plaintiff urges that these findings are not supported by the evidence.

The facts are not substantially in dispute. Defendant land company was organized in 1913, its officers and directors being L. Moretti, president; D. Morelli, vice-president, and A. E. Morelli, secretary-treasurer. Moretti, a substantial shareholder and the representative of other principal foreign shareholders, left this country in 1915 and took up his residence in Switzerland, returning to California only for short periods in 1919 and 1926. The interests of the Morellis in the company consisted in each holding a single share of stock so that he could qualify as officer and director. D. Morelli, who operated a general store on a profit sharing basis with defendant company, took little part in its general affairs until after 1934. In settling store accounts with the defendant he dealt with Moretti, when he was in this country, otherwise with L. Poletti, who had been employed by the company in 1918 as a bookkeeper, with the approval of Mr. Moretti, to assist A. E. Morelli. As vice-president, D. Morelli, in performing his corporate duties, merely signed any instruments presented to him for signature by either A. E. Morelli or L. Poletti. He further testified that, although he was a director and officer of the company, he paid little attention to its affairs; that he depended on Poletti for information; that he paid so little attention to its affairs that he did not know of a $250,000 mortgage that was placed on the defendant land company's properties.

A. E. Morelli testified that, while he participated in the general management of the company until 1930, when he moved to Nevada, his time, prior to 1930, was occupied with other interests, and Poletti, who at first took over part of A. E. Morelli's duties, at all times from 1921 to 1934 acted as defendant's general manager. He further testified that he knew that Poletti signed notes and renewal notes on behalf of the defendant, and that this was done with his full knowledge and permission. In response to the question, "Did you advise him [Poletti] to sign any notes?", he replied, "Yes, sir; he was left there in charge, taking my place." Prior to 1921 A. E. Morelli had been general manager of the defendant, but he stated that after that date Poletti was "authorized" to take his place.

The uncontradicted evidence shows that between 1921 and December, 1934, when Poletti left the employ of the defendant company, he took full charge of all of the company's affairs, including those calling for discretion and judgment. He acted as the defendant's general manager. Generally speaking, he had charge of the office, including the corporate records and seal; he had charge of the money and finances of the company; he handled the leasing of acreages, although the leases were actually signed by an officer of the company; he fixed and collected rentals, depositing the collections to the credit of the company; he negotiated for the sale of real estate and made investments for the corporation; he settled litigation; he kept the company's books and paid the taxes; he prepared and sent to Mr. Moretti, and to the plaintiff bank, financial statements, some of which he signed as "Treasurer"; he made regular deposits to the credit of Moretti in a San Francisco bank out of the profits of the company.

The business relations between plaintiff and defendant, commenced in 1919 when defendant first opened an account with the bank, were carried on almost entirely by Poletti. Various signature cards were filed with the bank from 1919 to 1931 authorizing Poletti over his individual signature to draw checks on the company's account. During the period from 1921 to 1934, all correspondence by the defendant company with the bank was over Poletti's signature, and during all of such period he conducted business with the bank personally and by correspondence as general manager of the company. He rendered regular financial reports to the bank as the representative of defendant. During one of Moretti's visits to California, in 1926, he told some of the officers of the bank that, in his absence, Poletti and A. E. Morelli would be in charge of, and handle the company's affairs. All of the financial dealings, however, were carried on by Poletti, and the officers of the bank testified that they looked upon him as the Coast Dairies & Land Company.

During a visit of Moretti to California in 1919, he purchased a cannery and organized a corporation to operate it. The cannery had no operating capital. Moretti instructed Poletti and A. E. Morelli to borrow money from defendant company to start operations, instructing them further that if more money was needed, to borrow it from plaintiff bank. Pursuant to such instructions, various sums were borrowed from the bank by defendant upon defendant's credit, but, such sums, so borrowed, were used for the benefit of the canning company. Many of these notes, and others representing loans to defendant, for defendant's own use, were executed by Poletti. All amounts so borrowed had been entirely repaid to the bank when the indebtedness forming the basis of this action was first incurred on April 28, 1925. On that date a promissory note for $15,000, payable to the bank, was executed by A. E. Morelli as secretary of defendant company, and pursuant to Poletti's instructions, this sum was credited to the account of the canning company at the bank. Concurrently, with the delivery of this note, there was filed with the bank a purported resolution of the directors of defendant company authorizing the borrowing of not to exceed $25,000, the president, or the vice-president or the secretary of the corporation to execute promissory notes for all sums so borrowed. It appears that all transactions by defendant company, including this, were handled in an altogether informal manner; that no directors' meetings were ever actually held, the resolutions and minutes being prepared by Poletti, and he and Morelli simply counting "the other directors in". Between 1921 and 1934 no directors' meetings were ever, in fact, held, although the record shows numerous "resolutions" including the one above-mentioned "passed" by defendant company. After the original note of $15,000 was executed by A. E. Morelli on behalf of defendant in 1934, various payments of principal and interest were made by Poletti, acting for defendant, on the obligation. The note was frequently renewed by the execution of a new note and the cancellation of the old one. Between 1925 and June 4, 1934, approximately ten renewal notes were executed. These renewal notes were signed either by A. E. Morelli or by Poletti. Each note purported to be an obligation of defendant company and bore the corporate seal. The renewal note which forms the basis of this action was executed on June 4, 1934, was payable six months from date, was in the sum of $11,000, and was signed "Coast Dairies & Land Co., by L. Poletti".

Both A. E. Morelli and Poletti testified positively that Moretti had instructed them to borrow from the bank the funds necessary for operating the cannery, and A. E. Morelli, the secretary-treasurer, not only signed the original obligation but had full knowledge of the existence of the indebtedness from the time it was incurred. D. Morelli, the vice-president and a director, testified that he had no knowledge of the matter until after 1934. While in a letter from Moretti to the defendant dated September 12, 1931, he stated that he had not known of this indebtedness to the bank on account of money borrowed for the operation of the cannery until 1926 when he made a trip to this country; he also stated that at that time he had given instructions to pay the obligation out of proceeds of the canning business. The cannery was later transferred to the defendant company in satisfaction of the former's note to it, but the defendant refused either to renew its note with the bank or to pay the same, and this suit is brought for the collection thereof.

As already indicated, the original indebtedness of April 28, 1925, was evidenced by the note signed by A. E. Morelli under proper authorization from the company. This note was renewed many times by either Morelli, or Poletti, under authority from Morelli, and while, as respondent contends, there was no proper authorization at the bank for permitting Poletti to borrow for the account of the company, the renewals, which preserved the credit of the company, were without dissent on its part, and payments thereon, both of principal and interest, were made through Poletti for the account of the company. There had at no time since Poletti commenced dealing with the bank in 1919 as an employee of the company, been any repudiation by the company of his activities in its behalf.

It should also be noted that Poletti was a director of the plaintiff bank at the time of the execution of the note sued upon; that, although D. Morelli, a director and the vice-president of the company, had no knowledge of the note until 1934, up to that time he had executed all leases for the company; that Poletti personally paid interest and renewal notes purportedly on behalf of the company without making entries thereof on the company's books, an examination of which, without independent investigation, would not have revealed the company's liability to the bank on the note; that financial statements furnished the bank in accordance with the books of the company did not represent its actual financial condition in that the liability on the note to the bank for money furnished the canning company in the conduct of its business was omitted; that the bank knew of this obligation and that the money so secured was used for the benefit of the canning company.

These are the uncontradicted facts. Appellant urges that Poletti, as general manager of the defendant, had authority to renew the overdue note which represented a lawfully incurred obligation of respondent; that knowledge on the part of a majority of the company's officers and directors of his action, and of the numerous payments made on account of principal and interest of such renewal, constituted a ratification by the corporation of the execution of the note by Poletti; that respondent is estopped to deny Poletti's authority to execute such renewals where it knowingly permitted the making thereof, and the payment of principal and interest thereon, and where the payee believed in good faith that the general manager had authority to renew the notes.

Respondent contends that by resolution it permitted the execution of notes in its behalf by the president, vice-president or secretary; that copy of such resolution was filed with the bank and in force at all times; that renewal notes, executed without the authority of respondent company, did not constitute a valid and binding obligation of the company.

The trial court based its judgment that respondent was not liable on the note on the findings that neither precedent nor subsequent authority had been conferred on Poletti, and that, under the facts, the defendant was not estopped to deny Poletti's authority.

[1-4] The problem presented involves no weighing of the evidence. We are well aware of the rule that this court, as an appellate court, has no power to weigh the evidence, and that all conflicts must be resolved in favor of the lower court. We are also aware of the rule that, in passing on the evidence, all reasonable inferences therefrom must be indulged in to support the judgment. These rules have no application to the problem here involved. Here there is no conflict. The case is one where all the material facts are admitted, and the question presented is whether or not, under

these facts, the defendant, as a matter of law, is liable. That is not a fact question at all. It is a question of law, which, in our opinion, was incorrectly decided by the trial court.

[5, 6] The facts establish a clear case of estoppel, if not a case of implied authority. They establish that defendant company had a three-man board of directors, and that each of the directors was an officer. L. Moretti was a director, president, a large shareholder and the representative of several foreign shareholders. He left this country in 1915, and returned for two short visits, one in 1919 and one in 1926. He corresponded with the company occasionally by letter on matters of general policy. Other than this, he did nothing in the performance of his important duties as president and director. He knew of the original obligation incurred in 1925, and ratified it by ordering it paid. From 1921 to 1934 he was apparently content to let Poletti handle all the details of the company's business.

D. Morelli was vice-president and a director. He owned but a single qualifying share, for which he paid nothing. He admitted that during all the period here relevant he took no interest or active part in the affairs of the company. He was content to let Poletti handle all the affairs of the company.

A. E. Morelli was the secretary-treasurer, and the third director. He, too, owned but a single qualifying share, for which he had paid nothing. He was the only officer or director who took active interest in the business. In 1930 he moved from California, and his time was entirely taken up with other affairs. He knew of the fact that prior to 1930 Poletti had executed several of the notes renewing the obligation forming the basis of this action. He approved and authorized the execution of these notes by Poletti. He also knew that Poletti had executed, on behalf of defendant, other notes naming plaintiff bank as payee, and he approved those transactions.

So far as plaintiff bank is concerned, they were dealing with the man that they knew was in full charge of the defendant's business. They had been told in 1926 by Moretti, a large stockholder, president and director, that Poletti was one of the two men who had authority to handle the company's affairs. Between 1925 and 1934 they knew that Poletti had executed many of the renewal notes, and that his authority had not been questioned. They knew that Poletti had executed other notes in substantial amounts, and that such notes had been paid. They knew his authority to execute and pay these notes had never been questioned. Large balances were carried in the bank account of defendant, and most, if not all, checks were signed by Poletti. All correspondence of the plaintiff was answered by Poletti. Reports, some of which were signed "Treasurer", were frequently received signed by Poletti. While it is true that in 1925 a copy of a purported resolution was delivered to them authorizing certain officers to execute notes, and while it is true that Poletti's name did not appear therein, this does not bar them from recovery in this case. They were reasonably entitled to believe, from all the facts heretofore recounted, that Poletti had been subsequently authorized to act. While a lending agency, in accepting a note from a corporation, should normally insist on a corporate resolution authorizing the officer executing the note to execute such instruments, the failure to secure a copy of such resolution will not, in all cases, bar relief. Certainly, relief should not be denied where the lending agency reasonably relies on a condition created by the borrowing corporation.

[7] The above recounted facts, in our opinion, establish, as a matter of law, that either Poletti had actual implied authority to execute the note, or that the defendant is estopped to deny his authority. First, as to actual authority. It is a fundamental and elementary rule of agency that an agency may be proved by evidence of facts showing that the alleged agent acted as such with the knowledge and acquiescence of the principal. Mattison v. Italo Petroleum Corp., 137 Cal. App. 148, 29 P.2d 901. This principle has peculiar application to the facts here involved. Poletti was originally employed with the knowledge and acquiescence of the board of directors. From 1921 to 1934, with the knowledge and acquiescence of the board, he was in full charge of all the money and finances of the company. No one made any attempt to question or disapprove anything done by him. The record is full of instances where Poletti exercised, and by necessity was compelled to exercise, duties involving discretion and judgment. The directors knew the general scope of his functions and knew generally what he was doing. Moretti was apparently willing to

trust A. E. Morelli to generally supervise matters. A. E. Morelli knew of the renewal notes, approved and authorized them.

[8] Under the circumstances here existing, it would seem that the board of directors certainly caused Poletti to believe he had the authority to execute the notes. It is not indispensable that actual authority be shown by an express agreement. It may also be shown by facts which demonstrate that the principal, by lack of ordinary care, led the agent to believe, reasonably, that he possessed the power in question. Civil Code, section 2316, provides: "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." See, also, Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 P. 658.

A case somewhat similar to the one here involved is Union Oil Co. v. Purissima Hills Oil Co., 181 Cal. 479, 185 P. 381. In that case, the president of a corporation, who was also the managing officer, acknowledged the existence of a debt of the corporation validly incurred after the running of the statute of limitations. In the instant case, the managing officer executed renewal notes representing an obligation validly incurred. In the Union Oil Co. case, supra, the court, in holding that the corporation was bound by the acts of the president, stated (181 Cal. page 482, 185 P. page 382): "It is unnecessary to determine whether the last payment alone would take the matter out of the statute of limitations, because in addition to that very significant partial settlement of the debt the defendant did in writing acknowledge the said obligation, less than four years before the filing of the complaint. It is true that the letters of acknowledgment, written upon the stationery of defendant, were signed by Mr. Broughton, personally. Appellant's principal contention is that he had no power to bind the corporation, but the court properly found to the contrary. By the by-laws the president was authorized in his discretion to proceed with the business of developing the land of the company. He was authorized to procure a drilling rig and all necessary appliances. True, he was to have, 'subject to the advice of the directors,' direction of the affairs of the corporation, yet their minutes fail to show any meeting of the directory between February 26, 1908, and January 1, 1913. He, and he alone, conducted all business with the assignor of plaintiff. He, and he only, replied to letters addressed to the corporation. It is apparent from all of these facts that defendant is bound by his acts as the managing officer of the corporation, which may not now, after so long acquiescence, repudiate his negotiations with plaintiff's assignor. Section 1962, subd. 3, C.C.P.; Nicholson v. Randall Banking Co., 130 Cal. 533, 62 P. 930; Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann.Cas.1913B, 1094; Newton v. Johnston Organ & Piano Mfg. Co. [180 Cal. 185], 180 P. 7."

The only evidence relied upon by respondent as indicating a contrary result are the letters sent by Moretti to the defendant company in 1931. In the letter dated September 12th of that year he stated that he had just learned "with great astonishment" that the bank still held the notes of defendant growing out of the canning company transaction. He then states hat he learned of the original transaction upon his arrival in California in 1926 and that "the entire transaction was right then and there disapproved by me". But he also states that he ordered the note paid from the proceeds of the sale of the canning company's canned goods, and that, "it seems to us" that the notes do not have to be paid because they were not authorized by the board of directors. In 1931 the amount outstanding on the notes to the bank was $12,500. It is to be noted that in this letter Moretti admitted that the original transaction had been ratified by him, and that the notes were ordered paid. It is true that Poletti and A. E. Morelli did not strictly follow the instructions contained in that letter. The evidence shows, however, that the reason was that $7,674.96 was received on the sale of the canned goods and that $5,174.96 of that had to be expended to save the canning company from attachment and complete loss of its physical equipment. $2500 was applied on the note. The evidence, without conflict, also shows that Poletti had tried to liquidate the canning company so that money could be secured to pay off the note, but that he had had great trouble in finding a purchaser, and that, when a purchaser was secured, the deal later fell through. Moretti was informed of all these facts in 1931. He admittedly did not inform the plaintiff bank of his position and permitted them to continue to deal with Poletti as before. Poletti was certainly led to believe he had authority to handle the canning company transaction in the manner he did. Under these circumstances, it would seem that a clear case of actual implied power was established by the evidence.

[9-13] Even if this were not so, a clear case of ostensible authority was also established. Section 2317 of the Civil Code provides that: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." This section embodies in statutory form one phase of the doctrine of estoppel. Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 P. 559; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 P. 121. It has been held that the above-quoted statutory provision applies, and an ostensible agency is created, where the business done by the supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and where, as to the transaction in question, the third party was justified in believing that an agency existed. Buckley v. Silverberg, 113 Cal. 673, 45 P. 804. The two essential elements of an ostensible agency are; (1) the third person must believe that the agent had authority; and (2) such belief must be generated by some act or neglect of the person or company to be held. Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758. Evidence that similar acts of the agent were approved by the principal establishes ostensible authority, if the other element of belief is present. See cases collected and commented on in 1 Cal.Jur. p. 742, section 42.

These principles establish, as a matter of law, the existence of an ostensible authority in the present case. Certainly, the plaintiff believed Poletti had authority. The uncontradicted evidence is that the bank looked upon Poletti as the Coast Dairies & Land Company. This belief on the part of the bank was generated by the acts and neglect of the members of the board of directors of defendant. Moretti had told the bank that Poletti and A. E. Morelli had authority. Other notes were executed and paid by Poletti without objection by defendant. With the exception of A. E. Morelli (who knew of, and approved, the execution of the notes), neither of the two other directors made any attempt to discover what Poletti was doing, and were apparently willing to let Poletti manage the affairs of the company. As directors and officers of the company, it was their duty to know what was being done by Poletti and how he was performing his duties as general manager. They cannot be permitted to disregard their duties for thirteen or fourteen years, and then, after receiving the benefits of the transaction, and when the particular transaction does not turn out advantageously, as an afterthought, contend that their agent was unauthorized to perform the questioned act.

None of the cases cited by respondent, including the case of Montrose Land & Inv. Co. v. Greeley Nat. Bank, 78 Colo. 240, 241 P. 527, compel a contrary conclusion. None of the cited cases involved a state of facts demonstrating such a disregard for their duties on the part of the board of directors as is shown in this case. Nor did any of the cases, including the Colorado case, involve a situation where over the years the agent had signed other notes which had been paid by the corporation.

The judgment appealed from is reversed.

We concur: WARD, J.; GOODELL, Justice pro tem.

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44 Cal.App.2d 351

MONTEREY CLUB et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 13030.

District Court of Appeal, Second District, Division 1, California.

April 21, 1941.

1. Appeal and error 🔑100(1)

A right of appeal exists from an order granting an injunction either preliminary or permanent.

2. Appeal and error 🔑76(2), 347(1)

It is the judgment or order that the statute says may be appealed from, and the entry of that judgment or order only serves the purpose of fixing the time from which the appeal may be taken.

3. Evidence 🔑83(1)

In the absence of evidence to the contrary, it will be presumed that an official act has been performed. Code Civ.Proc. § 963, subd. 2.

4. Certiorari ⚷64(1), 66

Where it did not appear from the record that no official entry of preliminary injunction was made, it would be presumed that entry had been made and that injunction had been entered, and fact that preliminary injunction was never signed or filed is immaterial on original proceeding in certiorari to review preliminary injunction, since the proceeding was concerned only with the order granting the injunction and not with formulation of the injunction itself. Code Civ.Proc. § 963, subd. 2.

5. Certiorari ⚷64(1)

On original proceeding in certiorari to review a preliminary injunction, court need not concern itself with whether an injunction orally granted is valid without later being reduced to writing and signed by the judge, since the only question involved is the authority of the trial judge to act at all in the matter.

6. Appeal and error ⚷76(2)

The right of appeal from an order granting a preliminary injunction exists regardless of failure or defects of ministerial duty with respect to signing and entry of order, and if entry of the order were necessary to an appeal, either party to the action could compel the right entry to be made in order to exercise his rights.

7. Constitutional law ⚷56

Codal provision authorizing a writ of review when jurisdiction has been exceeded and there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy, does not contravene the constitutional provision giving District Courts of Appeal jurisdiction over certiorari proceeding, since the constitutional provision merely confers jurisdiction and does not prescribe the manner in which the jurisdiction shall be exercised. Code Civ.Proc. § 1068; Const. art. 6, § 4b.

8. Certiorari ⚷4, 5(1), 28(1)

The conditions on which a certiorari may be granted are separate and concurrent, and there must be an excess of jurisdiction by an inferior tribunal, no appeal, and no other plain, speedy and adequate remedy, and if any one of such essentials is missing the writ will not lie. Code Civ.Proc. § 1068.

9. Certiorari ⚷5(2)

The fact that an appeal does not afford a plain, speedy and adequate remedy makes no difference as respects right to certiorari, since the statute prescribing other conditions is explicit and must control. Code Civ.Proc. § 1068.

10. Certiorari ⚷5(1)

The fact that an order was made in excess of jurisdiction does not afford any right to proceed in certiorari if a right of appeal exists. Code Civ.Proc. § 1068.

11. Certiorari ⚷5(1)

A right of appeal affords ipso facto a "plain, speedy and adequate remedy" which precludes resort to certiorari. Code Civ.Proc. § 1068.

See Words and Phrases, Permanent Edition, for all other definitions of "Plain, Speedy and Adequate Remedy".

12. Certiorari ⚷1

The specific conditions for the issuance of a writ of review differ from those provided for writs of mandamus, and prohibition and authority for the issuance of the latter writs is not generally applicable to the issuance of the former. Code Civ.Proc. §§ 1068, 1086, 1103.

◆

Original proceeding by Monterey Club and others for a writ of review to annul an order of the Superior Court of the state of California in and for the County of Los Angeles, Emmet H. Wilson, Judge, granting a preliminary injunction against petitioners restraining them from operating and conducting certain gambling games notably draw poker and "low ball" at an establishment allegedly run by petitioners as a private club.

Writ discharged.

Samuel L. Rummel and Arthur Mohr, both of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, John F. Dockweiler, Dist. Atty., and Thomas F. O'Brien, Deputy Dist. Atty., all of Los Angeles, for respondents.

Earl Warren, Atty. Gen., Everett W. Mattoon, Asst. Atty. Gen., and Warren Olney, Deputy Atty. Gen., amicus curiæ.

DORAN, Justice.

Petitioners have applied to this court for a writ of review to annul an order of the Superior Court of Los Angeles County granting a preliminary injunction against petitioners restraining and enjoining them from maintaining, operating and conducting certain gambling games, notably draw poker and a game similar thereto, "low ball", at an establishment allegedly run by petitioners as a private club.

The action in which the injunction was granted was instituted by the district attorney of Los Angeles county in the name of the People of the State of California, whereby it was sought to permanently enjoin petitioners from maintaining, operating and conducting the said games at their club. The club in question is maintained in the City of Gardena and is alleged by petitioners to be open only to members and their guests. The playing of draw poker, "low ball", bridge and rummy by the members of the club and their guests is admitted. In lieu of a transcript of the record and proceedings in the court below the parties have stipulated that the record and proceedings as set forth in the petition for the writ herein may be deemed to be a full, true and complete transcript of the record in the action below, entitled the People of the State of California v. E. J. Primm et al., Superior Court No. 460979. It is further stipulated that on February 17, 1941, the trial court orally stated in open court, in the presence of certain of the defendants, that the preliminary injunction against the defendants was granted to the extent of the relief requested by the prayer of plaintiff's complaint, but that the said preliminary injunction was never actually signed by the court or filed with the clerk of the said court.

Petitioners contend that the court exceeded its jurisdiction in granting the preliminary injunction in question. Respondents contend, among other things, that the writ of certiorari will not lie in the instant case because the order of the court here questioned is one from which an appeal may be taken. In this respect, respondents' contention appears to be well taken.

[1-6] There can be no question as to the right of appeal from an order granting an injunction, either preliminary or permanent. Sec. 963 [2d], Code Civ.Proc.; Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278; Laam v. McLaren, 28 Cal.App. 632, 153 P. 985. Petitioners contend that the instant order is not appealable for the reason that it was never entered in the minutes of the court. But in so contending petitioners confuse the right of appeal with the time within which such right should be exercised. "It is the judgment or order that the statute says may be appealed from. The entry of that judgment or order only serves the purpose of fixing the time from which the appeal may be taken." Estate of Hughston, 133 Cal. 321, 323, 65 P. 742, 743, 1039. Moreover, in the absence of evidence to the contrary, it will be presumed that an official act has been performed. (Sec. 1963 [15], Code Civ.Proc.), and it does not appear from the record here presented that no minute entry of the order was made. The fact that the preliminary injunction was never signed or filed is immaterial, since the proceeding here is concerned only with the order granting the injunction and not the formulation of the injunction itself. Upon this proceeding in certiorari the court need not concern itself with the question of whether an injunction orally granted is valid without later being reduced to writing and signed by the judge, since the only question here involved is the authority of the trial court to act at all in the matter. Furthermore, petitioners' contention that a party against whom an injunction order exists is not required to compel the court to sign it and the clerk to enter it by mandamus, has no bearing upon the appealable nature of the order. The right of appeal exists regardless of failure or defects of ministerial duty; and if entry of the order were necessary to an appeal, either party to the action could compel the entry to be made in order to exercise his rights.

[7] Section 1068 of the Code of Civil Procedure provides that a writ of review may be granted when jurisdiction has been exceeded "and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy". This section does not contravene the provision of the state constitution (Art. VI, sec. 4b) which gives the district courts of appeal jurisdiction over certiorari proceedings. The constitutional provision merely confers jurisdiction; it does not prescribe the manner in which that jurisdiction shall be exercised.

[8-11] Petitioners' contention that certiorari will lie unless an appeal will afford a plain, speedy and adequate remedy is not supported by the authorities. The conditions on which such a writ may be granted, as set forth in section 1068, supra, have been held to be separate and concurrent, namely: (1) An excess of jurisdiction by an inferior tribunal; (2) no appeal; and (3) no other plain, speedy and adequate remedy. If any one of these essentials be missing the writ will not lie. Postal, etc., Co. v. Superior Court, 22 Cal. App. 770, 772, 136 P. 538, citing Noble v. Superior Court, 109 Cal. 523, 42 P. 155. The fact that the appeal does not afford a plain, speedy and adequate remedy makes no difference since the provisions of the statute are explicit and govern. Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278. Nor does the fact that the order was made in excess of jurisdiction afford any right to proceed in certiorari if a right of appeal exists. Anglo-Californian Bank v. Superior Court, 153 Cal. 753, 755, 96 P. 803. Moreover, the right of appeal has been held to afford ipso facto a plain, speedy and adequate remedy. Manoogian v. Superior Court, 48 Cal.App. 609, 613, 192 P. 168. Petitioners claim that the case last cited infers that the appeal must afford a plain, speedy and adequate remedy, but a reading of the opinion therein reveals it to mean that an appeal is of necessity such a remedy.

Petitioners rely strongly upon Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635, as supporting their contention. In that case, however, the time for appeal had long since passed, and the court there stated that it was obvious from the state of the record that the petitioner neither had nor was in any condition to receive notice of the making of the order or of the defects in the same during the statutory time when such appeal might have been taken. The case must therefore be classed as one in which there was no right of appeal extant and hence is inapplicable to the instant situation. The Grinbaum case does not hold, as contended by petitioners, that where it appears that an appeal does not provide a plain, speedy and adequate remedy the writ may issue even though such right of appeal exists. Fortenbury v. Superior Court, Cal.Sup., 106 P.2d 411, is also inapplicable. There the proceeding was to review a judgment of contempt for violating a temporary restraining order. It is settled that there is no appeal from a judgment of contempt. Gale v. Tuolumne County Water Co. et al., 169 Cal. 46, 145 P. 532.

[12] An examination of the authorities upon the question here presented shows the law upon the subject to be well settled.

It should be noted that, while writs of mandate are governed by the provisions of section 1086 of the Code of Civil Procedure, and must issue, as therein provided, in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law, and writs of prohibition are governed by the provisions of section 1103 of that code and, as there provided, may issue in like situations, the issuance of writs of certiorari is governed by the provisions of section 1068, which specifically authorizes such writs to be issued only in cases where there is no appeal. It may thus be seen that the specific conditions for the issuance of a writ of review differ from those provided for writs of mandate and prohibition; and authority for the issuance of the latter writs is not generally applicable to the issuance of the former.

As it appears that an appeal would lie from the order granting the injunction, the writ heretofore granted must be discharged.

It is so ordered.

We concur: YORK, P. J.; WHITE, J.

44 Cal.App.2d 320

In re SCHAETZEL'S ESTATE.

BABSON et al. v. COLTON et al.

Civ. 12959.

District Court of Appeal, Second District, Division 1, California.

April 19, 1941.

1. Wills 🔑487(3)

In proceeding for construction of will, trial court did not err in refusing to receive testimony of executor of conversations which he had with testatrix when, as her attorney, he prepared her will and codicils, offered for purpose of showing testatrix' intent. Probate Code, § 105.

2. Wills 🔑440, 456

Testatrix' intent must be determined from language of will, and where language is clear it must be interpreted according to its ordinary meaning and legal import. Probate Code, § 105.

3. Wills ⚷439, 734(1)

In construing will, intention of testatrix in regard to disposition of her property must be given effect whenever it can be ascertained, and in regard to interest due upon legacies, matter is controlled by testatrix' express intention. Probate Code, §§ 105, 163.

4. Wills ⚷734(3)

Where testatrix authorized trustees to withhold distribution to beneficiaries of residuary trust created by will for period of five years, but also expressly stated that sums to be paid to beneficiaries should be treated as legacies for all purposes, notwithstanding such delayed payment, sums to be paid beneficiaries would carry interest from first anniversary of testatrix' death. Probate Code, § 163.

5. Executors and administrators ⚷510(8)

Where trial court heard jointly petition citing executor to account and distribute and petition for construction of will and a single order was made covering all matter heard, and no appeal was taken from portion of decree which directed executor to file his final account and petition for distribution within 30 days, even if question of fact was raised on issue whether executor should be required to account and distribute, failure of trial judge to make written findings and conclusions on such issue was of no moment on appeal.

6. Trial ⚷388(2)

Where there was no objection, pleading nor filing traversing any allegation of petition for construction of will, no issue of fact was raised by such petition and construction of will was solely one of law, and hence trial court was not required to sign and file findings of fact and conclusions of law.

7. Trial ⚷261

In proceeding for construction of will, trial court's denial of certain requests propounded by executor for instructions, without prejudice to renewal of requests, was not error, where requests were not only premature, but were largely suppositional in their nature.

8. Executors and administrators ⚷472

In proceeding by certain of legatees citing executor to account and distribute, where nearly four years had elapsed since testatrix' death, and will required distribution within period of five years from date of probate of will and so much earlier as executor deemed wise, order directing executor to file his final account and petition for distribution within 30 days, which closed with words "to make such payments without any delay that is not based upon sound reason", was not error.

9. Executors and administrators ⚷511(3)

On appeal by executor and others who petitioned for construction of will, and appeal by certain legatees from all except certain portion of decree construing will, instructing executor and ordering him to file his account and petition for distribution, District Court of Appeal, in its discretion, ordered costs of appeal to be paid by appellants and not in any part from funds of the estate. Probate Code, § 1232.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Helen H. Schaetzel, deceased. Elizabeth Colton and others caused a citation to issue to H. P. Babson, executor of the estate of Helen H. Schaetzel, deceased, to show cause why he should not forthwith file his final account and petition for distribution, which was consolidated with a petition by H. P. Babson, etc., and others against Elizabeth Colton, Nell C. Nichols, and others to construe will. From all except a certain portion of an order and decree construing will, instructing executor and ordering him to file his final account and petition for distribution, H. P. Babson, executor, Nell C. Nichols, and others appeal.

Affirmed.

John C. Goff, of Los Angeles, for appellants executor and trustees.

John J. Irwin and Clarence G. Weisbrod, both of Los Angeles, for appellants residuary legatees.

T. P. Wittschen, of Oakland, and Charles E. Beardsley, of Los Angeles, for respondents.

DESMOND, Justice pro tem.

This is an appeal from a decree by which the probate court ordered interest to be paid to all beneficiaries of a residuary trust to whom money was bequeathed, "from April 7, 1937 (said date being one year after the death of the testatrix) until payment is made to such beneficiaries and each of them".

Paragraph ninth of decedent's will provides as follows: *"It is my intention that* *the amounts* set opposite the names of each beneficiary in paragraph Sixth, Subdivision 1, Resubdivision 2 hereof with the attendant provisions for increase or decrease of such various amounts *shall be in fact treated as legacies to such beneficiaries herein named, and I intend them so to be.* The creation of the trust as herein provided and the bequest of the residue and remainder of my estate to my said trustees are intended to conveniently vest in my said trustees discretion to accumulate my said estate and withhold distribution of *such legacies* for a period of five years or such shorter period as my said trustees and executors shall in their discretion determine to the end that my said estate shall not be sacrificed by too early liquidation and it is my express wish that this my will shall be so construed as to vest in my said executors and trustees herein named such discretionary power to withhold such distribution for such period up to five years from the time of probate of this my Will as they shall determine and to give effect to *my wish that such sums shall be paid to the beneficiaries herein named as legacies and be treated as legacies for all purposes notwithstanding such delayed payment* as is herein provided." (Emphasis added.)

Testatrix by her will provided that, after payment of two specific legacies by her executors, all the rest, residue and remainder of her estate, both real and personal, should pass to her executors, as trustees, to be held by them upon trust for various uses and purposes. Under the terms of the trust ten individuals were named as specific beneficiaries in a certain sum of money set opposite the name of each. The balance of the estate still under the trust would pass by the terms of the will to two residuary legatees, namely, Julius G. Schaetzel, his share being fixed at $60,000, and Elizabeth Colton, whose share was fixed at $40,000. It was also provided that these two amounts of $60,000 and $40,000 might be increased, if the condition of the estate warranted, to $75,000 and $50,000, respectively; and further, if the payment of all specific beneficial interests above mentioned did not exhaust the estate, that the balance should be distributed "by dividing any surplus of the net amount of such estate equally between Julius G. Schaetzel and Elizabeth Colton, share and share alike".

By various codicils admitted to probate certain changes in the disposition of property by testatrix became effective with the final result that one of the ten specific beneficiaries under the will is eliminated, three new names are added to that list, including Julius G. Schaetzel in the amount of $20,000, and those who now hold the position of residuary legatees or residuary beneficiaries are Julius G. Schaetzel and Nell C. Nichols. Nell C. Nichols is also a trustee with Horace P. Babson, who is executor as well. Julius G. Schaetzel, Nell C. Nichols and Horace P. Babson all join in their respective capacities in the prosecution of this appeal.

Mrs. Colton, who was named as a residuary beneficiary under the will, has now become a specific beneficiary, her share being fixed in one of the codicils as $20,000. She and Betty Colton, her daughter, who by the same codicil was bequeathed a share in the sum of $10,000, appear as respondents in this case.

After approximately three and a half years had elapsed from the time the will and codicils were probated, respondents here caused a citation to issue directed to the executor to appear before the probate court and show cause why he should not forthwith file his final account and petition for distribution; the petition for citation stating the belief that interest "must be paid on all the legacies of the class in which the legacies to petitioners are included"; and also stating upon information and belief that the executor had, with the approval of the court, paid to himself "all or the major portion of the specific legacy of $15,000.00 distributed to him as residuary legatee of one-half of the so-called 'Morgan Trust'." Further, "that said executor had, prior to December 31, 1938, already paid himself, as legatee, interest in the sum of $1,118.54 upon the unpaid balance of his $15,000.00 legacy"; and that an account rendered by an auditor "shows the payment of $1,272.45 in interest on the legacy of Nell C. Nichols prior to December 31, 1938".

The citation issued upon this petition was dated October 5, 1939, and was returnable on October 26, 1939. There was no hearing, however, upon that last-mentioned date, the citee in the meantime filing a petition for construction of the will of decedent, and both matters then came on for hearing on November 14, 1939.

Briefly stated, this petition of executor asked the court to advise him as to whether interest should be paid the beneficiaries under the trust, and if so, whether the interest period should run "from a time one year after the death of said decedent until the time of distribution of said interests to them, or until the time of general distribution of the said estate to the residuary trustees named in the will". The court, acting upon this petition, directed that interest, reckoned to the date of payment, be paid to each beneficiary. The trial judge also directed the executor to file his final account within thirty days, and by his order ruled that the "beneficiaries are entitled to look to all of the property which may be distributed to the trustees pursuant to the provisions of the last will and testament of said decedent and any codicils thereto and in accordance with paragraph fifth of the said will, and are entitled to have this distribution to the trustees made promptly, and also are entitled to have the trustees use every diligence to place the estate in a condition to make the specified payments and to make such payments without any delay that is not based upon sound reason".

Other requests for instructions the court pronounced premature on the ground that they "contemplate contingencies which may or may not arise", and, therefore, they were denied without prejudice.

The appeal is taken from the entire order and decree "excepting only that portion of said decree which directs the executor to file his final account and petition for distribution in said estate".

[1, 2] Appellants charge that error arose when the trial judge refused to receive testimony of the executor of conversations which he had with the decedent when, as her attorney, he prepared her will and codicils, relative to declarations which she made and instructions which she gave concerning the provisions of those instruments having to do with the matters mentioned in his petition. We find no error in this ruling. Sec. 105, Prob.Code; see, also, In re Estate of Johnson, 107 Cal.App. 236, 290 P. 314; In re Estate of Watts, 186 Cal. 102, 198 P. 1036. In Re Estate of Watts, reported in 179 Cal. 20, page 23, 175 P. 415, at page 417, the court said, "We must determine her intent from the language of her will, and where that language is clear and unambiguous it 'must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby.' [In re] Estate of Blake, 157 Cal. 448, 459, 108 P. 287, 291."

[3, 4] Appellants call our attention to that clause of the will which provides that "no beneficiaries shall take any vested or alienable interest in the principal or any accumulation of this trust estate until the time of actual distribution under the terms hereof," and apparently conclude that by reason of these words an uncertainty arises which must be cleared away. If there is any uncertainty, it cannot be explained by a resort to oral declarations which the testatrix may have made (Sec. 105, Prob. Code), and it does not appear that the trial judge found any uncertainty. He was governed by the rule that the intention of the testatrix in regard to disposition of her property must be given effect whenever it can be ascertained, and the further rule in regard to interest due upon legacies that that matter is "controlled by a testator's express intention". Sec. 163, Prob.Code. This testatrix authorized her trustees to withhold distribution of *"such legacies"*, but also expressly stated that it is "my wish that such sums shall be paid to the beneficiaries herein named as legacies and *be treated as legacies* for all purposes *notwithstanding* such delayed payment as is herein provided". In re Estate of Williams, 112 Cal. 521, 44 P. 808, 53 Am.St. Rep. 224, presents a case where the testator made provision for delayed payment of legacies, but there the court held that, when paid, they should have added thereto, interest reckoned from the first anniversary of the testator's death. The testatrix in the instant case, while providing that prior to final payment to her beneficiaries they should take no vested or alienable interest in the trust, expressed no intent that when the amounts allotted to them were paid they should not carry interest. Quite to the contrary, she says: "It is my intention that the amounts * * * shall be in fact treated as legacies * * * and I intend them so to be." Treating these shares as legacies, the court properly ruled that they should carry interest. It seems an excess of caution which leads the executor, after he has asked and received from the court directions on this subject, to appeal from the decision which makes those directions effective.

[5] It is charged that the court erred in failing to sign and file findings of fact and conclusions of law after the court heard jointly the petition citing the executor to account and distribute, and the petition of the executor for construction of the

will. Appellants state "issues of fact were presented upon the hearing in respect to both petitions * * *. A single order was made covering all matters heard. Neither findings of fact nor conclusions of law being made, signed or filed, said order can be of no force or effect and should be declared a nullity * * *." However, as we have stated, this appeal was not taken from the portion of the decree which directed the executor to file his final account and petition for distribution within thirty days, so, if a question of fact, upon issue joined, was there decided (and we do not say that such was the case) without written findings and conclusions signed by the trial judge, that is a matter of no moment now.

[6] So far as the other matters inquired into at the hearing are concerned, that is, the proper construction of the will and codicils and the determination by the court of what instructions should issue to the executor upon his request, no written findings were necessary, for, as respondents state in their brief, there was here "no objection, pleading, nor filing traversing any allegation of the executor's petition for a construction of the will. No issue of fact was raised by that petition. The construction of the will was solely one of law." Citing In re Estate of Donnellan, 164 Cal. 14, 19, 127 P. 166.

[7] It is claimed that the court committed error in denying requests propounded by the executor for instructions on various other matters. But the denial was made without prejudice to renewal of the requests, and upon the ground that they were premature. We have examined them. They seem not only premature, but largely suppositional in their nature. Whether appellants have found any occasion to renew these requests or any of them does not appear, but by the very terms of the order complained of that right was secured to them. No error arose in this regard.

[8] Appellants seem to feel aggrieved because the court by its order sought to secure for the future prompt action in this estate, where, after a lapse of almost four years, the issuance of a citation finally procured an order for an accounting and distribution. But the paragraph to which exception is taken closed with the words, "to make such payments without any delay that is not based upon sound reason". This language of the trial court furnishes no ground for a charge of error. On the contrary, we consider it commendable. We note that by the terms of Mrs. Schaetzel's will "in any event the assets of my estate shall be disposed of so as to make possible the distribution of the body of the trust estate and termination of the trust within a period of five years from the date of probate of this my Will and so much earlier as shall seem to my executors wise". This will was admitted to probate on May 14, 1936, and, if the instruction of the testatrix is observed, her property will be distributed and the trust created by her will terminated before, and not after, May 14, 1941.

[9] The order of the probate court is affirmed. Costs of this appeal to be paid by the appellants and not in any part from the funds of the estate. Sec. 1232, Prob. Code. Nothing in this opinion is to be construed as an intimation on our part that any fees should be allowed in probate to the executor or trustees or any attorney representing them, or either of them, in connection with this appeal.

We concur: YORK, P. J.; DORAN, J.

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44 Cal.App.2d 289

WILLINGHAM et al. v. PECORA et al.

Civ. 2398.

District Court of Appeal, Fourth District, California.

April 17, 1941.

1. Venue 🔑52(1)

On motion for change of venue for convenience of witnesses, convenience of witnesses in attending trial, rather than places of their actual residences, is issue to be decided by trial court. Code Civ.Proc. § 397, subd. 3.

2. Venue 🔑52(1)

Convenience of counsel and of parties to action was not material to issue presented upon defendants' appeal from order overruling defendants' motions for change of venue for convenience of witnesses. Code Civ.Proc. § 397, subd. 3.

3. Venue 🔑52(1)

Convenience of employees of parties to action cannot be considered on motion for change of venue for convenience of witnesses. Code Civ.Proc. § 397, subd. 3.

4. **Appeal and error** ⚷965
Venue ⚷42

Determination of motions for change of venue upon statutory grounds rests largely in sound discretion of trial judge to which such matters are addressed, and judge's orders based upon such motions will not be disturbed except where it manifestly appears that there is a clear abuse of discretion. Code Civ.Proc. § 397, subd. 3.

5. **Venue** ⚷70

Evidence justified denial of defendants' motions for change of venue for convenience of witnesses on ground that convenience of witnesses and ends of justice would not be promoted by changing place of trial. Code Civ.Proc. § 397, subd. 3.

6. **Venue** ⚷58

Under statute authorizing trial court, on motion, to change place of trial when convenience of witnesses and ends of justice will be promoted by change, an averment of residence of a witness is unnecessary. Code Civ.Proc. § 397, subd. 3.

7. **Venue** ⚷67

Where affidavit filed by plaintiffs in opposition to defendants' motions for change of venue for convenience of witnesses averred that highway patrolmen who investigated accident were "stationed" at a certain place, quoted word was properly construed to mean to appoint or assign to a post, place, office, or the like. Code Civ.Proc. § 397, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Station".

8. **Venue** ⚷52(1)

That highway patrolmen sought as witnesses in automobile accident case were assigned to Bakersfield locality justified inference that their convenience would not be promoted by requiring patrolmen to leave locality where their duty required their attention during progress of trial, in so far as question whether trial court abused its discretion in denying defendants' motions for change of venue from Kern to Los Angeles county for convenience of witnesses was concerned. Code Civ.Proc. § 397, subd. 3.

9. **Venue** ⚷52(1)

That expense incident to production of records of Industrial Accident Commission, if trial of automobile accident case was held in Kern county, would be prohibitive was not controlling in determining whether defendants' motions for change of venue from Kern to Los Angeles county for convenience of witnesses should have been granted. Code Civ.Proc. § 397, subd. 3.

10. **Venue** ⚷52(1)

That many of defendants' witnesses resided in Los Angeles county, or that possibly a greater number lived there than in Kern county, was not controlling in determining whether defendants' motions for change of venue from Kern to Los Angeles county for convenience of witnesses should have been granted. Code Civ.Proc. § 397, subd. 3.

11. **Venue** ⚷61

Where defendants permitted action to lie dormant for nearly four months and filed amendment to answer shortly before trial date, and after amendment was filed defendants filed motions for change of venue from Kern to Los Angeles county for convenience of witnesses, and a five months' delay would have resulted in trial if action had been transferred to Los Angeles county, denial of motions would have been justified on ground that they were not made within a "reasonable time". Code Civ.Proc. § 397, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

12. **Venue** ⚷61

Motions for change of venue for convenience of witnesses must be made within a reasonable time. Code Civ.Proc. § 397, subd. 3.

13. **Venue** ⚷68

Under statute authorizing trial court, on motion, to change place of trial when convenience of witnesses and ends of justice will be promoted, it is not only necessary that convenience of witnesses be promoted but it is equally essential that ends of justice will be promoted by change of venue, and burden to prove both conditions is on moving party. Code Civ.Proc. § 397, subd. 3.

14. **Venue** ⚷51

Where defendants' motions for change of venue were made on ground of convenience of witnesses, and neither of the motions was made upon ground that ends of justice would be promoted by change, and a

five months' delay in trial would have resulted if motions had been granted, motions could have been properly denied upon ground that ends of justice would not have been promoted by change. Code Civ.Proc. § 397, subd. 3; § 1010.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by George Willingham and others against Philip Pecora and others, wherein plaintiff George Willingham claimed damages for personal injuries allegedly sustained in an automobile collision and plaintiffs Alice N. Hodges and G. H. Hodges sought damages for the alleged wrongful death of their husband and father who was killed in the accident. From an order denying their motions for a change of venue, defendants Philip Pecora, Mary J. Pecora, Joe Pecora and Ace Freight Lines appeal.

Affirmed.

See, also, 40 Cal.App.2d 123, 104 P.2d 405.

William C. Ring and Fontana & Goldstone, all of Los Angeles, for appellants.

Brittan & Mack, of Bakersfield, for respondents.

CONWAY, Justice pro tem.

Defendants and appellants, Philip Pecora, Mary J. Pecora, Joe Pecora and Ace Freight Lines, have taken an appeal from the order of the superior court denying their motion for change of place of trial from Kern county to Los Angeles county. The motions were made upon affidavits based upon the ground that the change of venue was for the convenience of the witnesses to be called on the trial of the action.

This action was commenced on October 4, 1939. It was at issue and a memorandum of motion to set for trial was filed December 12, 1939, at which time the court fixed the date of trial for May 15, 1940. On April 8, 1940, appellants presented motions for change of venue based upon the same ground and both of these motions were denied by the trial judge. A writ of supersedeas was issued out of this court upon stipulation of the parties staying further proceedings in the action until the determination of this appeal.

The sole question presented is whether the court abused its discretion in denying said motions for change of venue.

The action arose from an automobile collision which occurred on the Grapevine grade in Kern county, between an automobile driven by plaintiff George Willingham, and a truck driven by defendant Vernon Shearer. Plaintiff Willingham seeks damages for personal injuries alleged to have been sustained, and plaintiffs Alice N. Hodges and G. H. Hodges, mother and son, respectively, pray for damages for the alleged wrongful death of their husband and father who was killed in the accident. The principal issues presented in the answers of defendants raise the question of the alleged negligence of the driver of the automobile in which plaintiffs were riding and also a denial of negligence on the part of the driver of the truck. The answers also raise the question of the legal relationship between the driver Shearer and certain defendants, and set up the defenses of unavoidable accident. The usual questions of damages, proximate cause, contributory negligence, and the defense of Philip Pecora that his truck was operated by the defendant Shearer without his knowledge or consent is also alleged. Upon the hearing of the motions, all of the records, papers and files were received in evidence from which the court had before it, not only a clear conception of all the issues raised by the pleadings, but also the evidence from which the court might reasonably determine whether or not the motions for change of venue were seasonably made. The respondents offered the affidavit of Henry C. Mack, who is one of the attorneys for the plaintiffs. This affidavit substantially shows: That the only eye-witness to the collision between the automobile and the truck, excluding certain parties to the action, was one McCarty, who lives in San Jose, California, admittedly beyond the distance of effective service of a subpoena for personal appearance in either county; that plaintiff George Willingham was taken immediately after the accident to the San Joaquin Hospital at Bakersfield, and was there attended by Dr. Joe Smith and certain nurses whose names are now unknown to this plaintiff; that it will be necessary to call the doctor and nurses to testify for the plaintiff at the trial; that the accident was investigated by Kenneth A. Ward and Frank Walker of the highway patrol, who are stationed at Bakersfield, California; that said witnesses are familiar with the circumstances of the accident, the location thereof, the marks on the highway, the condition of the vehicles involved and can testify to certain statements concerning liability made by some of the participants therein; that all of this testimony is material to plaintiffs' case; that Robert F. Myers, a civil engineer, residing in Bakersfield, will be called as a witness for the purpose of making a map showing the roadway involved at the point of the collision; that a Mr. Amundsen is a photographer residing in Bakersfield and will be called to testify concerning the pictures taken of the highway. The Mack affidavit further states there is another witness residing in Kern county whom he expects to locate and who will be called to testify as to matters material to the action. In addition to testimony of all of these witnesses affiant avers that, as a part of this case, he desires to take the jury, before whom the case will be tried, to the scene of the accident for the purpose of illustrating certain testimony which affiant believes cannot be completely understood by a jury from pictures or in any other manner excepting a visit to the scene of the accident. He also sets up that the cost of taking the jury to the scene of the accident, if the action is transferred to Los Angeles county, would be prohibitive, and alleges the penurious condition of his clients as a further ground for resisting the motions.

Appellants have challenged the sufficiency of the affidavit offered for respondents, claiming that it furnishes no proof that the witnesses named therein reside in Kern county. This attack obviously refers to Dr. Joe Smith and the two nurses who attended plaintiff Willingham in the Bakersfield hospital, and the two highway patrolmen who were "stationed" in Bakersfield. The actual residences of other witnesses stated in the Mack affidavit was averred to be in Kern county.

[1] Subdivision 3 of section 397 of the Code of Civil Procedure contains no requirement that the residence of the witnesses whose convenience is promoted, be in any particular county. The statute provides that the court, on motion, may change the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change. Obviously, the convenience of the witnesses in attending the trial, rather than the places of their actual residences, is the issue to be decided by the trial court. It doubtless often occurs that the convenience of witnesses would be promoted by their testifying in a county where they are "stationed" or actually engaged in performing services in their chosen professions, even though their residences might be in a county far distant from the county where the trial is held.

[2, 3] A substantial portion of appellants' brief is devoted to the question touching convenience of counsel for the litigants and convenience of the parties to the action. Neither of these matters are material to the issue presented upon this appeal. Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991; Wood v. Silvers, 35 Cal.App.2d 604, 96 P.2d 366, 97 P.2d 265. The rule announced in these cases likewise pertains to the employees of the parties to the action.

[4, 5] The determination of motions for change of venue upon grounds specified in subdivision 3 of section 397 of the Code of Civil Procedure rests largely in the sound discretion of the trial judge to which such matters are addressed, and its orders based upon said motions will not be disturbed by an appellate tribunal except where it manifestly appears that there is a clear abuse of discretion on the part of the trial judge. Pascoe v. Baker, 158 Cal. 232, 110 P. 815; Scott v. Stuart, 190 Cal. 526, 213 P. 947. Viewed in the light of these decisions enunciating this salutary rule we are unable to say as a matter of law that the trial judge in the instant case abused the discretion vested in him, in denying appellants' motions.

Eliminating the parties to the action and their employees, and attorneys for the litigants, we feel there is a satisfactory showing in respondents' affidavit, and from the papers and files introduced upon the hearing, to justify the trial judge in coming to the conclusion that the convenience of witnesses and the ends of justice would not be promoted by a change of place of trial.

[6-10] Appellants attack respondents' affidavit wherein affiant avers that the two highway patrolmen who made the investigation of the accident in question and who are familiar with many of the important details of the case, were "stationed" at Bakersfield. As we have heretofore pointed out, the averment of residence of a witness under this particular subdivision is unnecessary and the court undoubtedly correctly construed the word "stationed" to mean, "to appoint or assign to a post, place, office, or the like". See, Webster's New International Dictionary. Surely the fact that these highway patrolmen were assigned to the Bakersfield locality would justify the trial court in drawing the infer-

ence that their convenience would not be promoted by requiring them to leave the locality where their duty required their attention during the progress of the trial which might be protracted. The court was likewise justified in the implied finding that Dr. Joe Smith and the two nurses who were in attendance in the local hospital in Bakersfield might be reasonably inconvenienced by a change in the place of trial to Los Angeles county. Appellants make the additional claim that the expense incident to the production of the records of the Industrial Accident Commission, if the trial were to be held in Kern county, would be prohibitive. This circumstance, if true, is not controlling. Scott v. Stuart, supra. The fact that many of defendants' witnesses reside in Los Angeles county, or that possibly a greater number live there than live in Kern county, is also not a deciding factor in motions of this kind. Tait v. Midway Field Oil Co., 28 Cal.App. 107, 151 P. 378.

[11, 12] While we are satisfied that the merits of this appeal may well be determined upon our finding that the trial court did not commit an abuse of discretion in denying appellants' motions on the sole ground of convenience of witnesses, there is an additional reason presented by respondents to the effect that the motions were not made within a reasonable time. The record shows that appellants permitted the action to lie dormant for nearly four months, then shortly before the trial date they filed an amendment to the answer setting up special defenses of contributory negligence and unavoidable accident. And shortly after this amendment was filed they filed these motions for change of venue. Respondents' affidavit shows that a five-month delay would result in the trial of the action if the trial court should transfer the same to Los Angeles county. It is the universal rule in this state that motions of this character must be made within a reasonable time. Cook v. Pendergast, 61 Cal. 72, 78; Barclay v. Supreme Lodge, 34 Cal. App. 426, 167 P. 701.

[13, 14] Subdivision three of section 397 of the Code of Civil Procedure contains conjunctive conditions, both of which must occur before the moving party is entitled to change the place of trial. It is not only necessary that the convenience of witnesses be promoted but equally essential that the "ends of justice" be promoted before the court is justified in granting the motion. The burden of proving both of these conditions is necessarily on the moving party. The motions of appellants relied upon at the hearing in the lower court stated that the motions were made on the ground of "convenience of witnesses". Section 1010 of the Code of Civil Procedure provides that notices of motion must state the grounds upon which it will be made. Neither of these motions are made upon the ground that the "ends of justice" would be promoted by the change of venue. We conclude that the trial court could have properly denied the motions upon the ground that the ends of justice would not have been promoted by a five-month delay in the trial of the action which would have resulted if the motions had been granted.

The order is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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44 Cal.App.2d 370

AMERICAN BOX & DRUM CO. v. HARRON.

Civ. 11459.

District Court of Appeal, First District, Division 1, California.

April 22, 1941.

Rehearing Denied May 22, 1941.

Hearing Denied June 19, 1941.

1. Attorney and client 🔑113

In absence of litigation, existing or contemplated, an attorney is not precluded from representing adverse parties providing his employment is within knowledge and with consent of each and he deals fairly with both.

2. Attorney and client 🔑129(2)

Evidence supported finding that attorney who represented both company and estate of deceased president of company was not guilty of fraudulent acts in connection with filing of claim by company against estate, on ground that attorney concealed facts which would have estopped executor from pleading successfully the statute of frauds and statute of limitations, where it appeared that attorney, on account of conflicting interests, withdrew both as attorney for company and for executor, and evidence authorized finding either that he did not conceal vital facts, or that any failure by him to disclose known facts to attorney employed to bring claim suit against estate on behalf of company was due to his failure to appreciate their legal significance.

3. Fraud ⚿58(1)

One asserting fraud has burden of proving it by substantial evidence.

4. Fraud ⚿58(1)

To establish fraud, evidence must give rise at least to reasonable inference of fraud, and not mere suspicion.

5. Fraud ⚿58(1)

If there are two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the duty of court or jury to draw inference favorable to fair dealing.

6. Attorney and client ⚿114

Proof that attorney, who represented both company and estate of deceased president of company, and who, on account of conflicting interests, withdrew both as attorney for company and for executor, failed to disclose facts to attorney subsequently appointed to represent company which would have estopped executor from pleading successfully the statute of frauds and the statutes of limitation in regard to company's claim against estate because of negligence in failing to appreciate possible importance of such facts, if established, would not establish that attorney was guilty of "constructive fraud", so as to be liable for damages resulting to company. Civ.Code, § 1573.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Fraud".

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Appeal from the Superior Court of San Francisco, Franklin A. Griffin, Judge.

Action by the American Box & Drum Company against Howard Harron, to recover damages sustained as result of an alleged fraudulent scheme on the part of defendant in connection with a creditor's claim filed by him as attorney for plaintiff against an estate. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Philip S. Ehrlich, Albert A. Axelrod, and Julien R. Bauer, all of San Francisco, for appellant.

O'Connor, Neubarth & Moran and Louis Lamy, all of San Francisco, and Howard Harron in pro. per., for respondent.

WARD, Justice.

This is an appeal by plaintiff from a judgment in favor of defendant in an action in which damages in the sum of $7,551.15 were sought. The complaint alleged that, as the result of a fraudulent scheme and plan on the part of defendant in connection with a creditor's claim filed by him as attorney for plaintiff against an estate, he omitted therefrom facts which if established would have estopped the executor to plead successfully the statute of frauds and the statute of limitations.

The American Box & Drum Co., hereinafter called the American company, was organized prior to 1921 by George A. Racouillat, who until his death acted as its president, a director and general manager. Racouillat was also instrumental in organizing the California Novelty Wooden Box Company, a corporation, hereinafter referred to as the Novelty company. At the time of his death he owned approximately a one-third interest in each company. During the period from 1921 to and including 1930 he caused a number of loans to be made by plaintiff to the Novelty company without, however, securing authorization therefor or ratification thereof by plaintiff. On July 31, 1933, the Novelty company renewed a promissory note evidencing its indebtedness to plaintiff based upon such loans. Racouillat died November 30, 1935, at which time the obligation, exclusive of interest, amounted to the sum of $5,550. Upon liquidation of the affairs of the Novelty company on October 24, 1936, $1,704.32 was paid plaintiff as a final dividend.

Upon the death of Racouillat, Emil Nissen, an employee of plaintiff, became its president and manager. He was also, with Mrs. Racouillat, appointed one of the executors of Racouillat's estate. Defendant, as attorney, represented Racouillat personally during his lifetime, the American and Novelty companies and the Racouillat estate. On behalf of the plaintiff corporation he filed a creditor's claim with Nissen, the executor of Racouillat's estate, covering the amount of the Novelty company's indebtedness to it. Upon defendant's advice the claim was at first approved, and then rejected upon the grounds that it was barred by the statute of limitations and the statute of frauds. It appears that certain legatees of the estate had indicated approval of the claim but subsequently, upon the advice of other counsel, withdrew such approval.

Upon rejection of the claim defendant determined that it was to the best interests of all concerned that plaintiff company and the executor be represented by separate and independent counsel, and he suggested the names of attorneys to represent each. No claim is made and the record does not disclose any collusion between the attorneys selected. All of the information upon which the allegations of the complaint were based was supplied by defendant in a written statement of facts, and it was upon this statement that a complaint was filed upon the rejected claim. Defendant executor in that proceeding filed a demurrer in which he also set up that the cause was barred by the statute of frauds and the statute of limitations. The demurrer was sustained without leave to amend. Judgment of dismissal was signed and filed and no appeal has been taken therefrom.

The trial court in the present proceeding found that a valid claim existed, but that "it is not true that said defendant believed at the time he gave such advice (to reject the claim) that a valid and enforceable claim existed in favor of plaintiff and against E. C. Nissen as executor of the Last Will and Testament of G. A. Racouillat, deceased".

[1] Up to this point no well grounded claim of fraud may be based upon defendant's actions as an attorney. Attorneys, like other agents, may represent conflicting interests. In the absence of litigation, existing or contemplated, an attorney is not precluded from representing adverse parties providing his employment is within the knowledge and with the consent of each and he deals fairly with both. Lessing v. Gibbons, 6 Cal.App.2d 598, 45 P.2d 258; 7 C.J.S., Attorney and Client, § 47, page 826; 3 C.J.S., Agency, § 141, page 17. It is not suggested in the briefs that defendant's representation of the adverse interests was without the knowledge and consent of all persons interested in the estate and in the plaintiff corporation, including its stockholders. No contest was contemplated until certain legatees informally disapproved the payment of the claim filed by plaintiff.

In the present action it developed that during his operation of the American and Novelty companies Racouillat, without corporate approval or ratification, "dipped" into the funds of one corporation for the benefit of the other, and that at various times his conduct indicated that he was personally responsible for such transfers. In that connection the court herein found "that the repayment of said loans to plaintiff was guaranteed by said G. A. Racouillat" and that the estate was estopped to plead the statute of frauds or the statute of limitations. For the purpose of this appeal we may assume, without deciding, that the trial court was correct.

The contention of appellant is that respondent fraudulently concealed from the attorney representing it in the suit upon the rejected claim, facts which established a liability not barred by the statute of limitations nor unenforceable because not in writing. Actual fraud on the part of respondent is alleged; that he knew plaintiff had a valid claim and deliberately concealed vital facts; that the attorney for plaintiff who brought suit on the rejected claim was "falsely and fraudulently directed * * * to draft said complaint so that it would show on its face that it was barred by the statute of frauds and the statute of limitations". There is no evidence in this case that anyone was "directed" to file a complaint based upon a rejected claim, showing upon its face that it was barred by the statute. Consideration may be confined to an uncontradicted verbal statement attributed to respondent claimed by appellant to be a deliberate misrepresentation of fact; concealment of vital facts; and the motive of respondent in respect to possible monetary or other gain.

In the order for final distribution in the estate of Racouillat, respondent as attorney for the estate was awarded compensation for extraordinary services in the sum of $2,500. The account and petition for distribution requesting the additional allowance, set forth that respondent had assumed liability for the services of both firms employed in the rejected claim litigation. The attorney prosecuting the claim was paid from funds of the American company. The attorney representing the executor was paid by respondent. The decree sets forth compensation for extraordinary services but it is impossible to determine therefrom the amount representing legal services in the matter of the executor's defense in the claim action. Neither the account nor the petition for distribution attempted to segregate items making up the requested allowance for extraordinary services. The record does not disclose that respondent gained any monetary advantage by the rejection of the claim; rather that his financial interest as a stockholder in plaintiff company would have been benefited by a successful outcome of the suit.

Appellant points to testimony in the present case of the attorney representing it in the rejected claim suit, to the effect that he understood from information furnished him by respondent that the acts of directors and officers had been approved. The testimony is as follows:

"In 1921 it (the amount of the loans) was crystallized into that amount of money. Furthermore, as I understood, at each annual meeting of the board of directors the acts of the officers had in all respects been verified; furthermore, that the stockholders generally knew all about this * * *

"Q. This is all that Mr. Harron has been telling you? A. Well, naturally I got my information from Mr. Harron * * *

"Q. As I recall your testimony, Mr. Harron told you that these withdrawals and payments to the California Novelty Wooden Box had been ratified by the stockholders and directors of the American Box & Drum? A. I believe in that respect he told me the customary resolutions approving all the acts of the officers and directors had been passed at each meeting of the directors and stockholders."

In his appearance as a witness respondent failed to comment upon this testimony.

Appellant contends that the above, in addition to the procuring by respondent of the verification of the complaint in the claim action, personally filing it and delivering a copy to the attorney for the executor, his presence in court at the time of argument upon the demurrer, forecasting decision thereon, the claim for additional fees for extraordinary services, the fact that he represented Racouillat, and subsequently his estate as attorney, together with his position as director and secretary of plaintiff company, constituted proof of the commission of actual fraud by him to the financial injury of appellant; and that respondent's conduct constituted if not actual, at least constructive fraud upon plaintiff corporation (Civil Code, sec. 1573) regardless of whether or not he received any actual benefit therefrom. On the issue of fraud the trial court found against appellant.

The finding of respondent's innocence of fraud seems to be predicated upon the theory either that he did not misrepresent and did not conceal vital facts, or that any failure by him to disclose known facts to the attorney employed to bring the claim suit on behalf of the plaintiff herein was due to his failure to appreciate their legal significance. That the trial judge adopted the latter view appears from his statement in the record as follows: "That defendant did not handle this matter as efficiently as he should have, is evident, but that fact would not constitute fraud."

Appellant's contention raises several queries, viz., whether the evidence compels the conclusion that respondent was guilty of fraud as a matter of law, whether it upholds the finding that he was not guilty of fraudulent acts or conduct in connection with the claim and whether he believed that a valid claim existed? If this last query be answered in the affirmative, a finding of fraud could be sustained. In this respect appellant places great reliance upon a letter dated January 18, 1936, by respondent to the widow of Racouillat. It deals extensively with matters pertaining to the estate, the American company, etc., including the possibility of Mrs. Racouillat's resignation as executrix, in connection with which respondent declined to advise her. The portion pertinent to the question here involved is as follows:

"There is still another item of $———, which George took from the American Box & Drum Company and loaned to the California Novelty Wooden Box Company. When informed of this, I pointed out to him, that, at any time, this transaction was questioned he, personally, would be liable to the American Box & Drum Company for that amount. On several occasions George spoke of this fact to Emil. Personally, I would like to see the residuary legatees, yourself and Adeline, arrange in some way to pay any portion of this that is unpaid including the accumulated interest, so that no claim could ever be filed by the American Box & Drum Company against George's estate. As to this phase of this letter, I should like to have you and sister Adeline meet Nissen and me and discuss it at length and see if a satisfactory plan can be devised to accomplish this end.

"I want to add that my advice to George that he had a personal liability for this $5,000 and interest was solely because he was loaning the American Box & Drum Company's money to the California Novelty Wooden Box Company without adequate, if any, security, and by security, I mean even ability to repay, and George, as I said before, recognized his liability and always intended to repay the loan any time that the American Box & Drum Company demanded, which really meant when George felt it proper to do so, as he, alone, controlled the actions of the American Box & Drum Company.

"In connection with this last item, in spite of George's indifference thereto, I procured the necessary documents to obligate the stockholders to guaranty in writing the payment of this indebtedness in the proportion in which they hold stock, and on account of this, the liability of the estate will be reduced in proportion to the amount received from the other guarantors under this instrument. Of course, the estate will pay its one-third. On the other hand, the gain of the American Box & Drum Company will benefit the estate practically one-third if all are able to pay their obligations, thus reducing the estate's loss to a minimum. * * *

"This is an exceedingly long letter, but I have thought it my duty, as well as a necessity, to put all these matters in writing, and want you, my dear Mae, after you have read this letter and we have completed our talk, to take it with you, study it carefully, digest it thoroughly, and if you feel so inclined to consult with anybody you like as to its contents, and thereafter decide what you wish to be done in reference to all matters therein contained, and I also want Adeline to follow the same course."

A careful reading of the letter indicates that respondent had not given consideration to the question of the statute of limitations, since in the letter he refers to the liability of the stockholders of the Novelty company as an existing liability though in fact barred, as well as to an existing liability of the estate arising from Racouillat having made the loans without security. Respondent testified that he changed his view of liability as based on the last mentioned ground when he recalled that when the loans were made the stockholders' liability law had not been repealed, and since the stockholders of the Novelty company were all quite solvent the loans were not without adequate security.

[2-5] In spite of the somewhat unusual circumstances appearing in connection with respondent's position as attorney, it cannot be concluded that he was guilty of fraud as a matter of law. The court's finding that he was not guilty of fraudulent acts or conduct in connection with the claim and the subsequent suit thereon finds a sufficient foundation in the evidence introduced, including the testimony of the attorneys in the suit based upon the claim. Appellant does not attribute responsibility for the loss of the suit to the attorney who therein represented it, nor does it criticize either attorney in the action on the claim. In this regard it referred to the attorney representing the executor as one of the most eminent members of the bar. Each side testified that respondent had not directed nor interfered with the conduct of the case. Each acted independently in the preparation of the pleadings, the conduct of the trial and the submission of the case. In the absence of proof of facts and circumstances which constitute fraud as a matter of law, we are not prepared to say that the trial court was incorrect in drawing an inference of fair dealing rather than of corrupt practice. In Estate of Ross, 199 Cal. 641, 651, 250 P. 676, 680, the court said: "It is true that the trial court is the exclusive judge of the weight to be given to the evidence, but it is also true that the presumption is in favor of honesty and fair dealing (see Estate of Sweetman, supra), and the burden is upon the party asserting the fraud to prove it by some substantial evidence (12 Cal.Jur. 817). The facts and circumstances shown in evidence must have given rise at least to a reasonable inference of fraud, and not a mere suspicion thereof. Roberts v. Burr, 135 Cal. 156, 67 P. 46. Indeed, it has been held that—'If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing.' Ryder v. Bamberger, 172 Cal. 791, 158 P. 753."

[6] During the oral argument on appeal the question was suggested whether, assuming the conduct of respondent to be mere negligence in his failure to appreciate the possible importance of certain facts, the law applicable thereto or the correct

course to be pursued, such a condition of facts would come within the definition of constructive fraud? In support of its theory that it would, appellant cites Younglove v. Hacker, 15 Cal.App.2d 211, 59 P.2d 451. In that case one Hacker was named as trustee. The basis of the action was that the trustee while so acting had neglected to carry out an agreement. To follow the holding arrived at on the facts of that case, we must in the present appeal conclude that respondent assumed the position of a trustee to protect the interests of appellant. There are of course conditions of fact under which that conclusion might well be reached, but here we find that respondent, on account of the conflicting interests of the American company and the executor of the estate withdrew both as attorney for plaintiff and for the executor. Assuming that respondent's advice to the executor to reject the claim was unsound and that subsequently, on account of his not appreciating its importance, he failed to give full data to the attorney prosecuting or defending the claim suit, there could be no justification to apply the principle followed in the Hacker case to the acts or conduct of an attorney unless there be disclosed an intent on his part to defraud, a situation which does not appear from the findings in this case. Appellant's argument in this respect is tenuous and unconvincing.

The judgment is affirmed.

We concur: PETERS, P. J.; GOODELL, Justice pro tem.

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44 Cal.App.2d 278

BASTAJIAN v. BROWN et al.

Civ. 6399.

District Court of Appeal, Third District, California.

April 17, 1941.

Appeal and error ⚷643(2)

Where an appeal was presented on a settled bill of exceptions, which did not contain all the evidence, a motion for diminution of the record by adding thereto the reporter's transcript of testimony, which motion was not filed until after appeal had been submitted for determination, came too late to be granted. Rules for the Supreme Court and District Courts of Appeal of California, rules 14, 15.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by S. B. Bastajian against James E. Brown and others, wherein judgment was rendered in favor of plaintiff. From an order setting aside such judgment, and entering judgment in favor of defendants, plaintiff appeals. On respondents' motion for diminution of the record by adding thereto reporter's transcript of testimony.

Motion denied.

C. P. Von Herzen, Astor Elmassian, George C. Woods, and Paul Vallée, all of Los Angeles, for appellant.

Reynolds & Painter and Sidney A. Cherniss, all of Los Angeles, for respondents.

PER CURIAM.

The respondents have moved this court for diminution of the record, under rule XIV of Rules for the Supreme Court and District Courts of Appeal of California, by adding thereto the reporter's transcript of testimony taken at the trial. The motion is supported by affidavits of the attorneys for the respective parties. The plaintiff appealed from an order of the trial court setting aside a judgment previously rendered in his favor and entering in lieu thereof a judgment in favor of the defendants on the ground that the court was without jurisdiction to do so.

The appeal was presented to this court on a settled bill of exceptions which does not contain all of the evidence adduced at the trial. The cause was fully briefed, orally argued and submitted to this court for decision on March 10, 1941. The petition for diminution of the record was not filed until March 26th of this year. The motion comes too late to be granted. Rule XV of Rules for the Supreme Court and District Courts of Appeal provides that: "Exceptions or objections to the transcript * * * must be taken and notified to the appellant in writing at least five days before the hearing, or they will not be regarded."

To grant a motion for diminution of a record after a cause has been submitted to a reviewing court for determination would open the doors for endless litigation. The preceding rule is reasonable and necessary to the orderly disposition of appeals.

The motion is, therefore, denied.

44 Cal.App.2d 253

DARLING et al. v. DREAMLAND BEDDING & UPHOLSTERING CO. et al.

Civ. 11445.

District Court of Appeal, First District,
Division 2, California.

April 17, 1941.

1. Automobiles ⚷181(1)

Under statute, a guest who accepts a ride in an automobile upon highway without giving compensation for such ride is limited in his right to recover for injuries sustained in an accident. Vehicle Code, § 403, St.1935, p. 154.

2. Automobiles ⚷245(24)

In action against furniture company and its salesman by occupant of salesman's automobile for injuries received in collision, where occupant, who had allegedly met salesman at hotel to discuss purchase of furniture prior to accident, claimed that she was a passenger in salesman's automobile at time of accident, and salesman and company claimed that occupant was a guest, motive which prompted parties to be present at hotel was for jury, and hence trial court erred in granting a nonsuit. Vehicle Code, § 403, St.1935, p. 154.

3. Trial ⚷143

Motion for nonsuit must be denied if plaintiff has presented evidence of so substantial a character that, notwithstanding any conflict which would be raised by evidence produced by defendant to contrary, it would support a judgment for plaintiff.

4. Trial ⚷165

On motion for nonsuit, every favorable inference fairly deducible and every favorable presumption clearly arising from evidence adduced must be considered as facts proved in plaintiff's favor, and evidence must be taken most strongly against defendant, and where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, trial court must take view most favorable to plaintiff and discard contradictory evidence.

5. Trial ⚷165

On motion for nonsuit, plaintiff must be given benefit of every piece of evidence which tends to sustain his averments, and such evidence must be weighed in a light most favorable to plaintiff's claim.

6. Trial ⚷165

On motion for nonsuit, evidence, whether erroneously admitted or not, if relevant to issues joined, must be given credit and benefit of its full probative strength, and any question arising from variation between evidence of witnesses cannot be raised or considered.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by T. H. Darling and another against Dreamland Bedding & Upholstering Company and others, for injuries allegedly sustained in an automobile collision. From judgments based on orders granting motions for nonsuit by the Dreamland Bedding & Upholstering Company and defendant Walter Carter, plaintiffs appeal.

Judgments reversed.

Sullivan, Roche & Johnson, Eustace Cullinan, Jr., and Willard Lee Pope, all of San Francisco, for appellants.

Bronson, Bronson & McKinnon, George M. Naus, and Raymond O'Connor, all of San Francisco, for respondents.

STURTEVANT, Justice.

On April 26, 1939, the plaintiff Arlene Darling, while riding in an automobile which was being driven by the defendant Walter Carter, was injured in a collision. To recover damages for injuries sustained she and her husband commenced this action against Walter Carter, Dreamland Bedding & Upholstering Co., a copartnership, his employer, Jess Ernest Norris who was driving the other automobile, and Norris Printing Company, a copartnership, of which he was a member. The action was tried before the trial court sitting with a jury. At the end of the plaintiffs' case the trial court granted the motion for a nonsuit of Dreamland Bedding & Upholstering Co. and it granted a similar motion in favor of Walter Carter. As the other defendants had not demanded a jury, the jury was dismissed. The case proceeded as to the remaining defendants and on the final submission judgment was rendered in their favor as against the plaintiffs. From the judgments based on the orders of nonsuit the plaintiffs have appealed.

Prior to April 26, 1939, Dreamland Bedding & Upholstering Co., a copartnership, was engaged in manufacturing, renovating and selling furniture and home furnishings at its place of business in San Francisco. The defendant Walter Carter was one of its employees acting as a salesman. He sold on commission and in the transaction of his business he operated his own automobile. The Norris Printing Company was engaged in the printing business at San Francisco and one member of the partnership was the defendant J. E. Norris.

Early in the morning on April 26, 1939 the defendant Walter Carter was driving south from San Francisco toward Burlingame. In the car riding with him were Mrs. R. M. Miller and the plaintiff Mrs. Arlene Darling. In the neighborhood of Mills Field Airport Carter's automobile collided with the automobile being driven by the defendant J. E. Norris.

It was the theory of the plaintiff Arlene Darling that she was a passenger in the car being driven by the defendant Carter and that he was responsible to her as a passenger. On the other hand it was the theory of the defendant Carter and Dreamland Bedding & Upholstering Co. that Mrs. Darling was a guest, that there was no evidence that Carter was intoxicated, or that he was guilty of wilful misconduct, and therefore the defendants were not liable.

[1] It is statutory that a guest who accepts a ride in any vehicle upon the highway without giving compensation for such a ride is limited in his right to recover for injuries sustained in an accident. Cal. Vehicle Code, sec. 403, St.1935, p. 154. As stated in McCann v. Hoffman, 9 Cal.2d 279, at page 282, 70 P.2d 909, at page 911: "A review of a few only of the numerous cases indicates that the nature of the compensation as contemplated by such a statute is as variable as the particular facts involved. Compensation has been deemed made: When the carriage is of a prospective purchaser of real estate or other customer riding in contemplation of the mutual business of the parties. [Citing cases.] * * * When otherwise a benefit of a tangible nature was conferred upon the driver or his principal by reason of the transportation. [Citing cases.]" The parties to this appeal concede the foregoing propositions but they differ as to the application in the instant case. The plaintiffs stress the fact that we are considering an order of nonsuit granted at the end of the plaintiffs' case. They then earnestly call to our attention that on the afternoon of April 26, 1939 the defendant Carter was in the home of Mrs. Duff at Burlingame installing some new furniture he had recently sold Mrs. Duff. While there Mrs. Miller called. Mrs. Duff introduced Mrs. Miller as a prospective purchaser of furniture. She was interested and Carter drove her to the place of business of Dreamland Bedding & Upholstering Co. There Carter showed the goods of the company to Mrs. Miller. Later Mrs. Miller stated that she had a friend, Mrs. Darling, one of the plaintiffs, who was interested in having some of her furniture done over. Mrs. Darling was engaged in conducting a beauty shop and an appointment was made to meet her that evening at 8:30. Mrs. Miller and Mr. Carter separated at about 6 p. m. agreeing to meet later. At the appointed hour Mrs. Miller and Mrs. Darling met Mr. Carter in the lobby of the Hotel St. Francis in San Francisco. For some hours they discussed furniture and furnishings—not all the time but much of the time. Each testified the purpose of the meeting was to discuss the purchase or repair of furniture. Some time after 12 midnight, acting upon Mr. Carter's request, Mrs. Miller and Mrs. Darling entered his automobile and he started to drive them to their homes. When in the neighborhood of Mills Field Airport the accident happened. Except as will be herein noted Mr. Carter was at all times acting within the scope of his employment. If the record contained no additional facts it is quite clear the plaintiffs had made a prima facie showing and were entitled to have their case submitted to the jury. Crawford v. Foster, 110 Cal.App. 81, 82, 83, 293 P. 841; McCann v. Hoffman, supra. However the record discloses other facts and circumstances which the defendants vigorously stress and contend that the meeting at the

St. Francis and the subsequent events were not matters of business but were a matter of social amenities and, as they argue, after Mrs. Miller and Mr. Carter temporarily parted at 6 p. m. the business of the day was done and all transactions thereafter were of a social nature.

[2-6] Not controverting any of the facts just set forth, the defendants call to our attention that after meeting at the St. Francis intoxicating liquors were served. Mrs. Miller did not drink any of the intoxicating liquor but before dinner Mr. Carter and Mrs. Darling had a highball. During their dinner and before leaving the St. Francis those two each had two more highballs. Still later and when near Mills Field Airport, at the Skyway Cafe, they stopped and Mr. Carter and Mrs. Darling each had another highball. While at the St. Francis as indicated above they had their dinners and participated in the dancing. Mr. Carter danced a couple of times with Mrs. Miller and a couple of times with Mrs. Darling. As pointing to the nature of the evening the defendants place much stress on a dinner menu that was introduced in evidence. On it Mrs. Darling had written, "To my darling Walt, Arlene"—Mr. Carter's name being Walter and Mrs. Darling's name being Arlene. It will be conceded at once that the facts recited in this paragraph tend to show a social event as distinguished from a business meeting. However one of the issues to be tried was the motive which prompted the parties to be present at the meeting in the St. Francis. That was a question of fact for the determination of the jury. The utmost that can be claimed by the defendants is that there was a conflict in the evidence as to what was the purpose of the meeting at the St. Francis Hotel. But on the determination of a motion for a nonsuit made at the end of the presentation of the case of the plaintiffs the powers of the trial court are quite limited. In Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, at page 197, 64 P.2d 946, at page 948, the court said: "On a motion for nonsuit, if a plaintiff has presented evidence of so substantial a character that notwithstanding any conflict which would be raised by evidence produced by the defendant to the contrary it would support a judgment in his favor, the motion must be denied. The evidence must be taken most strongly against the defendant. 'Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be discarded. Estate of Arnold, 147 Cal. 583, 82 P. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in a light most favorable to plaintiffs' claim. Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381. Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength, and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered.' Gregg v. Western Pac. R. R. Co., 193 Cal. 212, 216, 223 P. 553, 554." The orders granting the motions of nonsuit took from the jury its right to determine whether the meeting in the St. Francis was for business purposes, or whether the social events were merely incidental to such business purposes, or whether the meeting was purely social.

The judgments appealed from are reversed.

We concur: NOURSE, P. J.; SPENCE, J.

44 Cal.App.2d 283

CONOVER v. BOARD OF EQUALIZATION et al.

Civ. 6526.

District Court of Appeal, Third District, California.

April 17, 1941.

Hearing Denied June 12, 1941.

1. Officers 🔑11

It was beyond the power of the personnel board of the state to make its classification of supervising stenographer clerk retroactive. Const. art. 24, § 1 et seq.

2. States 🔑59

Under constitutional provision for blanketing into the civil service of certain public employees, such employees came into the civil service with the salaries which they were then getting and they were to continue to receive such salaries until the personnel board should give them the class and grade appropriate to their work, and personnel board was without power to give employee retroactively a salary higher than that which she was receiving when she entered the civil service. Const. art. 24, § 1 et seq.

3. States 🔑67

The state personnel board is a body of special and limited jurisdiction and has no powers except such as the law of its creation has given it.

4. States 🔑59

The fact that a position of a civil service employee was improperly classified on a certain date gave such person no right, and the personnel board was without power to give any retroactive increase in salary. Const. art. 24, § 1 et seq.

5. Officers 🔑11

Sound public policy forbids a construction of the civil service laws that would unsettle the whole civil service of the state and open the door to favoritism, the exercise of political pressure and personal solicitation. Const. art. 24, § 1 et seq.

6. Officers 🔑94

A "salary" is an incident to an office or employment, and at common law, the salary annexed to a public office is incident to the title to the office.

See Words and Phrases, Permanent Edition, for all other definitions of "Salary".

7. Officers 🔑69
States 🔑64

Where public employees holding positions in civil service are discharging their duties under color of right, a person claiming to be entitled to possession of position cannot maintain an action against the state or other governmental body for the emoluments of the office without first establishing his right to the position by direct proceedings.

8. States 🔑61

Where order of personnel board made a civil service employee a supervising stenographer clerk on January 7, 1939, such person did not hold such position before order of the personnel board, and was not entitled to salary attaching to the position prior to the date of such order. Const. art. 24, § 1 et seq.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Ruth E. Conover against Board of Equalization and others for a writ of mandate adjudging petitioner entitled to rank and grade of supervising stenographer clerk from December 20, 1934, and to payment of certain sums due her because of her performance of the duties of such office. From a judgment dismissing the petition, the petitioner appeals.

Judgment affirmed.

Hearing denied; TRAYNOR, J., not participating.

J. M. Inman, of Sacramento and E. R. Vaughn, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

PER CURIAM.

This is an appeal from a judgment of dismissal entered upon an order sustaining respondents' demurrer to a petition for a writ of mandate, and a refusal to amend.

We are convinced the opinion of Judge Peter J. Shields correctly states the facts and the law, and hereby adopt the same as the opinion of this court.

By this proceeding in mandamus it is prayed that the petitioner be adjudged to have been entitled to the rank and grade of supervising stenographer clerk, from December 20, 1934, to the present time and that she be paid certain sums due to her because of her performance of the duties of that office. The facts alleged in the petition herein are substantially these: For over six months immediately prior to December 20, 1934, the petitioner had been in the employ of the state, her duties being exactly those of other employees who had been classified as, and had been receiving the emoluments of a grade in the civil service classified as supervising stenographer clerk. By virtue of the constitutional amendment of December 20, 1934, article 24, petitioner was incorporated into the state service, subject only to a probationary period of eight months during which time she could have been dropped from the state's employ.

With reference to such persons so legislated into the civil service it was provided that the personnel board "shall give each such person such class or grade as it may deem just", subdivision E constitutional amendment. It is not provided at what time this classification must be made. But in the case of the petitioner it is alleged that her position was graded and classified July 8, 1935, during her probationary period, as senior stenographer clerk.

It will be recalled that the petition alleges that at that time petitioner was doing the same work as other employees who were classified as supervising stenographer clerk. Petitioner therefore alleges that the lower classification given her was arbitrary and unlawful and that she should have been given the grade and in law must be regarded as having held the position as supervising stenographic clerk from the date of her inclusion in the civil service, December 20, 1934.

Details following her classification are that she applied for reclassification and that thereafter the personnel board asked that all those who desired reclassification present their petitions to the board. No action was taken upon the petitions thus submitted to the board until January 7, 1939, when the state personnel board classified petitioner's position as that of supervising stenographer clerk, and declared that her title to that rank should relate back to the time at which she was "blanketed in" to the civil service, December 20, 1934.

Upon the basis of this action by the personnel board petitioner claims that from December 20, 1934, to January 7, 1939, she should have been paid successively increasing sums per month instead of the $110 which she was receiving when first called to the civil service and was paid until January 8, 1939, when she was given the classification to which she was entitled and for which she has since been paid $180 per month.

It will appear from the foregoing that petitioner is now holding the classification to which she claims she is entitled and is receiving the salary appropriate to that position. It will appear also that petitioner had never been, nor given the grade and salary of supervising stenographer clerk until January 7, 1939. It may be admitted that under the allegations of the petition, petitioner should have been so classified within a reasonable time after December 20, 1934, but she was not so designated. It cannot be contended, and petitioner does not so contend, that the constitutional amendment itself and by its own terms so classified her; what she does contend is that in the facts stated in the petition the amendment made it the duty of the board to so classify her.

[1] To give petitioner a right to the relief prayed for, and to establish her status as a supervising stenographer clerk from the date of her inclusion in the civil service, petitioner relies upon the order of the personnel board of January 7, 1939, but the board had no such power as it assumed in that order and its effort to make its order of that date retroactive was beyond its power. This conclusion is abundantly supported by the case of Heap v. Los Angeles, 6 Cal.2d 405, 57 P.2d 1323, although the attempted exercise of the power of reconsideration and retroaction in that case had much more to support it than has the action of the board before us.

[2] The petitioner here is seeking to recover the full salary of a supervising stenographer clerk less what she has already received from the date of her adoption into the civil service, December 20, 1934. In this she is supported by the order of the board of January 7, 1939. The board in this order attempted to give petitioner the status of supervising stenographer clerk from the very moment of the effective life of the constitutional amendment. This is contrary to the amendment itself. This amendment states that when persons in the position of the petitioner were to be "blanketed" into the civil service, that they should "continue" to hold positions under which they were to come

into the civil service, and such positions which they were to continue to hold were to be held until the board should "give each such person such class or grade as it may deem just". Clearly, therefore, when the unclassified employees of the state were "blanketed" into the civil service they came in with the salaries which they were then getting and they were to continue to receive such salary until the board should, as it might "deem just," give them the class and grade appropriate to their work. Stephens v. Clark, Cal.Sup., 106 P.2d 874. So when the board attempted to give the petitioner retroactively a salary higher than that which she was receiving when she entered the civil service, it acted in clear excess of its authority.

[3, 4] It is equally clear that in attempting any retroactive authorization of salary it was equally without authority. The state personnel board is a body of special and limited jurisdiction. It has no powers except such as the law of its creation has given it. If it has power to increase the salary of petitioner, retroactively, it would unquestionably have the power to lower it and require one in the position of petitioner to refund her excess receipts. From what date could the salary in this case be retroactively increased? Not to the date of the amendment as we have seen. Should it have been to July 8, 1935, when as contended for by petitioner her position was improperly classified? But the fact that her position was improperly classified on a certain date gave petitioner no right. If the board had looked into her position with a view to giving her the proper classification it might have taken months for the board to have reached its conclusion. In the circumstances of this case the only effect of the attempted order of the board of date January 7, 1939, was to give to the petitioner the money demanded in this action. This so far as the board is concerned would have been a pure gift which of course it had no power to make. At best it was an effort of the board to pay an equitable claim, a matter beyond its jurisdiction.

[5] To give the personnel board the power which they attempted to exercise here would be to unsettle the whole civil service of the state, to open the door to favoritism; to the exercise of political pressure, and personal solicitation. Sound public policy forbids such a construction of the civil service laws of the state. It is clear that petitioner had no legal title to her classification, the classification actually did not exist until it was made January 7, 1939. The most that can be said from the facts stated in the petition is that petitioner had a legal claim or right to have the legal title given to her within a reasonable time after December 20, 1934.

[6] A salary is an incident to an office or employment. "At common law, the salary annexed to a public office is incident to the title to the office." Chubbuck v. Wilson, 151 Cal. 162, 90 P. 524, 527, 12 Ann.Cas. 888.

[7] "Where a de facto officer is in possession of an office, discharging its duties under color of right, a person claiming to be a de jure officer, entitled to possession of the office, cannot maintain an action against the state or other governmental body for the emoluments of the office without first establishing his right to the office by direct proceedings." 46 Corpus Juris, 1028, § 278; City of Oakland v. Lyckberg, 95 Cal.App. 71, 272 P. 606. The same rule unquestionably applies to public employees holding positions such as that of petitioner.

It might be within the power of the board to make an order correcting a previous order to make the latter state correctly what has been done, or to retroactively regulate precedence or seniority, but in that way to give a person a classification and then to provide that the salary of that position should be paid to such person for a long period during which she did not hold that position and did not have a legal title to it, seems clearly beyond the power of the board.

[8] A statute might provide otherwise as section 936 of the Political Code does in certain cases, but there is no statute in this case which attempts to change the rule of the common law. Petitioner was not a supervising stenographer clerk until she was made one by the personnel board January 7, 1939. Before that time the most that can be said of her was that she should have been so named, and was legally entitled to such a designation. But she was not given the position and did not hold the title to it until it was given to her as above stated. Stephens v. Clark, supra. Since that time she has held the position, enjoys the classification, and has been re-

ceiving the salary which is attached to it. The petitioner therefore has no legal grievance which can be relieved against in this proceeding. In view of the foregoing we do not deem it necessary to consider the several other points urged by respondent.

The judgment is affirmed.

ERRECA v. WESTERN STATES LIFE INS. CO. et al.

Civ. 6478.

District Court of Appeal, Third District, California.

Feb. 17, 1941.

As Modified on Denial of Rehearing March 19, 1941.

Hearing Granted April 17, 1941.

1. Insurance 🔑665(5)

In action for "total permanent disability" compensation under life insurance policy insuring plaintiff as a farmer, evidence that he was unusually active and efficient farmer, skilled and trained for no other occupation, personally attended to every detail of conducting, managing and operating several farms for many years, and after sustaining certain injuries was unable to perform any substantial portion of such work, but was required to employ his son to carry it on, was sufficient to support trial court's findings and judgment for plaintiff, notwithstanding his mental activity and occasional discussions of unimportant incidents relating to farming enterprise with his son.

See Words and Phrases, Permanent Edition, for all other definitions of "Total Permanent Disability".

2. Insurance 🔑146(1)

Insurance policies, like other written contracts, should be interpreted by consideration of entire document and purposes sought to be attained thereby, so as to give effect to parties' intention, as expressed in language of instrument reasonably construed.

3. Insurance 🔑516

An insured's ability to perform slight or inconsequential acts in connection with his business does not defeat his right to compensation for "total permanent disability" under life insurance policy, if he is unable to do any substantial part of his regular work.

4. Insurance 🔑146(2)

The meaning of disability clauses in insurance policies must be determined largely from language of contract itself, interpreted in light of particular circumstances of each case.

5. Insurance 🔑516

"Total disability" within insurance policy does not mean absolute physical inability to transact any kind of business pertaining to insured's occupation, and exists if he is not able to do any substantial portion of his work, though he is able to perform a few occasional or trivial acts.

See Words and Phrases, Permanent Edition, for all other definitions of "Total Disability".

6. Insurance 🔑516

"Total disability", contemplated by disability clause of life insurance policy, does not mean state of absolute helplessness, but such disability as renders insured unable to perform all substantial and material acts necessary to prosecution of his business or occupation in customary and usual manner, and his ability to perform some inconsequential, trivial or incidental duties connected with his usual employment or occupation does not preclude recovery under such clause.

7. Insurance 🔑516

A man insured as farmer or one making his living solely by manual labor under life insurance policy providing for payment of total permanent disability benefits on proof that insured is wholly incapacitated by bodily injury or disease, preventing him from engaging in any occupation or performing any work for remuneration or profit, is deemed "totally disabled", if unable reasonably to earn substantial remuneration from any other available occupation as result of injuries or ailments preventing him from performing his usual work or following some other lucrative occupation, though he may be able to perform occasional unimportant, inconsequential or trivial details of his accustomed work.

See Words and Phrases, Permanent Edition, for all other definitions of "Totally Disabled".

8. Appeal and error ⟹1008(1)

In action for total permanent disability compensation under life insurance policy, where facts in evidence presented close question as to whether plaintiff was totally and permanently disabled, determination thereof was sole province of trial judge, with whose conclusion appellate court may not interfere.

9. Appeal and error ⟹931(1)

In action for total permanent disability compensation under life insurance policy, when reasonable minds may differ as to whether facts in evidence show that plaintiff is so disabled from injury or disease as to prevent him from performing all material parts of his employment or engaging in any other available lucrative pursuit, disability clause of policy must be liberally construed by appellate court in support of judgment for plaintiff.

10. Insurance ⟹146(3)

Uncertainty, arising from conflicting provisions in total permanent disability clause of life insurance policy that disability shall be presumed to be permanent after continuous existence thereof for three consecutive months and that, on failure to furnish proof of insured's continued disability when demanded by insurer, or, if it appears on medical examination of insured that he is no longer wholly disabled, no further premiums shall be waived nor income payments made, must be resolved against insurer.

11. Insurance ⟹516

A specific declaration in life insurance policy, providing for payment of total permanent disability benefits, that disability which has existed for stated time shall be presumed to be permanent, creates conclusive, indisputable presumption that such disability is continuous, not merely temporary.

12. Courts ⟹91(1)

Where state Supreme Court denied hearing in case wherein District Court of Appeal held that specific declaration in life insurance policy, containing total permanent disability clause, that disability should be presumed permanent after its existence for stated time, created conclusive, indisputable presumption of continuous, not merely temporary, disability, another District Court of Appeal is bound by such decision in later case involving same question.

13. Insurance ⟹549

Under life insurance policy containing total permanent disability clause, providing that insured's disability should be presumed to be permanent after its continuance for three months and that no further premiums should be waived or income payments made, if it appeared from medical examination, which policy authorized insurer to demand at any time, that insured was no longer wholly disabled, conclusive presumption is confined to permanency of ailments and inapplicable to question whether insured continues to be totally incapacitated, so as to entitle insurer to demand subsequent medical examination of insured.

14. Insurance ⟹549

An insured did not waive his right to total disability payments under life insurance policy by refusing to submit to further medical examination demanded by insurer after denying liability for such disability.

Appeal from Superior Court, Merced County; J. D. Garibaldi, Judge.

Action by Martin Erreca against the Western States Life Insurance Company and another for total permanent disability compensation under a life insurance policy. Judgment for plaintiff, and defendants appeal.

Affirmed.

C. Ray Robinson, of Merced, and Downey, Brand & Seymour and Frederic R. Pierce, all of Sacramento, for appellants.

D. Oliver Germino, of Los Banos, and F. M. Ostrander, of Merced, for respondent.

THOMPSON, Justice.

The defendants, Western States Life Insurance Co. and California-Western States Life Insurance Co., have appealed from a judgment of $2,300 which was rendered against them on account of compensation for "total and permanent disability" of the plaintiff, under the provisions of a life insurance policy held by him. It is contended the findings and judgment are not supported by the evidence for the reason that the plaintiff is not entirely and permanently disabled from performing all remunerative work as that term is defined in the policy.

June 16, 1923, the plaintiff was insured with the Western States Life Insurance Company, for $10,000, upon which policy he paid premiums of $240.30 per year for fifteen years. The obligations of the policy were assumed by California-Western States Life Insurance Company. The contract provides that if the insured becomes "totally and permanently disabled" prior to his sixtieth birthday, the company will pay the insured $200 a month for one year, and the sum of $100 per month thereafter during his disability. It is also provided that all premiums due on the policy after receipt of proof of the disability of the insured will be waived.

Those portions of the disability clause of the policy which are involved on this appeal read as follows:

"Disability benefits shall be effective upon receipt of due proof * * * before default in the payment of premium, that the insured became totally and permanently disabled subsequent to the delivery hereof and before the policy anniversary nearest his sixtieth birthday.

"Disability shall be deemed to be total whenever the insured becomes wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation, or performing any work whatsoever for remuneration or profit, and under this contract disability shall be presumed to be permanent when it is present and after the insured has been continuously so disabled for not less than three months. * * *

"Waiver of Premium Commencing with the anniversary of the policy next succeeding the receipt of such proof, the company on each anniversary will waive payment of the premium for the ensuing policy year. * * *

"If it appears that the insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made."

The plaintiff was insured as a "farmer". During all of his active years he was engaged in grain and stock farming. At and prior to the time of the accident which caused his disability, the plaintiff leased and personally operated six ranches in Merced county containing an aggregate area of 7,000 acres. One ranch was located at Chowchilla. It was a dairy farm operated by the plaintiff in partnership with another man, with whom he shared the profits and losses equally. All of the other farms were grain ranches. While there is some conflict of evidence, it appears that the plaintiff was an unusually active man who personally managed, superintended and operated his several ranches. He was nearly fifty-eight years of age when the accident occurred. He then weighed two hundred pounds. He was in excellent physical condition and in good health. He was trained for no other occupation than that of a farmer. He was accustomed to ride horseback over his several ranches to see that the farm work was properly performed. Sometimes he traveled to the more remote ranches in an automobile. He personally supervised all work of various kinds upon all of the farms. He determined when and how the discing, plowing, harrowing, planting, cultivation, irrigation, and harvesting should be done. He personally assisted in the performance of much of that work when his aid was required. He inspected the land and tested the soil to determine the quantity of moisture present and he designated the location of particular crops. He directed and helped to construct levees and ditches for irrigation purposes. He purchased, overhauled and sometimes repaired machinery used on the land. He repaired fences and buildings. He often drove tractors, plows and other farm machinery. He bought the seed and feed for stock and marketed the products of the soil. In fact, he was the sole manager of all the details of each of the several farms, except the dairy ranch which his partner operated with his aid.

February 2, 1938, the plaintiff was thrown from a horse and his right leg was broken at the knee. The tendons of that leg were also seriously impaired. That accident required him to remain in a hospital for two months. He was thereafter forced to go about on crutches for several weeks. He then moved about with difficulty by the use of a cane. He never regained the entire use of his right leg. His weight increased to 235 pounds. He can now walk only with the use of a cane. He can stand on his feet for brief periods only of about twenty minutes at a time. He cannot now ride a horse. The circulation in his limbs is permanently obstructed. He testified that the right leg "is dead, half-way dead". Soon after the accident occurred the plaintiff suffered a pulmonary embolism from a clot in the lung. He was afflicted with chronic varicose veins resulting in numerous abscesses. There were open lesions and ruptured varicose ulcers on his limbs.

He was required to keep his lower legs constantly bandaged. He was confined to the house and sometimes to his bed because of his afflictions. He was utterly incapacitated from performing any substantial part of his former duties in managing and conducting his farming enterprises. In reply to specific interrogatories regarding his ability to perform his former ordinary farm work, he emphatically asserted that he was utterly unable to carry on the management of the farms or to personally perform any of the duties incident thereto. Summing up his disability as the result of his afflictions, Doctor Leroy R. Hillyer testified that, "I would say that he would certainly not be able to perform any manual labor on the farm".

As a result of plaintiff's disability he was compelled to and did abandon his management, control and personal assistance in farming his several tracts of land. He employed his son John, who was then twenty-nine years of age, and who had been formerly working for him on one of the farms, as manager and overseer of the ranches. It is true that his son sometimes conferred with him regarding certain transactions incident to the operation of the farms. But the son assumed the entire management and control of the farming enterprise. On cross-examination the plaintiff admitted that he was able to confer regarding the renewal of leases, the negotiation of loans and the signature of bank checks. There is evidence that "he could perform all the secretarial work connected with the farm". But he was unable to perform any manual work, or to inspect the land or direct the farm work as it progressed. The secretarial work in connection with the farms was unimportant. It does appear that he occasionally rode out to some of the farms in his automobile, but he was unable to perform any substantial part of his former work or continue his management of the farms.

The appellant contends that the findings and judgment are not supported by the evidence for the reason that the insured is not "totally and permanently disabled" from performing any and all character of work for remuneration, and that the plaintiff waived his right of recovery, under the disability clause of his policy, by refusing to permit a medical examination of his physical condition by a representative of the insurance company.

[1] After a careful reading of the entire record on appeal, we are of the opinion the findings and judgment are adequately supported by the evidence. Fairly construed, it appears that the plaintiff was insured against total disability as a farmer. He was an unusually active and efficient grain and stock farmer. He was skilled and trained for no other avocation. For many years he had personally attended to every detail of conducting, managing and operating a farming enterprise consisting of several grain ranches and one dairy farm. After sustaining a broken leg and injured tendons, together with other ailments, including chronic varicose veins, ruptured lesions, pulmonary embolism of the lung, excess weight, difficulty in breathing and loss of energy, he was unable to perform any substantial portion of the work or management necessary to the conducting of his farming enterprise. He was required to and did employ his son to carry on the work which he previously performed. He utterly abandoned the management of his ranches. He took no personal part in performing the manual work, in directing the labor of employees or in operating the farms. He was capable of performing no manual labor whatever. It is true that he occasionally rode in an automobile to some of the farms, but he was unable to inspect the land or to direct the labor in progress, and he made no attempt to do any work or to direct the operations on any of the ranches.

It appears that he retained his mental faculties and that he was capable of discussing with his son some of the affairs of the enterprise, including the renewal of leases, the negotiation of loans and the handling of their bank account. But it does not appear that he actually participated in such negotiations, except that he did sometimes talk informally with his son about the incidental affairs of the ranches. He maintained a joint bank account with his son, who, we assume, actually handled that account. He was not trained or qualified to conduct any other remunerative work. In support of the judgment, we are of the opinion the mental activity of the plaintiff and his occasional discussions with his son of unimportant incidents with relation to the farming enterprise do not deprive him of the right to recover compensation for total permanent disability as that term is defined in the policy and as it was intended by the parties to be construed.

The policy provides that when the insured becomes "totally and permanently disabled" after the policy anniversary nearest his sixtieth birthday, he may recover designated disability benefits, upon proof that he is wholly incapacitated "by bodily injury or disease so that he is prevented thereby from engaging in any occupation, or performing any work whatsoever for remuneration or profit".

[2] It is true that insurance policies, like other written contracts, should be interpreted by consideration of the entire document and the purposes sought to be attained thereby, so as to give effect to the intention of the parties as expressed in the language of the instrument reasonably construed. Ogburn v. Travelers Ins. Co., 207 Cal. 50, 276 P. 1004; 14 Cal.Jur. 442, § 23. It is said in First National Bank of Monrovia v. Maryland Casualty Company, 162 Cal. 61, at page 70, 121 P. 321, at page 325, Ann. Cas.1913C, 1170, that "where the terms of a policy are plain and explicit, the court can indulge in no forced construction of the contract to cast a liability upon the insurance company which it has not assumed".

[3-5] The foregoing disability clause of an insurance policy has been frequently construed to mean that when an insured person is so incapacitated from bodily injury or disease as to prevent him from substantially doing the work he was accustomed to perform, and when he is thereby so disabled as to render him unfit to earn substantial remuneration by following any other occupation for which he is qualified, he may be deemed to be totally disabled so as to entitle him to compensation. The policy specifically provides that after proof of total disability which has continued uninterruptedly for a period of three months, the insured person is presumed to be permanently disabled. The authorities are almost uniform in holding that the ability of an insured person to perform slight or trivial acts incident to his ordinary business, or his possession of physical or mental ability qualifying him to perform acts in another occupation which he is not trained to conduct and for which he has no reasonable opportunity to prepare himself, do not necessarily deprive him of the right to compensation. The ability to perform slight or inconsequential acts in connection with the business of an insured person may not defeat his compensation if he is not able to do any substantial part of his regular work. Fitzgerald v. Globe Indemnity Company of New York, 84 Cal.App. 689, 697, 258 P. 458; Wright v. Prudential Insurance Company of America, 27 Cal.App.2d 195, 215, 80 P.2d 752; Hill v. New York Life Insurance Company, 38 Cal.App.2d 627, 101 P.2d 752; Martin v. Postal Union Life Insurance Company, 31 Cal.App.2d 329, 87 P. 2d 897; Taylor v. Southern States Life Ins. Co., 106 S.C. 356, 91 S.E. 326, L.R.A. 1917C, 910; 6 Cooley's Briefs on Insurance, 2d Ed., p. 5543; 29 Am.Jur. p. 872, § 1161. It is true the meaning of disability clauses of insurance policies must be determined largely from the language of the contract itself, interpreted in the light of the particular circumstances of each case. The term "total disability" is defined in 6 Cooley's Briefs on Insurance, 2d Ed., at page 5543. That text reads:

"Total disability, within an accident policy, does not mean absolute physical inability to transact any kind of business pertaining to insured's occupation; and it exists though he may be able to perform a few occasional or trivial acts, if he is not able to do any substantial portion of his work."

[6] Likewise the text found in 29 American Jurisprudence, at page 872, reads: "The rule prevailing in most jurisdictions is that the 'total disability' contemplated by a sickness or accident insurance policy, or the disability clause of a life insurance policy, does not mean, as its literal construction would require, a state of absolute helplessness, but contemplates rather such a disability as renders the insured unable to perform all the substantial and material acts necessary to the prosecution of his business or occupation in a customary and usual manner. The fact that the insured is able to perform some inconsequential, trivial, or incidental duties connected with his usual employment or occupation does not preclude recovery under a total disability provision."

In the case of Taylor v. Southern States Life Insurance Company, supra, it was held that a farmer might be wholly and permanently disabled from performing farm work, even though he was still able to drive a team to his farm after the wagon had been loaded; that he sometimes rode with a boy in delivering milk from his dairy cows; that he directed the feeding of cows, and that he arranged for the purchase of necessary farm products. In that case the policy contained the following clause:

"If the insured shall furnish to the company due proof that he has become physically disabled, and wholly, continuously, and permanently incapacitated from carrying on any gainful occupation, * * *." he shall be entitled to compensation under the disability clause."

The supreme court of South Carolina said in regard to the sufficiency of the evidence to show total disability:

"The plaintiff is a man of 60 years; he is a three-horse farmer; he never learned to read and he only learned to write his name; and he cannot do that now; he was suddenly stricken down during January while doing manual labor * * *; he has never since the attack been able to do farmwork. * * * the plaintiff testified that when his wagon was loaded he drove it out to his farm; that he sometimes rode in a buggy with a boy who delivered milk for him; that he looked after the feeding of the cows; that he ran a dairy business with four cows with the help of a 14 year old boy; that he made arrangements for farm purchases, etc. * * *

"An illiterate three-horse farmer, dependent in large measure on his own strong arm for a livelihood, accustomed and trained only to bodily labor, made by disease suddenly and generally unfit for bodily labor, comes within the meaning of the contract; he is deemed totally disabled when he is no longer able to do his accustomed task, and such work as he has only been trained to do, and upon which he must depend for a living."

From the foregoing citations, which appear to be in accord with the weight of authority, we conclude that the question as to what constitutes total disability, according to the intention of the parties expressed in the definition included in the policy which is involved in this action, depends on the circumstances of each particular case. In determining that the question of total disability, which was involved in the Taylor case, should be presented to the jury, the learned judge wisely said:

"I think every case will have to stand on its own bottom as to disability. I am almost prepared to say that what might be disability to one person might not be to another."

[7] The foregoing language merely means, as applied to the facts of this case, that if a man is insured as a farmer, or as one who makes his living solely by means of his manual labor, and he is unable to reasonably earn substantial remuneration from any other available occupation, if he is injured or acquires ailments which prevent him from performing his usual work, or from following some other lucrative occupation, even though he may be able to perform occasional unimportant, inconsequential or trivial details of his accustomed work, he is deemed to be totally disabled so as to entitle him to compensation. Even though the policy in the present case has attempted to define the term "total disability", it has not included all of the elements which may be necessary under all circumstances to determine absolutely whether an insured person is or is not totally disabled. No hard and fast rule can possibly adequately cover all classes, conditions and circumstances necessary to definitely determine whether one is actually totally disabled.

Many other cases have held that farmers were totally disabled so as to entitle them to compensation under similar clauses of insurance policies, notwithstanding the fact that they could perform some unimportant work incidental to their usual occupation, among which are: National Life & Acc. Ins. Co. v. Bradley, 245 Ky. 311, 53 S.W. 2d 701; Mutual Life Ins. Co. v. Dowdle, 189 Ark. 296, 71 S.W.2d 691; Foglesong v. Modern Brotherhood, 121 Mo.App. 548, 97 S.W. 240; Colovos v. Home Life Ins. Co., 83 Utah 401, 28 P.2d 607; Manuel v. Metropolitan Life Ins. Co., La.App., 139 So. 548; Davis v. Midland Casualty Co., 190 Ill. App. 338. A long list of cases involving the question of total disability of farmers may be found in 24 A.L.R. 221, note; 79 A. L.R. 869, note, and 98 A.L.R. 814.

[8] We may assume that reasonable minds may differ as to whether the respondent in this case is deemed to be totally and permanently disabled under the circumstances which are here involved. It may be said to be a close question on the facts adduced. But under such circumstances it was the sole province of the trial judge to determine whether the plaintiff is totally disabled so as to entitle him to compensation under the provisions of the policy. We are of the opinion we may not interfere with that conclusion. Bochner v. Equitable Life Assurance Society of United States, 4 Cal.App.2d 670, 41 P.2d 365.

There was an effort on the part of the appellant to prove that the plaintiff was physically capable of performing manual labor by showing that he went duck and dove hunting with a neighbor on several occasions. We are of the opinion that fact fails to establish substantial evidence that he was physically able to perform any of the work which he was formerly accustomed to do. It appears that in a marsh, on the premises of the neighbor, there was a duck-blind consisting of a hole four feet in diameter and three and a half feet deep, which was surrounded by bulrushes. A stool had been placed in that blind to accommodate the plaintiff. He admits that on one occasion he accompanied his neighbor to that blind in an automobile, and with great difficulty he reclined on the ground and slid into the hole, sitting on the stool, from which he fired at passing ducks. He did not stand on his feet as the ducks flew by. It does not even appear that his aim was good enough to wing a single bird. In reply to the question as to how many times the plaintiff went duck hunting in 1938, after his leg was broken, he said, "maybe I went once or twice". It also appears that on four or five occasions in 1939, the plaintiff drove his automobile to a levee on his land, where he parked the car and sat upon the levee shooting at doves. He said in that regard: "I drove the automobile right close * * *, and you can shoot the doves right there." He admitted that on such occasions he sometimes walked "a few hundred yards". We think the hunting episodes are of little value in determining whether the plaintiff was actually totally or permanently disabled.

[9] In support of the contention that the plaintiff in this case is not totally and permanently disabled, the appellant strongly relies on an opinion recently rendered in the case of Mutual Life Insurance Company of New York v. King, a Tennessee case, decided December 14, 1940.[1] In some respects that case is similar to the present one. It was based on a disability clause of a policy reading almost the same as the one involved in this case. A judgment finding that the insured was totally disabled was reversed on appeal. We believe that case may be distinguished from this one, on the facts. If it be deemed that the facts of the two cases are substantially the same, we are still of the opinion the King case is not controlling to the extent of requiring us to reverse the judgment in this case, in view of the weight of authority upholding a liberal construction of a disability clause of a policy in support of a judgment when reasonable minds may differ as to whether the facts show that an insured person is so disabled from injury or disease as to prevent him from performing all of the material parts of his employment and from engaging in any other available lucrative pursuit.

In the present case Mr. Erreca was insured as a farmer. He not only personally superintended and managed his own ranches, but he actually participated in the labor incident thereto. His manual labor was an important and necessary part of his employment. After his leg was broken and his ailments were incurred, he could neither perform any of the material manual labor nor could he continue to supervise or manage the operating of the ranches. He was compelled to and he did abandon both the actual work and the management of the ranches. He thereafter employed his son to perform all of the material part of the work and management formerly performed by him.

In the King case, the plaintiff was insured as a "farmer and stock raiser". It does appear that he did, to some extent, act as managing agent for a partnership composed of himself and his five brothers, who owned 1,700 acres of grain and stock land which they leased to other tenants who raised thereon grain, tobacco and cattle. The opinion says in that regard: "He rents the grain land to eight or ten tenants who perform the substantial and material acts in the cultivation and harvesting of the crops." The plaintiff and his five brothers divided the proceeds of the several ranches with their tenants. The plaintiff admitted that he managed and directed the farming operations of the partnership enterprise. He sustained a dislocated hip and was thereafter prevented from walking or riding a horse, but was compelled to go about on crutches or in an automobile. Apparently his injury did not require him to give up his management of the partnership enterprise to any appreciable extent, although he could not thereafter perform any manual work. It did not prevent him from attending to most of his former duties. He never gave up his management of the enterprise. The court said that his business included the raising of blooded stock for breeding purposes. After his injury he continued to sell cattle, sheep and hogs. The purchasers came to his farm to buy them from him. He attended sales of his cattle at the stockyards. He accompanied purchasers in an automobile over his ranch, aiding them in locating and separating the desired stock. The farm accounts were kept in his name. After his accident, he continued to keep the accounts and to make periodical reports thereof. No physician testified that King suffered total permanent disability from his dislocated hip. Three physicians testified that he sustained only "a ten per cent disability to the leg". The appellate court found from the facts in that case "that the plaintiff is able to do the material act necessary to the prosecution of the insured's business or occupation (and substantially all the material acts) in (substantially) his usual and customary manner".

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[1] No opinion for publication.

In the present case, in spite of the serious conflict of testimony which exists, we think there is credible evidence that Mr. Erreca absolutely abandoned his personal operation and management of the ranches, employing his son to carry on that work for him, and that he was unable to perform any substantial portion of his former duties after he sustained the broken leg and acquired the other ailments.

The appellant insists that the plaintiff waived his right to disability payments by refusing to submit to subsequent medical examinations as provided by paragraph four of the special disability benefits clause of the policy. In determining the question of the asserted waiver of benefits, that paragraph should be read in connection with the preliminary paragraph, as follows:

"Disability benefits shall be effective upon receipt of due proof at the Company's Home Office, before default in the payment of premium, that the Insured became totally and permanently disabled subsequent to the delivery hereof and before the policy anniversary nearest his sixtieth birthday.

"Disability shall be deemed to be total whenever the insured becomes wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation, or performing any work whatsoever for remuneration or profit and under this contract disability shall be presumed to be permanent when it is present and after the insured has been continuously so disabled for not less than three months.

* * *

"4. Recovery from Disability—The Company may from time to time demand due proof of such continued disability, and any medical adviser of the Company shall be allowed to examine the person of the Insured in respect to any alleged permanent total disability, in the manner and at such times as the medical adviser may require but not oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if it appears that the Insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made."

With respect to the medical examination of the plaintiff the facts are that he was injured February 2, 1938; he incurred the varicose veins and other ailments shortly thereafter; he did submit to medical examinations at the request of the insurance company; June 7, 1938, he was examined by Dr. Neil J. Dau, who reported that he was then "totally disabled" and unable to perform any manual work; the company accepted the evidence adduced as satisfactory proof that he was permanently disabled, and paid disability compensation of $200 per month for five consecutive months, until October, 1938, pursuant to the terms of the policy. Sometime thereafter the company demanded that the insured again submit to a medical examination. He consented to that request, but the time for examination was postponed, and he failed to submit to another examination. We are not informed as to whether he actually refused to comply with their request. October 20, 1938, Dr. F. Harold Downing reported to the company that the insured was no longer totally and permanently disabled. Upon that report, and not for the assigned reason that the insured had refused to submit to a medical examination, further disability payments were refused. This suit was then commenced.

[10] We may concede that paragraph four of the disability clause of the policy is inconsistent with the paragraph preceding it. The last-mentioned paragraph definitely declares that "disability shall be presumed to be permanent" when the condition exists continuously for three consecutive months. On the contrary, paragraph four provides for the right of medical examination when demanded by the insurance company, and that, "upon failure to furnish such proof" no further premiums shall be waived, nor "income payments made".

Assuming that the language of the two paragraphs mentioned is conflicting, and therefore uncertain, under the well-established rule of construction, that uncertainty must be resolved against the insurance company. Dietlin v. Missouri State Life

Ins. Co., 126 Cal.App. 15, 25, 14 P.2d 331, 15 P.2d 188. It will be observed that the policy definitely declares that, upon acceptable proof that the disability of the insured has existed for three consecutive months, it will be "presumed to be permanent". That means that the disability is then conceded to be fixed, lasting and unchangeable as distinguished from temporary ailments. The conditions which led to the acknowledgment by the company of a permanent disability on the part of the insured was not only his broken leg, from which he never recovered, but also varicose veins, pulmonary embolism of the lung, excess weight, restriction of breath, etc. Even though a broken limb may not result in permanent disability, the other ailments would be more likely to do so. At least the company acknowledged permanent disability and paid compensation to the insured for five consecutive months on the theory that his disability was permanent.

[11, 12] The courts of California, and those of several other states have construed the same language in other insurance policies against the insurers by definitely holding that the specific declaration in the contract that after disability has existed for a stated time, it shall be presumed to be permanent. This creates a conclusive, indisputable presumption that the disability is continuous and not merely temporary. It is held that such a presumption is not disputable. Dietlin v. Missouri State Life Ins. Co., supra; 110 A.L.R. 631, note. It is true that there is a conflict of authorities upon that subject in some jurisdictions. But California and half a dozen other states have unequivocally upheld that doctrine. In the California case a hearing was denied by the Supreme Court. We are therefore bound by that decision.

The note in 110 A.L.R. at page 631, preceding the citation of authorities supporting the foregoing doctrine, declares in that regard:

"On this question there is a decided conflict among the authorities, some courts taking the view that the presumption created by the policy is conclusive, and that a disability which has lasted for the requisite period of time to render it presumably permanent within the meaning of the policy is nonetheless permanent, although it has since terminated; and that consequently an insured who has suffered such disability may, even after the termination thereof, recover benefits therefor as for permanent disability."

The Dietlin case from California, supra, is the first one cited under the preceding note.

[13] The appellants contend that the disability clause of the policy distinguishes between permanency of a disability and a condition of total disability which prevents the insured from performing any substantial work; that while the permanency of the ailment may be conclusively presumed to continue after it has lasted three months, the policy specifically authorizes the insurance company to demand, at any time, a medical examination, not more frequently than once a year; that if it appears from such examination "the insured is no longer wholly disabled" the subsequent premiums will again become due and the disability benefits will then cease.

Paragraph four of the disability clause is reasonably subject to that construction. But it seems inconsistent to say that the disability which is conclusively presumed to be permanent and lasting may subsequently be shown to be merely partial and not total, since the only disability contemplated by the policy in this case is total permanent disability. It may be reasonably asserted the only disability which, by the terms of the policy, is deemed to be permanent after it has lasted three months, is the total and permanent disability referred to in the contract. That construction would indicate that an irreconcilable uncertainty exists in the contract in that regard. As we have previously said, that uncertainty should be determined against the insurance company. However, we are disposed to accept the appellants' construction of the policy in that regard and hold that the conclusive presumption is confined to the permanency of the ailments and not to the question as to whether the insured continues to remain totally incapacitated. That construction would entitle the company to demand of the insured a subsequent medical examination. To be sure, such examination should be demanded and conducted in good faith. There is no evidence of bad faith on the part of the company in demanding a medical examination in this case.

[14] We are of the opinion the respondent did not waive his right to disability payments by refusing to submit to further medical examination for the reason that the appellants ceased to make disability payments after September 2, 1938, and on

October 26, 1938, notified the respondent in writing that "Your total disability has ceased. * * * We must now advise you that the income payment of $200.00 made you as of September 2, 1938, * * * must be the last on account of your present claim for total disabling benefits in accordance with the terms of your policy." The demand for medical examination was not made until after the company denied its liability.

The court found that paragraph V of the answer, which states that the plaintiff refused to submit to medical examination, was not true. The court further found that the insurance company, in its letter of October 26, 1938, disclaimed further liability for disability payments. There is ample evidence to support those findings. The letter from which we have previously quoted is clear and explicit in that regard. The demand that the insured submit to further medical examination was not made until after the company stopped disability payments and positively denied further liability. The plaintiff's right of action then accrued. It would be an idle and unnecessary act for the insured to submit to a medical examination after the company had absolutely denied its liability. That subsequent refusal was not a waiver of his right to recover payments which were otherwise due under the policy.

The judgment is affirmed.

I concur: TUTTLE, J.

17 Cal.2d 846

CUMMINS et al. v. BANK OF AMERICA N. T. & S. A.

L. A. 17033.

Supreme Court of California.
April 28, 1941.

1. Contracts 🔑143

Courts must construe agreements in their entirety and as written by the parties, without deletion or interpolation.

2. Mortgages 🔑114

On the question of amount due on bank's mortgage, the requirement in contract entered into by plaintiffs with bank for loan to construct a dwelling, to be insured under National Housing Act, that bank should procure written authorization from plaintiffs to make each respective progress payment to contractor prior to disbursement was not arbitrary, unusual, or inconsistent with terms of the transaction as a whole, particularly in view of fact that plaintiffs had waived giving of a completion and lien bond by contractor. 12 U.S.C.A. § 1701 et seq.

3. Mortgages 🔑463

In action against bank for breach of contract for loan to construct a dwelling, to be insured under National Housing Act, in that bank made progress payments to contractor without plaintiffs' written authorization as required by contract, wherein bank cross-complained for foreclosure of deed of trust, evidence failed to establish that plaintiffs ratified the payments. 12 U.S.C.A. § 1701 et seq.

4. Principal and agent 🔑166(1)

A "ratification", to be binding, must have been made with full knowledge of all material facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

5. Mortgages 🔑218, 415(1)

Where contract with bank for loan to construct a dwelling, to be insured under National Housing Act, required bank to procure written authorization from plaintiffs prior to making progress payments to contractor, bank's failure to procure plaintiffs' prior written authorization precluded it from foreclosing either for full amount allegedly due under deed of trust or for aggregate of progress payments actually made, but court, in exercise of its equitable powers, would allow bank to recover to extent that sums paid by bank to contractor were expended in the construction work. 12 U.S.C.A. § 1701 et seq.

6. Mortgages 🔑386

An action for foreclosure of a deed of trust is equitable in character and the court may exercise its broad powers to grant appropriate relief.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Fremont A. Cummins and another against Bank of America N. T. & S. A. for breach of contract in making progress payments to contractor building a house for plaintiffs without first procuring plaintiffs' written authorization, wherein the defendant cross-complained for a foreclosure of the deed of trust. From inadequate judgment for defendant on its cross-complaint, the defendant appeals.

Reversed with directions.

Louis Ferrari, of San Francisco, and Edmund Nelson and Hugo A. Steinmeyer, both of Los Angeles, for appellant.

Geo. D. Blair, of North Hollywood, and Willcox & Judson, of Los Angeles, for respondents.

GIBSON, Chief Justice.

The cross-complainant bank appeals from a judgment in its favor urging that the amount awarded to it and for which foreclosure of a deed of trust is decreed, is inadequate. The cause turns on the interpretation of written instructions as to the disbursement of a construction loan.

In 1936, respondents entered into a contract with one Sweet whereby he agreed to construct a dwelling for them at a cost of $7,200. Arrangements were made with appellant bank for a construction loan, to be insured under the National Housing Act, 12 U.S.C.A. § 1701 et seq. The respondents thereupon deposited with the bank the building contract, $720 in cash ($320 of which was to cover financing costs), and their note for $6,800 secured by deed of trust on the property. At the same time they advised the bank in writing that they were satisfied as to the financial responsibility of the contractor and requested that no completion and lien bond be required of him. They also gave written disbursement instructions, approved by the contractor, which, so far as here material, provide:

> "* * * You are authorized and instructed to pay to my contractor * * * the sum of $7200.00, payable in five equal payments at such times and subject to the conditions hereinafter set forth * * * (specifying five progress points in construction at which payments were to be made). My contractor will notify your office when the foundation trench is dug * * * in order that you may obtain Federal Housing Administration's inspection approval. In addition, said contractor will advise you when work has progressed sufficiently for each of the above-mentioned first four payments, in order that your appraisers may make inspection thereof before making the payments affected thereby. *The undersigned applicants will furnish your office with written authorization instructing you to make each respective payment prior to disbursement.*"

This appeal, as indicated, turns on the interpretation to be given to the italicized portion of the instructions. The bank made three progress payments, aggregating $4,320, to the contractor at appropriate stages of the work, but admittedly without the prior written authorization provided by the instructions. Shortly thereafter the contractor gave notice that he was insolvent. No further payments were made to him, and no attempt was made to complete the building. Neither were any payments made to the bank by respondents on their note. Mechanics' and materialmen's liens were filed on the property.

Respondents brought this action against the bank for damages alleged to have resulted from its breach of contract in making the progress payments without first procuring their written authorization. The bank answered and cross-complained for a foreclosure of the deed of trust. The trial court found against respondents on their complaint, and gave judgment for the bank on its cross-complaint, restricting recovery, however, to the portion of the progress payments which was actually expended by the defaulting contractor in the construction of the building, and sums expended for preservation of the premises. This was done on the theory that while the bank had made the payments in violation of the instructions requiring prior written authorization of the respondents, equitably it was entitled to credit for such amounts as actually went into the construction of the building. These expenditures served to increase the value of the property and the value of the bank's security. Accordingly, judgment of foreclosure was decreed in the bank's favor for $2,102.14. The bank appealed because of the asserted inadequacy of the amount of the judgment.

[1-4] The evidence is sufficient to support the findings. The disbursement instructions, whether construed alone or in the light of surrounding circumstances, required the prior written authorization of respondents as a prerequisite to progress payments. To construe the italicized provision in conformity with the bank's contention would be either to disregard the provision, or to read into it a qualification that such authorization would be furnished by respondents if requested by the bank. Courts must construe agreements in their entirety and as written by the parties, without deletion or interpolation. See authorities in 6 Cal.Jur., p. 258, sec. 165; p. 326, sec. 192. The trial court was warranted in concluding that nothing in the instructions or surrounding circumstances required the interpretation urged by the bank. The authorization requirement was not arbitrary, unusual, or inconsistent with the terms of the transaction as a whole, particularly in view of the fact that respondents had waived the giving of a completion and lien bond by the contractor. By reserving the right to authorize disbursements to him, respondents made it possible, if they so desired, to assure themselves prior to any disbursement that all claims for labor and materials had been paid and liens released. Neither can it be said that respondents' conduct afforded conclusive evidence of ratification of the progress payments. As stated in Promis v. Duke, 208 Cal. 420, 427, 281 P. 613, 615, "a ratification, to be binding, must have been made with full knowledge of all the material facts".

[5, 6] While concluding that failure to procure respondents' prior written authorization precluded the bank from foreclosing either for the full amount allegedly due under the deed of trust or for the aggregate of the progress payments actually made, the court below properly allowed recovery to the extent that sums paid by the bank to the contractor were expended in the construction work. An action for foreclosure of a deed of trust is equitable in character and the court properly exercised its broad powers to grant appropriate relief. The evidence and findings indicate, however,

that the court fell into error in computing the amount for which foreclosure should be decreed. We are unable to ascertain from the record the method by which it was determined that judgment should be in the amount of $2,102.14. In our opinion, that figure is less than the bank is entitled to recover. The evidence and findings disclose that of the $4,320 advanced to the contractor by the bank (without respondents' prior written authorization), the contractor actually expended in the construction work the sum of $2,739.23. The bank is entitled to this latter amount less $408.82 (which under the findings must be allocated to respondents' cash deposit), plus $24.50 and $326.25 (which under the findings were expended by the bank for a mechanics' lien report and for the care and preservation of the premises), making a balance of $2,681.16 due to the bank, rather than $2,102.14 as determined by the trial court. The bank states that if the trial court's interpretation of the disbursement instructions was correct, and we have determined that it was, then $2,681.16, as above computed, is the amount for which properly it should have judgment. Respondents make no convincing explanation of the figure $2,102.14, nor do they present any other computation.

In view of what has been said, the judgment is reversed with directions to the court below to amend paragraphs "III" and "VII" of its conclusions of law and to modify its decree so as to render judgment in favor of the bank for $2,681.16, for which amount the foreclosure should be ordered; each side to bear its own costs on this appeal.

We concur: SHENK, J.; CURTIS, J.; CARTER, J.; TRAYNOR, J.; EDMONDS, J.

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17 Cal.2d 814

CITY AND COUNTY OF SAN FRANCISCO v. SAN MATEO COUNTY et al.

S. F. 16074.

Supreme Court of California.

April 24, 1941.

Rehearing Denied May 22, 1941.

1. Taxation 🔑65

A wooden flume used to carry water to reservoirs of city for distribution to city's inhabitants was an "improvement" on land as contemplated by laws on taxation. St. 1939, p. 1277, § 105.

See Words and Phrases, Permanent Edition, for all other definitions of "Improvement".

2. Taxation 🔑204(2)

Provisions exempting property from general taxation must be strictly construed.

3. Taxation 🔑204(2)

The rule that provisions exempting property from general taxation must be strictly construed is not applicable when the property taxed belongs to a state or a municipal corporation, and a liberal construction should be followed, since the taxation of such property is the exception rather than the rule.

4. Constitutional law 🔑13

The object sought to be accomplished by an amendment to the Constitution by electorate was a highly important factor in ascertaining the intent of the electorate in adopting the amendment. Const. art. 13, § 1.

5. Taxation 🔑217

The purpose of the constitutional provision that lands and improvements located outside county, city and county, or municipal corporation, and taxable at time of acquisition by county, city and county, or municipal corporation, shall not be exempt from taxation, was to protect from loss of taxable properties those counties in which municipalities acquired property for the operation of various municipal projects. Const. art. 13, § 1.

6. Taxation 🔑220

"Improvements" constructed on property by a municipality, which are exempt from taxation under the constitutional provision that no improvements of any character constructed by any county, city and county, or municipal corporation shall be subject to taxation, are only such as are of an entirely new character and not theretofore existing in any form, since the words "construct", "constructed" and "construction" generally import the creation of something new and original that did not exist before, rather than replacement, repair or improvement. Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Construct" and "Construction".

7. Taxation ⚿220

Where city purchased wooden flume situated outside county in which the city was located, to carry water for distribution to the city's inhabitants, and thereafter city replaced the wooden flume with a concrete lined canal, with exception of a short wooden flume used as a spillway, the concrete flume was not an "improvement" "constructed" by the city, so as to exempt it from taxation under the Constitution. Const. art. 13, § 1.

8. Taxation ⚿421(1)

City could not complain that description of flume on assessment rolls of a county was insufficient, where city was not misled.

In Bank

Appeal from Superior Court, San Mateo County, Maxwell McNutt, Judge.

Action by the City and County of San Francisco against the County of San Mateo and others to recover tax paid under protest. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, for appellant.

Gilbert D. Ferrell, Dist. Atty., San Mateo County, and D. E. Sullivan, Asst. Dist. Atty., San Mateo County, both of Redwood City, for respondents.

CARTER, Justice.

The controversy presented by this appeal involves the extent to which the improvements on the land of a municipality lying outside its corporate limits are subject to taxation by the county in which such improvements are situated. There is no substantial dispute as to the facts. Prior to March 3, 1930, the Spring Valley Water Company, a public utility, owned two reservoirs, Crystal Springs and San Andreas, and the flume hereinafter mentioned, which facilities were used for impounding and distributing water for sale to the inhabitants of the City and County of San Francisco. Connecting these reservoirs was a flume consisting of two sections constructed of redwood. The dimensions of one section was 19,485 feet long, 28 inches high and 48 inches wide, with a capacity of carrying 17,500,000 gallons of water per day. It was constructed in 1900. The other section built in 1898, was 9,940 feet long, 4 feet high and 6 feet wide, with a capacity of carrying 70,000,000 gallons per day. The flume and reservoirs were situated in San Mateo county. The flume was used to transport water from Crystal Springs reservoir to San Andreas reservoir owned by said company. On March 3, 1930, the plaintiff acquired the reservoirs and flume from the Spring Valley Water Company and continued the use of those facilities for the sale and distribution of water to its inhabitants. In 1931, plaintiff replaced the wooden flume with a concrete lined canal with the exception of a wooden flume 80 feet long used as a spillway. The first section of said canal had a carrying capacity of 60,000,000 gallons per day and the second of 80,000,000 gallons per day. Plaintiff also constructed in addition to the above, a concrete lined ditch 3,125 feet long and a pipe line 800 feet long. The concrete lined canal and ditch are used for the same purpose and as a part of the same waterworks system, and follow substantially the same course as the wooden flume. For the fiscal year 1936–1937, defendant county assessed to plaintiff 5.75 miles of flume, and levied a tax thereon against plaintiff in the sum of $583.30. The property taxed was presumably the old wooden flume. The assessed valuation upon which the tax levy was based was the same as that fixed when the Spring Valley Water Company owned the wooden flume. Plaintiff paid the tax under protest and brought this action to recover it. The trial court rendered judgment for defendants and plaintiff prosecutes this appeal therefrom contending that it is not subject to the tax because the wooden flume no longer exists since its replacement by the concrete lined canal, and that said canal is not taxable under section 1 of article XIII of the Constitution of California as amended in 1914.

Prior to its amendment in 1914, section 1 of article XIII exempted all property belonging to a municipal corporation and city and county from taxation. By the vote of the electorate in that year, it was amended, and read:

"All property in the State except as otherwise in this Constitution provided, * * * shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. * * * And further provided, that property * * * such as may belong * * * to any county, city and county, or municipal corporation within this State shall be exempt from taxation, except such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; provided, that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any * * * city and county * * * not exempt from taxation, shall be assessed by the assessor of the county * * * in which said lands or improvements are located, * * *."

[1] Both the plaintiff and defendants treat the flume as an improvement on land as contemplated by the laws on taxation and as such it should be considered. Pasadena v. County of Los Angeles, 182 Cal. 171, 187 P. 418; Revenue and Taxation Code, sec. 105, St.1939, p. 1277. It must be conceded that the flume was, when it was acquired by plaintiff, subject to taxation, and being so, and lying outside plaintiff's corporate limits, it was subject to taxation after such acquisition in so far as its character is concerned as being property "subject to taxation at the time of the acquisition of the same by said * * * city and county".

[2-8] This brings us to the question of whether the concrete canal falls within that class of improvement designated in the Constitution as "of any character whatever constructed by any * * * city and county * * *", and is for that reason exempt from taxation. The ordinary rule of statutory construction, in respect to provisions exempting property from general taxation, is that such provisions must be strictly construed to the end that the exemption will be neither enlarged nor extended beyond the plain meaning of the language employed. Cypress Lawn C. Ass'n v. San Francisco, 211 Cal. 387, 295 P. 813; Bay Cities Transp. Co. v. Johnson, 8 Cal.2d 706, 68 P.2d 710. That rule is not applicable when the property taxed belongs to the state or a municipal corporation for the reason that the taxation of such property is the exception rather than the rule. A liberal construction is to be followed in such instances. Pasadena v. County of Los Angeles, 182 Cal. 171, 187 P. 418. Nevertheless the essence of the problem is the intent of the electorate in adopting the 1914 amendment to the Constitution, and the object and purpose sought to be accomplished by the amendment is a highly important factor in ascertaining that intent. It has been settled by judicial declaration since 1920 that the object of the 1914 amendment was to protect from the loss of taxable properties those counties in which municipalities acquire property for the operation of various municipal projects. Pasadena v. County of Los Angeles, supra. Prior to the amendment, the property of municipalities lying outside their corporate boundaries was exempt from taxation and that resulted in many instances in the county in which such property was situated losing large sources of revenue, a loss which it could ill afford. The aim of the amendment was to eliminate that condition. The object of the amendment was restated in 1930, in San Francisco v. County of Alameda, 5 Cal.2d 243, 245, 54 P.2d 462, 464:

"The undoubted purpose of the amendment was primarily to safeguard the tax revenues of smaller counties wherein large municipal corporations had purchased, or would acquire, extensive holdings and which would, except for the amendment, be exempt from local taxation. With the exemption in force, the serious financial embarrassment of the counties in which the holdings were situated was a reality. The argument sent to the electors of the state when the amendment was proposed also discloses that, unless the amendment be adopted, impending disaster would result to smaller counties by the removal from the local tax rolls of lands and water rights acquired and to be utilized in connection with the acquisition or extension of municipal water supplies such as were then in progress by the city and county of San Francisco and the city of Los Angeles. The adoption of the amendment was evidence that the acquisition of such lands and water rights should be without prejudice to the outlying counties whose existence from an economic and governmental standpoint depended upon the tax revenues derived therefrom. It was therefore provided that such lands and improvements thereon as were taxable at the time of the acquisition of the same by municipalities should continue to be taxable and should not be exempt from local taxation." This announced purpose of the amendment has evidently been satisfactory to the voters as no change has since been made. In furtherance of that purpose the intent of the amendment must have been to preserve for taxation not only the identical improvements existing on the property at the time of the acquisition of the property by the municipality, but also substitutes for the same and replacements thereof. The improvements constructed on the property by the municipality which are exempt are only such as are of an entirely new character and not theretofore existing in any form. In this connection it may be noted the words "construct, constructed and construction" generally import the creation of something new and original that did not exist before rather than replacement, repair or improvement. Platt v. San Francisco, 158 Cal. 74, 92, 110 P. 304; Cabell v. City of Portland, 153 Or. 528, 57 P.2d 1292, 1297; Board of Supervisors v. State Highway Commission, 188 Miss. 274, 194 So. 743, 748; Carlsen v. Kitsap County, 124 Wash. 155, 213 P. 930. Otherwise by merely repairing, enlarging or replacing existing improvements, the county in which the property was located would lose the tax revenues formerly received from such improvements, while the municipality would be enjoying the same use and benefits from the improvement as it did prior to the replacement, at least to the extent of the value of the improvement as it originally existed. While the concrete canal in this case is of larger dimensions and has a greater capacity than the wooden flume, it is substantially the same improvement. It is used for the same purpose and is a part of the same waterworks system. Both are used as conduits for transporting water. It cannot fairly be said that the concrete canal is different in character than the wooden flume. For these reasons it must be concluded not only that the concrete canal is not an improvement constructed by the plaintiff and exempt from taxation within the meaning of the Constitution, but also that the improvement taxed was in existence when the tax was levied. The improvement was in existence at the time the waterworks system was acquired by plaintiff, but it is a concrete canal now instead of a wooden flume. Plaintiff cannot complain that the description of the flume on the assessment rolls is insufficient inasmuch as it has not been misled. It unquestionably knew what property was assessed to it. Blinn Lumber Co. v. City of Los Angeles, 216 Cal. 474, 14 P.2d 512, 84 A.L.R. 1304. The clear intent and purpose of the 1914 amendment to the Constitution has been accomplished.

The judgment is affirmed.

We concur: SHENK, J.; TRAYNOR, J.; CURTIS, J.; EDMONDS, J.

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17 Cal.2d 827

NATIONAL RESERVE CO. OF AMERICA v. METROPOLITAN TRUST CO. OF CALIFORNIA et al.

L. A. 17753.

Supreme Court of California.

April 24, 1941.

Rehearing Denied May 22, 1941.

1. Assignments ⚷41

Where an instrument, executed by the owner of a thrift certificate, when read in its entirety, was in form and language an assignment of such certificate, the validity of such assignment was not affected by additional clause constituting any officer of assignee company attorney-in-fact for collection of certificate, nor by fact that granting clause did not name the assignee.

2. Assignments ⚷89

An assignment of a thrift certificate, which provided that assignee should credit all proceeds received by it from certificate to the purchase price of an investment certificate sold by assignee to assignor, was in essence an "assignment for collection".

See Words and Phrases, Permanent Edition, for all other definitions of "Assignment for Collection".

3. Assignments ⚷54, 80, 89, 121

An assignment of a chose in action for collection vests the legal title in the assignee, regardless of whether any consideration was paid therefor, and enables the assignee to maintain a suit on the chose in action in his own name, even though the assignor retains an equitable interest in the thing assigned.

4. Assignments ⚷80

Where granting clause of assignment transferred all assignor's right, title and interest in a thrift certificate issued under a trust indenture, the powers of assignee were not limited solely to collection of such dividends as might be received on the certificate through a liquidation of the existing trust collateral, but the cause of action for breach of the trust indenture under which certificate was issued was also transferred to assignee.

5. Assignments ⚷72

The granting clause of an assignment, whereby all right, title and interest of assignor in certain property are transferred without limitation, is controlling over ambiguous recitals in preamble of assignment.

6. Assignments ⚷80

A provision in assignment for collection of thrift certificate, whereby assignee could re-assign certificate, if no further collections could be made thereon, and assignor could demand a re-assignment at will, limited only the possible duration of the assignment and not the extent of the rights transferred thereby, and did not preclude assignee from maintaining action for breach of indenture of trust under which thrift certificate was issued, where no demand for re-assignment had been made by assignor.

7. Assignments ⚷80

The statement in assignment for collection of thrift certificate that assignment was made "for the purposes hereinabove stated, and for none other", did not preclude assignee from maintaining an action for breach of trust indenture under which thrift certificate was issued, since such statement was not a limitation upon the rights assigned, but simply a requirement that moneys collected be applied to the purposes provided for in assignment.

8. Assignments ⚷72

In determining what rights or interests pass under an assignment, the intention of the parties, as manifested in the instrument, is controlling.

9. Assignments ⚷80

An unqualified assignment of a contract or chose in action, with no indication of the intent of the parties, vests in the assignee the assigned contract or chose and all rights and remedies incidental thereto, including certain ancillary causes of action arising out of the subject of the assignment and accruing before the assignment is made.

10. Assignments ⚷80

Unless an assignment specifically or impliedly designates them, accrued causes of action arising out of an assigned contract, whether ex contractu or ex delicto, do not pass under the assignment as incidental to the contract, if such causes of action can be asserted by the assignor independently of his continued ownership of the contract and are not essential to a continued enforcement of the contract.

11. Assignments ⚷80

Where an accrued cause of action cannot be asserted apart from the contract out of which it arises or is essential to a complete and adequate enforcement of the contract, such cause of action passes with an assignment of the contract as incidental thereto.

12. Assignments ⚷80

Where an assignor, by express provision of assigned contract, is denied the right to assert an accrued cause of action after he has assigned over his interest in the contract, the right to sue on such cause of action passes to the assignee.

13. Assignments ⚷80

Under an assignment for collection of a thrift certificate issued under a trust indenture, which specifically provided that ownership of a certificate secured by the indenture should be a condition precedent to maintenance of action for violation of a covenant thereof, a cause of action for breach of the trust indenture, which had accrued prior to execution and delivery of assignment, passed to the assignee.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by the National Reserve Company of America against the Metropolitan Trust Company of California and Frank C. Mortimer to recover damages for alleged breach of a trust indenture. From an adverse judgment, plaintiff appeals.

Judgment reversed.

For prior opinion, see 105 P.2d 933.

Hill, Morgan & Bledsoe, Charles P. McCarthy, and William L. Baugh, Jr., all of Los Angeles, for appellant.

Wm. H. B. Haymond, Phillip Grey Smith, and Judd Downing, all of Los Angeles, for respondent.

Musick & Burrell, of Los Angeles, for respondent Frank C. Mortimer.

TRAYNOR, Justice.

The Metropolitan Trust Company of California, as trustee, and the National Thrift Corporation of America, as trustor, entered into a written trust agreement under which the Trust Company was to hold in trust a fund as security for the bonds, contracts, certificates, and annuity agreements which the Thrift Company was selling as investments. The agreement required the Thrift Company to maintain in the trust fund an amount equal to not less than 110 per cent of the total aggregate principal of the outstanding bonds and the cancellation value of the contracts and certifications, less the total amount of subsisting loans. It further required the trust tee to identify and authenticate all bonds, contracts, certificates and annuity agreements issued by the Thrift Company, provided that the latter was under no default known to the trustee with respect to the maintenance of the trust fund.

In 1927 Ward Esplin purchased from the Thrift Company a $1,000 participation certificate, secured by the trust, and identified and authenticated by the trustee. In 1932 the Thrift Company became insolvent and a federal equity receiver was appointed to take over the trust fund. On July 8, 1933, Esplin entered into a written agreement with the National Reserve Company of America purporting to assign all his right, title, and interest in the participation certificate to the Reserve Company for the purpose of permitting the latter to collect the proceeds from the certificate for him. The proceeds were to be applied by the Reserve Company as a cash credit toward the purchase of one of its own investment certificates by Esplin. The Thrift Company participation certificate and the purported assignment were then delivered to the receiver of the trust fund by the National Reserve Company. Since the value of the trust fund had fallen below the 110 per cent required by the trust agreement the liquidation value of the certificate was substantially less than the stated cancellation value. In 1936 the National Reserve Company instituted the present action against the Metropolitan Trust Company alleging that it had violated the trust agreement at various times by identifying and authenticating certificates issued by the Thrift Company with knowledge that the value of the collateral deposited in the trust fund was less than the required 110 per cent. Esplin was not joined in the suit. This action, for the benefit of plaintiff and all other holders of such contracts and certificates, is representative in character and seeks to hold the defendant trustee accountable for the difference between the actual value of the fund and the value at which it should have been maintained.

At the opening of the trial it was stipulated that prior to the consideration of any other issue evidence should be taken to determine whether any right to sue upon the cause of action ever vested in plaintiff. After receiving evidence on that issue, the trial court found that Esplin had not assigned the certificate to plaintiff for a valuable consideration and that plaintiff was not the owner thereof. It also found that the cause of action sued upon by plaintiff was never assigned or transferred to it by Esplin. The present appeal was taken from the judgment entered by the trial court pursuant to these findings.

The issues are: (1) Did the instrument of July 8, 1933, constitute a valid assignment of the participation certificate by Esplin to plaintiff, vesting the legal ownership in plaintiff? (2) If so, did it transfer to plaintiff the right to sue for a breach of the trust agreement occurring prior to the assignment?

The written instrument of July 8, 1933, provided as follows:

"Whereas, the undersigned having purchased of the National Reserve Company of America one of its investment certificates, hereafter referred to as certificate, and

"Whereas, the undersigned is the owner of National Thrift Certificate No. 136B Class B Series F having an estimated value of $835.10, and hereinafter referred to as property, and

"Whereas, the undersigned is desirous of having the cash value of said property applied, at the earliest possible moment, as a cash interest-bearing credit on said certificate.

"Now, Therefore, in consideration that National Reserve Company agrees to give an immediate conditional credit (not a credit on my certificate) of 100 per cent of the above estimated value, and of the company's further agreement to convert said credit to a cash interest-bearing credit on the certificate immediately as received by it in the form of cash or its equivalent in acceptable first mortgages, and that it further agrees to immediately pass to the cashable interest-bearing credit on said certificate all such amounts received by it from or out of said property; the undersigned hereby assigns and transfers, for the purposes hereinabove stated and for none other, all his right, title and interest of, in and to the hereinabove described property, and hereby constitutes, appoints and empowers any duly qualified officer of said National Reserve Company in his name, place and stead, and as his attorney in fact, for said purposes.

"Provided, that, at any time upon the determination and conclusion that it is or will be unable to collect further proceeds out of said property, said National Reserve Company may, or upon the written request at any time of the undersigned shall, re-assign and transfer to the undersigned, said property, depleted by the amount of the aforesaid receipts arising out of said property and credited as aforesaid to said certificate, whereupon this agreement shall become automatically terminated and cancelled.

"Executed and acknowledged by Ward H. Esplin * * * July 8, 1933."

[1] There is no basis for the trial court's finding that Esplin did not assign the certificate to plaintiff. The evidence is clear that Esplin signed the instrument. Its language is that of an assignment, the granting clause reading in part: "* * * the undersigned hereby *assigns and transfers* * * * all of his right, title and interest in and to the hereinabove property * * *" (italics added), and it is not less an assignment because of its power of attorney provision. Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P.2d 643. Read in its entirety, the instrument admits of no other construction than that plaintiff is the assignee despite defendant's objection that the instrument fails to name an assignee. Otherwise, for example, it would be impossible for plaintiff to re-assign the certificate pursuant to the provision in the last paragraph that "* * * said National Reserve Company may * * * re-assign * * * said property * * *".

[2, 3] The contention that the assignment is void for lack of consideration likewise cannot be sustained. Since the instrument provides that plaintiff is to credit all proceeds received by it to the purchase price of an investment certificate sold by it to Esplin, the assignment is in essence one for collection. It is well established that an assignment of a chose in action for collection vests the legal title in the assignee whether or not any consideration is paid therefor. In such case the assignee may maintain a suit thereon in his own name, even though the assignor retains an equitable interest in the thing assigned. Greig v. Riordan, 99 Cal. 316, 33 P. 913; Morrison v. Veach, 190 Cal. 507, 213 P. 945; Cohn v. Thompson, 128 Cal.App.Supp. 783, 16 P.2d 364. The instrument in question therefore constitutes a valid assignment of the certificate to plaintiff.

[4, 5] There remains the question whether the cause of action for breach of the trust indenture passed to plaintiff with the assignment of the certificate. There is no limitation, express or implied in the instrument to support the trial court's conclusion that the assignment was designed solely to authorize the collection by plaintiff of such dividends as it might receive on the certificate through a liquidation of the existing trust collateral. Plaintiff is empowered to apply to the purchase price of its investment certificate on behalf of the assignor "all such amounts received by it from or out of said [assigned] property". The words of the granting clause in no way restrict the source of such collections. Defendants rely upon the introductory clause of the instrument which reads: "Whereas, the undersigned is desirous of having the *cash value of said property* applied, at the earliest possible moment, as a cash interest-bearing credit on said certificate". (Italics added.) They urge that the term "cash value" refers to the cancellation value of the certificate in liquidation and thus indicates that the assignment was restricted to the collection of dividends in such liquidation. The granting clause of the assignment, however, transfers all of Esplin's right, title and interest without limitation, and is controlling over ambiguous recitals in the preamble. Bing v. Bowers, 2 Cir., 26 F.2d 1017. Moreover, plaintiff as an assignee for collection should collect all amounts recoverable on the certificate, and the cash value of the certificate would therefore include not only the amounts available in the trust estate for its cancellation, but in addition, any amounts which may be obtained by bringing suit against one whose wrongdoing has depleted the available funds and thereby reduced the value of the certificate.

[6] Defendants contend that the provision in the assignment which allows plaintiff to re-assign the certificate upon determining that it is unable to collect further proceeds and enables Esplin to demand a re-assignment of the certificate at will indicates that the cause of action was not intended to pass under the assignment. Esplin, however, has made no such demand for re-assignment, and the provision limits only the possible duration of the assignment and not the extent of the rights transferred thereby.

[7] The statement in the assignment that it was made "for the purposes hereinabove stated, and for none other" constitutes not a limitation upon the rights assigned, but simply a requirement that the moneys collected be applied to the purchase price of the investment certificate as provided in the first paragraphs of the assignment. The clause limits not what plain-

tiff may collect, but plaintiff's subsequent disposition of what is collected.

[8, 9] In determining what rights or interests pass under an assignment, the intention of the parties as manifested in the instrument is controlling. See cases cited in 5 C.J. 949, 6 C.J.S., Assignments, § 85. An unqualified assignment of a contract or chose in action, however, with no indication of the intent of the parties, vests in the assignee the assigned contract or chose and all rights and remedies incidental thereto. See cases cited in 3 Cal.Jur. 277. These incidental rights include certain ancillary causes of action arising out of the subject of the assignment and accruing before the assignment is made.

[10] Unless an assignment specifically or impliedly designates them, accrued causes of action arising out of an assigned contract, whether ex contractu or ex delicto, do not pass under the assignment as incidental to the contract if they can be asserted by the assignor independently of his continued ownership of the contract and are not essential to a continued enforcement of the contract. Regan Vapor-Engine Co. v. Pacific Gas-Engine Co., 9 Cir., 49 F. 68, 1 C.C.A. 169; Schaffer v. Vandewater & Co., 160 App.Div. 803, 145 N.Y.S. 769; Wasson v. Taylor, 191 Ark. 659, 87 S.W.2d 63; Fox v. Hirschfeld, 157 App. Div. 364, 142 N.Y.S. 261; Steele v. Brazier, 139 Mo.App. 319, 123 S.W. 477; Robinson v. Saxon Mills, 124 S.C. 415, 117 S.E. 424; Morris v. McCulloch, 83 Pa. 34; contra, Jackson v. Meinhardt, 99 Cal.App. 283, 278 P. 462.

[11, 12] If, however, an accrued cause of action cannot be asserted apart from the contract out of which it arises or is essential to a complete and adequate enforcement of the contract, it passes with an assignment of the contract as an incident thereof. Thus, the assignment of a contract passes from assignor to assignee an accrued cause of action for rescission (Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 P. 82; National Pacific Oil Co. v. Watson, 184 Cal. 216, 193 P. 133; Sherman v. International Life Ins. Co., 291 Mo. 139, 236 S.W. 634), or for reformation (Beck-Brown Realty Co. v. Liberty Bell Ins. Co., 137 Misc. 263, 241 N.Y.S. 727), and a creditor's assignee acquires the right to set aside a prior fraudulent conveyance by the debtor. Emmons v. Barton, 109 Cal. 662, 42 P. 303; Billingsley v. Clelland, 41 W.Va. 234, 23 S.E. 812. As a corollary, if an assignor by express provision of a contract is denied the right to assert an accrued cause of action after he has assigned away his interest in the contract, the right to sue passes to his assignee. There would otherwise be no one to enforce the right.

[13] The trust indenture, upon which the present action is based, specifically provides that ownership of a certificate secured by the agreement is a condition precedent to the maintenance of a cause of action for violation of a covenant contained therein. The assertion of the cause of action is thus dependent upon ownership of the certificate. All right, title and interest in such certificate has been assigned to plaintiff. Only by virtue of its transfer to the plaintiff could the cause of action continue to exist. Furthermore, plaintiff as an assignee for collection must secure the largest obtainable amount, and to the end of complete and adequate enforcement of the contract must be able to sue the delinquent trustee for a restitution that will enhance the value of the certificate.

The judgment is reversed.

We concur: CARTER, J.; CURTIS, J.; SHENK, J.

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17 Cal.2d 822

BROCHIER v. BROCHIER.

L. A. 16768.

Supreme Court of California.

April 24, 1941.

1. Judgment 🔑892

A satisfaction of judgment is the last act and end of the proceeding.

2. Judgment 🔑898(1)

A satisfaction of judgment which has been filed and entered may be set aside by appropriate proceedings for proper cause.

3. Execution 🔑74

An order for the issuance of an execution under a judgment which is prima facially satisfied is void.

4. Divorce ⚷261

Where satisfaction of judgment rendered in divorce action had been executed and acknowledged by plaintiff's attorney and had been filed with clerk of court, subsequent orders for writ of possession of permanent wave machine in defendant's possession and for payment of money were improper since the satisfaction was a sufficient acknowledgment that plaintiff had received from defendant all of property to which plaintiff was entitled under the divorce decree. Code Civ. Proc. § 675.

5. Divorce ⚷261

An order for issuance of writ of possession did not include a determination that plaintiff's satisfaction of judgment was not a bar thereto where the writ of possession was issued ex parte and defendant had no opportunity to be heard. Code Civ.Proc. § 675.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight and Leslie E. Still, Judges.

Action by May Brochier against Dorville J. Brochier for divorce. From an order denying a motion to vacate certain orders made after the entry of an interlocutory decree of divorce, defendant appeals.

Order denying motion to vacate the order reversed.

Richard Kittrelle, Hare & Walden, and Robert E. O'Neill, all of Los Angeles, for appellant.

Marion P. Betty, of Los Angeles, for respondent.

CARTER, Justice.

This is an appeal from an order denying a motion to vacate certain orders made by the trial court after the entry of an interlocutory decree of divorce. On May 17, 1937, an interlocutory decree of divorce was entered in favor of plaintiff on the grounds of adultery and extreme cruelty. That decree has never been modified and no appeal having been taken therefrom it is now final. No provision for alimony was made therein. It provided for a division of the community property of the plaintiff and defendant, in part as follows:

"It is * * * decreed that plaintiff * * * does * * * by these presents have and recover all property of the community of whatsoever kind or nature and wheresoever located, whether described in the pleadings or not, as her sole and separate estate with the exception of the following property which is hereby * * * decreed to be community, to-wit: (1) The beer parlor * * * (2) One Plymouth automobile * * * (3) And one Metropolitan Life Insurance Policy * * *." The decree awarded the above particularly described excepted property to defendant. It was also decreed that plaintiff owned at the time of her marriage as her separate property $2,000 in cash, a Dodge sedan, certain described real property and "Barber shop equipment". Defendant was ordered to refrain from molesting, talking to, harassing, etc., plaintiff. Finally the decree provided:

"It is * * * decreed, that all the rest of the property described in the said pleadings, together with all other property, wheresoever found or to be found, situated or located, in which the defendant claims any interest, either as his separate estate or as community property, is hereby awarded to the plaintiff as her sole and separate property and estate." Plaintiff in her complaint claimed as her separate property, among other things, "a beauty parlor establishment with equipment therein". Thereafter, a satisfaction of judgment dated July 1, 1937, and executed and acknowledged by plaintiff's attorney, was filed with the clerk of the trial court on July 2, 1937, and entered on July 6, 1937. It provided in part:

"The judgment herein having been paid, full satisfaction is hereby acknowledged of said Judgment entered * * * (describing it) * * * and the Clerk is hereby authorized and directed to enter full satisfaction of record in said action." On October 18, 1937, the court issued an order directing defendant to show cause why he should not be punished for contempt for violation of said decree, based upon plaintiff's affidavit of harassment by defendant and that defendant had collected the sum of $66.50 on an appeal bond in a small claims court action, which money plaintiff claimed was awarded to her by the decree. By minute order entered on November 5, 1937, the court adjudged defendant guilty of contempt for harassment of plaintiff, and at the end thereof stated "Defendant is $66.50 in arrears. Defendant is ordered to pay plaintiff $5.00 per month on arrearage, commencing November 15, 1937." On November 12, 1937, the court made an ex parte order directing the issuance of a writ of possession for a "permanent wave machine and protectors and curlers" in defendant's possession, on plaintiff's motion supported by affidavit in which she claimed the same under the omnibus clause of the decree hereinabove quoted. The writ issued and plaintiff was thereby put in possession of the permanent wave machine. Pursuant to notice of motion filed March 18, 1938, defendant moved the court to vacate the contempt order of November 5, 1937, in respect to the payment of $66.50, and the order for the writ of possession. Plaintiff obtained an order to show cause why defendant should not be punished for contempt for failure to pay the sum of $66.50, by affidavit filed on March 24, 1938. Defendant filed an affidavit in support of his motion to vacate setting forth the above-mentioned satisfaction of judgment and claiming that the sum of $66.50 and permanent wave machine were his separate property and were not included nor mentioned in the interlocutory decree. Plaintiff filed no counter affidavit. The motion and contempt hearing were considered at the same time and on April 6, 1938, the court made a minute order denying the motion and ordering defendant to pay plaintiff the sum of $66.50 in thirty days and the contempt proceeding was continued until May 6, 1938. The appeal is on the judgment roll alone and there is no record of any evidence having been taken at the hearing.

The basis of defendant's motion to vacate the orders and of this appeal is that the court lacked jurisdiction and the orders were void on their face because the sum of $66.50 and permanent wave machine were not particularly described or mentioned in the decree and that the satisfaction filed, as above stated, precluded plaintiff from obtaining such orders. Plaintiff has not filed a brief on this appeal.

The appellant's contention in reference to the effect of the satisfaction of judgment must be sustained. It is to be noted that the satisfaction was filed prior to both of the orders of the trial court which were attacked on defendant's motion to vacate the above-mentioned orders. At the time those orders were made, the one commanding the payment of the sum of $66.50 and the other for a writ of possession for the permanent wave machine, the satisfaction was on file and had been entered by the clerk. As far as the record shows, there was no mention in any of the proceedings for those orders of the satisfaction of judgment. Plaintiff and defendant stipulated that the record before this court contains the entire record, and the trial court in its certification to the record states that such record "constitutes the entire record used in the foregoing proceedings". The satisfaction has never been vacated or set aside, and further, defendant in his affidavit in support of his motion to vacate the orders, stated:

"That on the 2nd day of July, 1937, the plaintiff filed in this case a satisfaction of judgment, executed by Marion P. Betty as attorney for plaintiff, that said satisfaction of judgment fully satisfied the judgment in this case; that no motion was ever made to have set aside the said satisfaction of judgment. * * * Further, that the said orders were made without considering the satisfaction of judgment entered on behalf of the plaintiff prior to the making of the orders." That affidavit stands uncontradicted as plaintiff filed no counter affidavit. The motion for the order for a writ of possession was made ex parte and defendant was never notified thereof and no hearing was had on the merits.

[1-5] The general principle is well settled that a satisfaction of judgment is the last act and end of the proceeding. Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 P. 464; Estate of Baby, 87 Cal. 200, 25 P. 405, 22 Am.St.Rep. 239; Storke v. Storke, 132 Cal. 349, 64 P. 578; La Fleur v. M. A. Burns Lumber Co., 188 Cal. 321, 205 P. 102. Undoubtedly a satisfaction of judgment which has been filed and entered may be set aside by appropriate proceedings for proper cause (15 Cal.Jur. 273); but the satisfaction here was not vacated, and it was executed in the manner prescribed by section 675 of the Code of Civil Procedure. As a sale under an execution issued on a satisfied judgment is void (Reynolds v. Lincoln, 71 Cal. 183, 9 P. 176, 12 P. 449), a fortiori an order for the issuance of an execution under a judgment which is prima facially satisfied, is likewise void. We believe it is clear that the satisfaction here involved was a sufficient acknowledgment by plaintiff that she had received from the defendant all of the property to which she was entitled under the interlocutory decree of divorce. The orders for the writ of possession and payment of the sum of $66.50 were imprope

It cannot be said that the order for the issuance of the writ of possession included a determination that the satisfaction was not a bar thereto because, as we have seen, it was ex parte and defendant had no opportunity to be heard. The subject is tersely treated in Salveter v. Salveter, 11 Cal.App.2d 335, 337, 53 P.2d 381, as follows: "The so-called order to issue an execution was not a judgment on the merits against the plaintiff. It was * * * a direction by the court to its clerk to issue the execution. It is a fundamental rule that a writ of execution must be founded upon a valid and subsisting judgment which has not been satisfied. 11 Cal.Jur. 43, and cases cited. Payment of a judgment satisfies it and extinguishes it."

In view of the foregoing conclusion it is unnecessary to consider defendant's further contention that the interlocutory decree did not sufficiently describe the permanent wave machine or mention the sum of $66.50.

The order appealed from denying the motion to vacate the orders made by the trial court after the judgment was satisfied is reversed.

We concur: SHENK, J.; TRAYNOR, J.; CURTIS, J.; EDMONDS, J.

WEST KEY NUMBER SYSTEM

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17 Cal.2d 853

In re HENDERSON'S ESTATE.

PECK v. EASTERN STAR HOMES OF CALIFORNIA.

L. A. 17365.

Supreme Court of California.

April 28, 1941.

1. Charities 🔑34

Bequests for the benefit of the inmates of an institution, though made directly to the institution, are generally construed to constitute "trusts" for the benefit of the inmates if bequests are charitable in nature.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

2. Charities 🔑10

A bequest is a "charitable bequest" if its aims and accomplishments are of religious, educational, political, or general social interest to mankind and the bequest is thus made for a "charitable purpose," and if the ultimate recipients constitute either the community as a whole or an unascertainable and indefinite portion thereof, and the charitable nature of an institution to which a bequest is made is determined on the same basis.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable Bequest" and "Charitable Purpose".

3. Charities 🔑10

Relief of poverty is not a condition of charitable assistance, and if the benefit conferred by a bequest has a sufficiently widespread social value, a charitable purpose exists, even though relief of poverty is not involved.

4. Charities 🔑11
Evidence 🔑14

It is common knowledge that aged people require care and attention apart from financial assistance, and the supply of that care and attention is as much a charitable and benevolent purpose as the relief of their financial wants.

5. Charities 🔑11

A bequest to an institution to further its purposes of caring for old people regardless of financial condition is of enough social value to be designated as a charitable bequest.

6. Charities 🔑11

A gift or trust to support an institution beneficial to the community is charitable, even though the inmates must pay fees or contribute to the expense of maintaining the institution, so long as the income thus derived is used only to maintain the institution or for some other charitable purpose.

7. Charities 🔑20(1)

Whether a bequest is a charitable bequest is not necessarily determined by the status of the organization to which it is made, but a charitable gift may be made to a noncharitable institution so long as the purpose of the gift remains charitable.

8. Wills 🔑13(2)

A bequest to a nonprofit corporation organized by fraternal order to conduct homes for care of aged, indigent, or infirm members

of order was made for a "charitable purpose" and to an institution with a charitable purpose within statute restricting amount of a charitable bequest to one-third of testator's estate, even though an inmate upon admission must assign his assets to corporation, and members of order are assessed annually for support of corporation, where members acquire no right by paying such assessments to be admitted to a home even after fulfilling entrance requirements. Probate Code, § 41.

9. Charities ⟹21(1)

A charity may be validly restricted to an indefinite class within the community so long as the class is large enough to make the enforcement of the gift beneficial to the community.

10. Wills ⟹13(2)

A bequest to a nonprofit corporation organized by fraternal order to conduct homes for care of aged, indigent, or infirm members of order was a "charitable bequest" to a "charitable institution" within statute restricting amount of a charitable bequest to one-third of testator's estate, where order is a constantly changing group, home exists not only for benefit of members presently eligible for admission but also for benefit of presently ineligible members and future members, and articles of incorporation limit each local chapter to one resident in home for each 500 members in chapter, since the beneficiaries thus constitute an indefinite class. Probate Code, § 41.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable Institution".

CURTIS and CARTER, JJ., dissenting.

In Bank.

Appeals from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceedings in the matter of the estate of Ella M. Henderson, deceased, wherein Bessie Peck, executrix of the estate, instituted a proceeding to determine which persons were entitled to share in the distribution of the estate, the residue of which was bequeathed to the Eastern Star Homes of California. From the judgment, the Eastern Star Homes of California appeals.

Reversed and remanded, with instructions.

Prior opinion, 105 P.2d 937.

Argabrite & Elver, of Ventura, for appellant.

Lawrence Edwards and Chas. H. Epperson, both of Stockton, and Edmund Nichols, of Los Angeles, for respondent.

TRAYNOR, Justice.

On September 23, 1937, Ella M. Henderson died leaving a will executed on June 11, 1937, which provided for a specific legacy of $500 to Bessie M. Peck and bequeathed the residue of the estate to the Eastern Star Homes of California "to be used by the trustees in such manner as may be most beneficial to the Home and its inmates." The will was admitted to probate and Bessie Peck was appointed executrix of the estate which consists of personal property appraised at $16,229.04. At the request of Leon McGary, a nephew and one of the heirs-at-law of deceased, the executrix instituted this proceeding to determine which persons were entitled to share in the distribution of the estate. The trial court held that the Eastern Star Homes was a non-profit charitable organization under sections 41 and 43 of the Probate Code. These sections provide that a devise or bequest to a charitable corporation or to a person in trust for charitable uses under a will executed less than six months prior to the death of the testator cannot exceed one-third of the entire estate if there are surviving heirs who would otherwise take the excess over one-third. The court concluded that Bessie Peck should receive the sum of $500; the Eastern Star Homes should receive only one-third of the residue of the estate; and the nephews, nieces, and other relatives of the deceased should receive the other two-thirds of the residue. Judgment was entered accordingly. The Eastern Star Homes has appealed.

The respondent executrix has taken the position that she is a neutral party and not called upon to contest the appeal of the Eastern Star Homes. She consequently has filed no brief nor made any appearance in opposition to the appeal. Certain of the heirs of the deceased, however, to whom distribution of a portion of the residue of the estate has been ordered, have been granted leave to appear and have filed a brief in opposition to that of appellant.

The order of the Eastern Star in the state of California is an unincorporated fraternal organization consisting of approximately 96,000 members affiliated in 492 subordinate chapters located within the state. Membership in the Order is limited to those persons elected by the Order from among Master Masons, their wives, and certain other female relatives. In addition to an initiation fee, each member pays annual dues and assessments levied by the Grand Chapter, the governing body of the Order in this state, and by the local chapter with which the member is affiliated. In 1930 the Grand Chapter organized the Eastern Star Homes of California, a nonprofit corporation and appellant herein, for the following purpose: "To own, control, conduct and manage homes for the care, maintenance and support of aged, indigent or infirm members of the Order of the Eastern Star." Appellant maintains such a home in Los Angeles. The laws of the Grand Chapter and the by-laws of the corporation provide that admission to the Home shall be restricted to members of the Order selected by appellant's board of trustees who: (1) have been nominated by their local chapter; (2) have been members in good standing of the Order of the Eastern Star in the state of California for not less than 10 years; (3) are 65 years of age; and (4) are in reasonably good health. Upon admission to the Home each member is required to assign all of his assets to the appellant.

The average yearly cost of operating the Home is $30,000, 80 per cent of which is derived from annual assessments levied by the Grand Chapter upon members of the Order and the remaining 20 per cent principally from income on investments. Appellant's only other income is $500 a year from its endowment fund.

[1] If the bequest in question constitutes a gift to a charitable institution or a gift in trust for charitable uses, it is invalid to the extent that it exceeds the one-third limitation imposed by section 41 of the Probate Code, the will having been executed within six months prior to the death of the testatrix. The present bequest sets up a trust for the benefit of the inmates of the Home. It is made to the Eastern Star Homes, Inc., "to be used by the trustees in such manner as may be most beneficial to the Home and its inmates". Thus, the trustees, the beneficiaries, and the trust purpose are all stated. Such bequests, even though made directly to an association, are generally construed to constitute trusts for the benefit of the inmates if the bequests are charitable in nature. In re Estate of McDole, 215 Cal. 328, 10 P.2d 75; In re Estate of De Mars, 20 Cal.App.2d 514, 67 P.2d 374; Estate of McCray, 204 Cal. 399, 268 P. 647; In re Estate of Upham, 127 Cal. 90, 59 P. 315; Restat.Trusts, sec. 397 [f].

[2] A bequest is charitable if: (1) It is made for a charitable purpose; its aims and accomplishments are of religious, educational, political or general social interest to mankind. People v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269; In re Estate of Merchant, 143 Cal. 537, 77 P. 475. (2) The ultimate recipients constitute either the community as a whole or an unascertainable and indefinite portion thereof. People v. Cogswell, supra; In re Estate of Hinckley, 58 Cal. 457; Fay v. Howe, 136 Cal. 599, 69 P. 423. The charitable nature of an institution is determined on the same basis.

[3-5] The bequest in the present case was clearly made for a charitable purpose. Since the enactment of the Statute of Charitable Uses during the reign of Elizabeth, aid to the aged and infirm has been recognized as charitable. See cases cited in 5 Cal.Jur. 24. Relief of poverty is not a condition of charitable assistance. If the benefit conferred has a sufficiently widespread social value, a charitable purpose exists. Restat., Trusts, secs. 368, 374; People v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269; Collier v. Lindley, 203 Cal. 641, 266 P. 526; 16 Cal.L.Rev. 478. Thus, gifts or trusts for educational institutions (Restat. Trusts, sec. 370; People v. Cogswell, supra), the promotion of woman's suffrage (Garrison v. Little, 75 Ill.App. 402), the publishing of religious writings (Restat. Trusts, sec. 371; In re Estate of Graham, 63 Cal.App. 41, 218 P. 84; see 16 Cal.L.Rev. 478 at 482), and even for the relief of dumb animals (In re Estate of Coleman, 167 Cal. 212, 138 P. 992, Ann.Cas 1915C, 682; Restat. Trusts, sec. 374[c]), have been held charitable. It is a matter of common knowledge that aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants. Every civilized community must provide facilities, either public or private, for the care of old people, re-

gardless of financial condition, and a bequest to such an institution to further its purposes is of enough social value to be designated as charitable. See In re Estate of Friedman, 171 Cal. 431, 153 P. 918; In re Estate of Peabody, 154 Cal. 173, 97 P. 184; Restat. Trusts, secs. 368–374. The articles of incorporation of appellant Home indicate that it was created for the purpose of rendering assistance to the deserving aged. A bequest to it may therefore be charitable even though indigence is not a requirement for admission.

[6] Appellant points out that upon admission an inmate must assign his assets to the Home. The value of such an assignment is not necessarily commensurate with the benefits derived by him from the Home. But even if each inmate were required to pay in full for his care, a bequest to the institution may still be charitable. A gift or trust to support an institution beneficial to the community is charitable even though the inmates must pay fees or contribute to the expense of maintaining the institution so long as the income thus derived is used only to maintain the institution or for some other charitable purpose. Restat., Trusts, sec. 376[c]; Dingwell v. Seymour, 91 Cal.App. 483, 267 P. 327; In re Estate of Peabody, 154 Cal. 173, 97 P. 184. Thus students at a private school may be required to pay tuition fees to cover the cost of their instruction; yet a gift to such a school for the purpose of assisting in the education of its students is clearly charitable. In re Estate of Bailey, 19 Cal.App.2d 135, 65 P.2d 102; People v. Cogswell, supra; In re Estate of Bartlett, 122 Cal.App. 375, 10 P.2d 126; Restat., Trusts, sec. 370. Appellant cites a number of decisions denying a charitable status to fraternal orders, lodges, and kindred organizations. City of Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am.Rep. 369; Mason v. Perry, 22 R. I. 475, 48 A. 671; Babb v. Reed, 5 Rawle, Pa., 151, 28 Am. Dec. 650. These cases have no bearing on the present one. The gift here is not to the order of the Eastern Star but to the Eastern Star Homes, Inc., a corporation devoted exclusively to caring for the aged, and it is not a general fraternal contribution but was made expressly for the charitable purpose of aiding the aged.

[7] The support of the Home by annual assessments on members of the Order of the Eastern Star likewise does not destroy the charitable nature of the bequest. Appellant cites In re Estate of Dol, 182 Cal. 159, 187 P. 428; Brown v. La Societe Francaise, etc., 138 Cal. 475, 71 P. 516; and Gorman v. Russell, 14 Cal. 531, for the proposition that a mutual benefit society, each member of which pays fixed periodic sums into a common fund which is used to render medical or other assistance to any member in need thereof, does not constitute a charitable organization. Appellant contends that it is just such a non-charitable mutual benefit society organized for the protection of the members of the Order of the Eastern Star and that a bequest to it is therefore not charitable. Appellant, however, overlooks the fact that the nature of the bequest is not necessarily determined by the status of the organization to which it is made. A charitable gift may be made to a non-charitable institution so long as the purpose of the gift remains charitable. Estate of Willey, 128 Cal. 1, 60 P. 471; Powers v. Home for Aged Women, 58 R.I. 323, 192 A. 770, 110 A.L.R. 1361. The cases of Gorman v. Russell and Brown v. La Societe Francaise were concerned solely with the charitable or non-charitable status of certain organizations and not with the question of whether a gift to such organizations by an outsider might be a charitable one. In the Gorman case a group of longshoremen formed a society, each member of which contributed to a common fund which was used to assist members who became sick or disabled. Certain individuals who were expelled from the organization brought suit for dissolution and distribution of the funds, claiming the organization was no more than a private partnership. The defendants contended the society was a charitable one and that therefore the funds belonged not to the individual members but to the ultimate beneficiaries. The court held the organization to be non-charitable. In the Brown case a patient who was negligently treated in a hospital maintained by a mutual benefit society for the assistance of its members brought suit against the hospital. The hospital contended that it was a charitable institution and therefore not liable under the rule of respondeat superior for the negligent acts of its servants. The court held it to be non-charitable. In Re Estate of Dol the question was squarely presented whether a bequest to a mutual benefit society organized to render medical aid to its mem-

bers was charitable. The court, however, held on the basis of the Brown and Gorman cases that the bequest was not charitable because the organization itself was not a charitable one. It failed to consider in any way whether the gift was charitable in nature despite the status of the organization, overlooking the fact that the Brown and Gorman cases on which it relied were not at all concerned with the charitable nature of gifts.

If a group of individuals agree to contribute equal amounts into a fund to be used for the benefit of all, such a group may well be said to be non-charitable in nature because each individual is providing only for his own welfare and does not intend to make a free contribution toward the assistance of others. If an outsider, however, receiving no benefits from the organization, makes a gift to it, that gift may well be a charitable one if the members of the organization are sufficiently numerous and it is organized for a purpose beneficial to society such as providing for medical assistance to its members. Such a donor has the charitable purpose of assisting those members of a large group who become sick, without any benefit to himself, and the gift thus may be a charitable one.

In the present case, therefore, even if the Home itself be considered in the nature of a mutual benefit society and hence non-charitable, the bequest to the Home, being for the purpose of aiding the aged, may remain charitable.

[8] A true mutual benefit association, however, is based upon reciprocal contracts and requires that a member receive benefits as a matter of right. Members of the Order of the Eastern Star who pay their required assessments acquire no right, contractual or otherwise, to be admitted to the Home, even after fulfilling the entrance requirements. A member must be nominated by his local chapter and selected by the trustees of the Home before he can gain admittance, and only one member out of every 500 in a local chapter can acquire residence in the Home at the same time. A member is admitted to the Home because his case is deserving and not because his previous contributions have given him a contractual right to admission. Thus, there is a clear distinction between this type of organization which has a charitable purpose and a mutual benefit society. Many decisions sustain the charitable nature of institutions established to render aid to the members thereof who need assistance even though the institutions are supported by contributions from the members. Spiller v. Maude, 1 Ch. D. 497 [1881]; Pease v. Pattison, 32 Ch. D. 154 [1886]; In re Buck, [1896] 2 Ch. 727; In re Lacy, [1899] 2 Ch. 149; Morrow v. Smith, 145 Iowa 514, 124 N.W. 316, 26 L.R.A.,N.S., 696, Ann.Cas.1912A, 1183; Plattsmouth Lodge, etc., v. Cass County, 79 Neb. 463, 113 N.W. 167; De La Pole v. Broughton, infra; Bogert, Trusts and Trustees, Vol. 2, § 367, pages 1122–1126; Rest. Trusts, sec. 369, page 1144. The bequest to appellant was therefore made for a charitable purpose and to an institution with a charitable purpose.

[9, 10] There remains the question whether the aged members of the Order for whose welfare the Home was established constitute a class of beneficiaries indefinite enough to render the bequest or the institution to which it was made charitable. It is not essential that every member of the community be a direct beneficiary of a charitable gift. A charity may be validly restricted to an indefinite class within the community so long as the class is large enough to make the enforcement of the gift beneficial to the community. Restat. Trusts, sec. 375(2). In the case of bequests for the relief of poverty, or the advancement of education, or religion, or the promotion of health, inclusive of the care of the aged, the number of beneficiaries need not be so large as when the gift is simply for the general benefit of a class without indication of the particular purpose for which it is to be used. Restat. Trusts, sec. 375c. Thus gifts and trusts to eleemosynary institutions whose benefits are restricted to members in a particular organization have been held charitable. In re Estate of Halm, 196 Cal. 778, 239 P. 307; In re Estate of Bailey, 19 Cal.App.2d 135, 65 P.2d 102; Spiller v. Maude, 32 Ch. D. 158 [1881]; Pease v. Pattinson, 32 Ch. D. 154 [1886]; In re Buck, [1896] 2 Ch. 727; In re Lacy, [1899] 2 Ch. 149; City of Indianapolis v. Grand Master, etc., 25 Ind. 518; Duke v. Fuller, infra; Morrow v. Smith, 145 Iowa 514, 124 N.W. 316, 26 L.R.A.,N.S., 696, Ann.Cas.1912A, 1183; Most Worshipful Grand Lodge v. Board of Review, 281 Ill. 480, 117 N.E. 1016; Roberts v. Corson, 79 N.H. 215, 107 A. 625, 5 A.L.R. 1172; State v. Toney, 141 Or.

406, 17 P.2d 1105; Masonic Education & Charity Trust v. City of Boston, 201 Mass. 320, 87 N.E. 602; City of Petersburg v. Petersburg Benevolent Mechanics' Ass'n, infra; De La Pole v. Broughton, infra; Scott on Trusts, vol. 2, pages 2022–2028; Bogert, Trusts and Trustees, Vol. 2, § 363 pages 1106–1107; Restat. Trusts, 369. Gifts and trusts designed to aid the poor, the aged, and the unfortunate have been sustained as charitable although the beneficiaries are limited to the widows and orphans of deceased members of particular organizations, including fraternal orders. In re Estate of Willey, 128 Cal. 1, 60 P. 471; In re Estate of Upham, 127 Cal. 90, 59 P. 315; Guilfoil v. Arthur, 158 Ill. 600, 41 N.E. 1009; Widows' & Orphans' Home, etc., v. Commonwealth, 126 Ky. 386, 103 S.W. 354, 16 L.R.A.,N.S., 829; Duke v. Fuller, 9 N.H. 536, 32 Am.Dec. 392; Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 11 S.W. 825, 4 L.R.A. 699; City of Petersburg v. Petersburg Benevolent Mechanics' Ass'n, 78 Va. 431; De La Pole v. Broughton, 118 Wash. 395, 204 P. 15.

Appellant points out that admission to the Home is restricted to members of the Eastern Star who have been affiliated with the California Order for ten years and have reached the age of 65 years and contends therefore that the number of beneficiaries is definitely fixed since their identity can be ascertained by an examination of the Order rolls. This argument assumes that the Home exists solely for the benefit of members who are at present able to fulfill the requirements for admission. The Order of the Eastern Star, however, is a constantly changing group. The Home exists not only for the benefit of members now eligible for admission but also for the benefit of members who at present lack the entrance qualifications and persons who will join the Order in the future. An inspection of the records therefore will not disclose all of the class to be benefited. In addition, appellant's articles of incorporation limit each local chapter to one resident in the Home for each 500 members in the chapter. This restriction operates to exclude from the Home many members possessing the required qualifications for admission and renders the beneficiaries even more indefinite.

Section 41 of the Probate Code restricts the amount of a charitable bequest to one-third of the testator's estate. The trial court in the present case restricted the amount of the bequest to appellant to one-third of the residue of the testator's estate. The judgment is reversed and the cause is remanded to the trial court with instructions to modify its decree by awarding to appellant an amount equal to one-third of the testator's estate, neither party to recover costs on appeal.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.

CURTIS, Justice (dissenting).

I dissent. From the findings of the court it appears that the Eastern Star Homes was organized as a non-profit corporation under the provisions of section 593 of the Civil Code by the Grand Chapter of the State of California of the Order of Eastern Star. Its articles of incorporation state that the purpose of its organization is "to own, control, conduct and manage homes, hospitals and asylums for the care, maintenance and support of aged, indigent or infirm members of the Order of the Eastern Star". The by-laws of the corporation restrict admission to the Home to members of the Order of the Eastern Star who have been in good standing for not less than ten years. The Home is maintained and supported by dues and assessments levied against members of said Order. No person not a member of said Order has ever been admitted as a resident of said Home. It thus appears that only those persons who have contributed toward the support of said home for a long period of time are entitled to the privileges of said home, and such contributions are practically the sole support of the home. Is such an organization a charitable or benevolent society or corporation within the meaning and intent of section 41 of the Probate Code?

In the case of Brown v. La Societe Francaise, etc., 138 Cal. 475, 71 P. 516, the question before the court was whether or not the defendant was a charitable institution. In passing upon that question, the court held that it was not such an organization and, for reason of so holding, stated at page 477 of 138 Cal., at page 517 of 71 P.: "From the by-laws of the defendant, of date May 10, 1854, it appears that the society was originally organized as a voluntary association, but was afterwards incorporated by the filing of a certificate of election of trustees June 7, 1854 (Hitt. Gen. Laws, art. 1024); and on May

5, 1895, new by-laws were adopted. From these it appears that 'the society is established on the basis of mutuality for the treatment of sick members,' or, as more specifically provided, for the purpose of securing to its members (without payment otherwise than of dues), medical and surgical treatment, including the services of its physicians, surgeons, apothecaries, dentist, nurses, etc., and also medicines. Nor do we find in it any provision for assistance to others except to paying patients, or sick persons, not members, admitted to treatment for agreed compensation. It is therefore merely an association for mutual profit or benefit, similar in its essential nature to other societies formed for such purposes. Gorman v. Russell, 14 Cal. 531; Id., 18 Cal. 688; Donnelly v. Boston Catholic Cemetery, 146 Mass. 166, 15 N.E. 505; Coe v. Washington Mills, 149 Mass. [543] 547, 21 N.E. 966; Babb v. Reed, 5 Rawle [Pa.] 151, 28 Am.Dec. 650; Texas & Pac. Coal Co. v. Connaughton [20 Tex.Civ.App. 642], 50 S.W. 173–175."

In the Estate of Dol, 182 Cal. 159, 187 P. 428, an appeal was taken from an order distributing the sum of $5,000 to a hospital located in Los Angeles, and the name of which and the purpose of its organization were practically the same as those of the defendant in the Brown case. The court held that the two organizations were so similar that the later case was controlled by the decision in the earlier case, that the respondent in the case then before the court was not a charitable or benevolent society or corporation as these terms were used in section 1313 of the Civil Code (now in part re-enacted in section 41 of the Probate Code), and that the bequest to it was not limited by the provisions of said section of the Code. In the discussion of the question of the charitable character of the defendant therein, Mr. Justice Shaw at page 163 of 182 Cal., at page 430 of 187 P. of the Estate of Dol expressed the view of the court as follows: "* * * The same principle is stated in Gorman v. Russell, 14 Cal. 531. Referring to an organization known as the 'Riggers and Stevedores Union Association of San Francisco,' which was unincorporated, the court said that it was 'a voluntary association formed for the benefit of the members of it,' and further that—'A number of the members of a particular avocation meet for mutual benefit and protection, and prescribe rules for the government of the society thus organized. They agree that each shall contribute a certain fixed sum to the common treasury, and that the sum shall be applied, in a certain event, as in sickness, etc., to the relief of the necessities or wants of the individual members or of their families. This is not a charity any more than an assurance society against fire, or upon life, is a charity. It is simply a fair and reciprocal contract among the members to pay certain amounts, in certain contingencies, to each other, out of a common fund.' The fact that the society there involved was unincorporated makes no essential difference. The members of the corporation here involved are interested therein substantially in the same way as the members of a voluntary association or partnership formed for the same object are interested. No sound distinction exists on this ground. In each case the arrangement partakes of the nature of a contract whereby, for the dues and fees agreed upon and paid, the members receive the medical treatment to be given by the association at the expense of the common fund thus accumulated. Such a society, whether incorporated or not, is not doing charitable work, but is merely rendering the consideration agreed upon in the contract between it and its members."

The Estate of Dol was again before this court. On the second occasion the question before the court was whether the Los Angeles County Pioneer Society was a charitable society, as that term was used in section 1313 of the Civil Code. That society was organized for the purpose of the collection and preservation of data touching the early history of the state. This court held: "We are of the opinion that the respondent is a charitable and benevolent corporation. If its only object were to cultivate social intercourse and friendship among its members, it would be for the benefit of the members alone, and it would not come within that class. But it is apparent from a reading of the part of the articles [of incorporation] above quoted that this was but a minor part of its purposes." 186 Cal. 64, 65, 198 P. 1039, 1040.

It might be well to call attention again to the purpose for which the appellant, the Eastern Star Homes, was organized, which is to maintain a home exclusively for its own members. No person other than a member of the Order in good standing could enjoy the privileges of the Home, which was maintained and supported by dues and assessments paid by these members.

No legal distinction may be made respecting their charitable character between an institution founded and maintained by a society or corporation for the purpose of providing a home for its needy members and a hospital founded and maintained for the purpose of caring for its sick or injured members, where each institution is supported and maintained by dues and assessments levied upon and paid by its members. In each case those enjoying the privileges of the Home or hospital have paid for all the privileges and benefits received by them. In neither case does any member of either of such institutions, enjoying the privileges and benefits of the society of which he is a member, receive anything for which he has not paid a stipulated consideration. In the case of a member of the Order of the Eastern Star, before she can be entitled to the benefit of the Home maintained by that Order, she must have been a member of the order for ten years and be in good standing at the time of making her application for admission. That means that for that period of time she has contributed toward the support of the Home all dues and assessments levied by the Order. To say that the Home is a charitable society or corporation when its benefits and privileges are limited solely to the members of the Order who have contributed definite and fixed amounts for its maintenance and support, is contrary to all reasonable or legal definitions of the word "charity". The decisions above cited are contrary to any such construction and clearly support the contention of appellant that the Eastern Star Homes is not a charitable or benevolent society or corporation within the provisions of section 41 of the Probate Code. "Such a society," quoting from the case of Gorman v. Russell, supra, and approved and applied by this court in the Estate of Dol, supra, "whether incorporated or not, is not doing charitable work, but is merely rendering the consideration agreed upon in the contract between it and its members."

The respondents have cited in their brief some thirty cases decided either by this court or by the district courts of appeal, which they argue support their contention that the appellant is a charitable or benevolent society or corporation. A mere reading of these cases discloses that not one of them involves a society or corporation whose benefits and privileges are limited only to the paying members of such organization. It is useless to discuss these cases in any detail for the reason that they are so wide of the mark that their inapplicability is apparent from simply mentioning the name and purpose of the particular organization to which the gift was made. In one case, In re Estate of Friedman, 171 Cal. 431, 153 P. 918, the bequest was made to the Hebrew Home for Aged Disabled of San Francisco. It is not clear that this Home was ever limited even to the Jewish people, but it does plainly appear that the privileges of this Home were not limited to the members of that group who contributed to the maintenance of the Home, like those members of the hospital in the Dol case were doing. A number of these cases involved gifts to educational institutions, which clearly have no application to the question before us in the present proceeding. In other cases the question before the court concerned bequests to churches and other religious organizations. As churches and religious organizations are invariably held to be charitable societies, the court in these last-named cases held, in accordance with this well-established rule, that such bequests were charitable within the terms of section 1313 of the Civil Code. The Estate of Burns, 26 Cal. App.2d 741, 80 P.2d 77, is also cited, but for what purpose we are unable to determine. While the will under contest in that case provided for a bequest to the Hollenbeck Home, a charitable institution, the sole question before the court in that case was whether the evidence of the contestants established a prima facie case of undue influence on the part of certain beneficiaries named in the will. This court held that it was insufficient and affirmed the judgment of nonsuit. It is unnecessary to consider any of the other cited cases, as those not discussed above have no more bearing upon this present proceeding than those we have considered.

The rule approved by the decisions of this state cited and relied upon above is the general accepted doctrine in other jurisdictions. In Zollmann on Charities at section 206 it is stated: "Mutual benefit societies exist in great numbers and, as their name indicates, are of much benefit to their members. * * * Since their benevolence begins and ends at home, they will not receive recognition as charities.

* * *". The author in section 208 of the same work in discussing the status of lodges, stated: "On reason lodges are not charities within the meaning of the statute of Elizabeth. * * * They are bodies which derive their funds not from gifts, testamentary or otherwise, but from dues, fees and assessments, and which have other objects than charity, and are rather mutual benefit associations than charitable institutions. * * * A lodge of Odd Fellows is, therefore, a mutual benefit society rather than a charity."

A leading case upon this subject is City of Bangor v. Rising Virtue Lodge, 73 Me. 428, 40 Am.Rep. 369, in which the question before the court was whether a Masonic lodge was a charitable institution. After an extended review of the authorities upon the subject and an analysis of the constitution, by-laws, and rules and regulations of Masonic lodges, the court held that such a lodge was not a charitable institution. On page 436 of the opinion in 73 Me., 40 Am.Rep. 369, the court states its conclusion as follows: "* * * Its funds are derived * * * from fees and the assessment of its members. The funds so obtained are to be distributed among the poor and needy members, from whom they were collected, and among their wives and children. It is an association for the mutual benefit of its members, and not a charitable institution within the meaning of the statute." The statute just referred to provided that all real and personal property of all benevolent and charitable institutions incorporated in that state should be exempt from taxation. The court held that as the lodge was not a charitable or benevolent institution, it was not exempt from taxation under said statute.

Among the cases cited and relied upon in City of Bangor v. Rising Virtue Lodge, supra, was the case of Babb v. Reed, 5 Rawle, Pa., 151, 157, 28 Am.Dec. 650, wherein the charitable character of an Odd Fellows lodge was at issue. In commenting on that case the Supreme Court of Maine in the above decision (page 436 of 73 Me., 40 Am.Rep. 369) observed: "In Babb v. Reed, 5 Rawle [Pa., 151] 157 [28 Am.Dec. 650], it was held that a lodge of Odd Fellows, being an association of mutual benevolence among its members, was not a charitable institution. * * * 'The association,' observes Sargent, J., in delivering the opinion of the court, 'from whose property is the money in court, was formed and conducted without incorporation. Its objects are stated to be the employment of its funds in purposes of mutual benevolence among its members and their families; but these cannot be deemed charitable uses under the common law of Pennsylvania, or the statute 43 Eliz. * * *' "

Respondents contend that a later case of the Supreme Court of Pennsylvania, Philadelphia v. Masonic Home, 160 Pa. 572, 28 A. 954, 23 L.R.A. 545, 40 Am.St.Rep. 736, lays down a different rule and is in conflict with the earlier case of Babb v. Reed, supra, but such is not the case. The constitution of the state of Pennsylvania, article 9, § 1, provided that property of "institutions of purely public charity" was exempt from taxation. The court in Philadelphia v. Masonic Home, supra, simply held that the Masonic home, maintained by the Grand Lodge of Masons of the state of Pennsylvania, was not such an institution, as the benefits of the home were limited to members of the Masonic fraternity and were not open to the public.

In the case of In re Rathbone's Estate, 170 Misc. 1030, 11 N.Y.S.2d 506, at page 529, is to be found a clear statement as to the distinction between a beneficial and a charitable society. It is there said: "The distinction between a beneficial and a charitable society is clear. In the beneficial society the world outside the association's doors is essentially a stranger. The beneficial society is regardful only of its members. It constitutes a group of insiders. Its membership is formed of candidates able to satisfy onerous conditions—financial, moral, civil, etc. The members have been drawn together by a mutual desire to be as they are. Once assembled they exclude all other persons from their society activities. The charitable institution is exactly the opposite in all the stated particulars allowing of comparison. To a charity the world outside is a world, the inhabitants of which should all be united as brothers. * * * The managing members of a charitable organization expect to get nothing for their labors. Charity seeks primarily the good of others. * * * Charity is the proof of the profound paradox that to get one must give but the giving must not be for the purpose of the getting. Every charitable use is open to the whole world so far as is practicable."

As the appellant, the Eastern Star Homes, was founded and is maintained for the express and sole purpose of providing a home for the members of the Order of the Eastern Star of this state, and as the funds necessary for its operation and maintenance were contributed by the members of said Order in regular dues and assessments, under the above authorities it cannot be held to be a charitable or benevolent corporation or society, but is, on the other hand, a mutual benefit association, rendering to its members benefits for an agreed consideration under a contract between itself and its members.

The respondents further contend that even though the appellant is not a charitable or benevolent society or corporation, that the bequest to it is for a charitable purpose and therefore comes within the limitation placed on gifts of that character by the provisions of section 41 of the Probate Code. In support of this contention they cite the case of In re Estate of Willey, 128 Cal. 1, 60 P. 471. In that case it was contended that certain gifts to several Masonic bodies were invalid because these bodies were charitable societies. The court held that even if these Masonic bodies were not charitable societies, the gifts to them were for charitable purposes and sustained them. This decision, therefore, properly may be construed as holding that a gift or bequest may be charitable and therefore subject to the limitation placed on such gifts by section 41 of the Probate Code, although the person or society to whom the gift or bequest is made may not be a charitable society.

As already stated, the bequest to the Eastern Star Homes was made "to be used by the trustees in such manner as may be most beneficial for the Home and its inmates". It is presumed that the trustees will properly apply the fund so bequeathed to them in accordance with the terms imposed by the testatrix. In re Estate of Willey, supra, 128 Cal. at page, 12, 60 P. 471, 474. If so, the proceeds from the gift will be applied in accordance with the purposes of the society, as set forth in its articles of incorporation, which we have seen are "to maintain the Home for the members of the Order". As the purposes of the Order of the Eastern Star are not charitable and the bequest from the testatrix was to carry out these purposes, it cannot be said that the bequest took on any of the characteristics of a charitable nature. Had the bequest been made to the Home for the care and maintenance of the children of the members of the Order, rather than for the benefit of the members, then there might be some legal grounds for holding it to be a gift in trust for charitable purposes, and the case would be brought within the rule announced in the Estate of Willey, supra, where the bequest was made to certain Masonic bodies "for the use of the widows' and orphans' fund of said" lodges. But it was not so made and, as made, the only persons to be benefited by the gift were the members of the Order who might at some time in their lives become residents in the Home.

The accepted definition in this state of a charitable trust is "* * * a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals". People v. Cogswell, 113 Cal. 129, 45 P. 270, 271, 35 L.R.A. 269; Zollmann on Trusts, page 140; 5 Cal.Jur. 6.

The bequest here involved does not come within the terms of this definition. It was not a donation for promoting the welfare of mankind at large, or of any community or class indefinite in number. On the other hand, its purpose was to promote the welfare of a class of individuals definite in number; that is, the membership of the Order of the Eastern Star of the state. As no member of the Order is entitled to become a resident of the Home without she is in good standing in the Order and has been such for ten years prior to her admission, the number of individuals whose welfare the bequest was designed to promote was definitely fixed, and their identity could be ascertained by an inspection of the records of the Order. The bequest, therefore, was not a gift to the Home for charitable uses, as the members of the Order for whose welfare the gift was made were an ascertainable and definite class of beneficiaries. Zollmann on Trusts, page 141; Loch v. Mayer, 50 Misc. 442, 100 N.Y.S. 837, 839.

I have stated in a preceding part of this opinion that practically the sole support of the Eastern Star Homes came from the annual dues and assessments levied against the Members of the Order of the Eastern Star in this state. The facts respecting the maintenance and operation of the Home are that the annual cost of such maintenance and operation of the Home is $30,000. Approximately $24,000 of this amount is from annual dues and assessments levied by the Order on its members, and the balance of said annual cost of maintenance, except the sum of $500, is from income on investments made by the corporation from the surplus of previous dues and assessments. Said sum of $500 per annum, the court found, is income "from an endowment fund of the corporation". Respondents state that endowment suggests charity. Admitting that the possession of a substantial endowment fund is frequently taken into consideration in determining the charitable character of an institution possessing such a fund, we have been cited to no instance where the income from an endowment fund so insignificant in comparison to the total upkeep of the institution, as is the endowment income in the present case, has ever been seriously considered in determining whether such an institution is a charitable society. Here the annual income from the endowment fund is less than two per cent of the annual cost of maintaining the Home, and it cannot have the effect of determining the charitable character of the Home when the purposes of the Home and the actual operation thereof indicate its non-charitable character.

Respondents call our attention to the by-laws of the corporation, the Eastern Star Homes, where in four instances reference is made to the corporation as a "charity", and contend that it is bound by such an interpretation of itself. There is no merit in this contention. No authority is cited in support of this assertion of respondents, and we doubt whether any can be found. On the other hand, the contrary rule is followed in this state. Stewart v. California Medical, etc., Ass'n, 178 Cal. 418, 421, 422, 176 P. 46; Stonaker v. Big Sisters Hospital, 116 Cal.App. 375, 378, 2 P.2d 520. It would be an easy matter in those states where charitable societies are exempt from certain taxes, for a corporation organized for purely commercial purposes, to escape taxation by stating in its articles of incorporation or in its by-laws that its purposes were benevolent and that it was a charitable society, if respondents' construction of the law should be accepted.

I have referred to the heirs of said deceased who have appeared herein by filing a brief in opposition to this appeal as the respondents.

For the foregoing reasons in my opinion the judgment should be reversed.

I concur: CARTER, J.

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18 Cal.2d 40

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

S. F. 16513.

Supreme Court of California.

April 30, 1941.

1. **Workmen's compensation** 🔑1939

The finding of the Industrial Accident Commission will not be disturbed unless there is an entire lack of evidence to support it and court is not concerned with conflicts in the evidence.

2. **Workmen's compensation** 🔑1574

Where dock superintendent's duties required him to call at railroad freight depot in morning on his way to dock and obtain notices that railroad had received concerning cars of freight to be accepted by the superintendent's employer, take the notices to dock office and to take charge of cars of freight that had arrived, and after obtaining notices the superintendent obtained permission from locomotive fireman to ride on engine from freight depot to dock, evidence sustained finding of Industrial Accident Commission that injury sustained by superintendent when he stepped off engine to avoid steam "arose out of and in course of the employment." St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arose out of and in Course of Employment".

3. **Workmen's compensation** 🔑1165

Rules applicable to a common-law action for negligent injury have no application to proceeding for workmen's compensation under the Workmen's Compensation Laws. St. 1937, p. 269, § 3600.

4. **Workmen's compensation** 🔑772

Whether injured servant was negligent, or assumed risk, cannot be considered as factors in determining workmen's compensation case. St.1937, p. 269, § 3600.

5. **Workmen's compensation** 🔑753

Where an employee chooses for his own convenience a hazardous means, a safe means being provided by the employer for his employees, not customarily used, of entering or leaving employer's premises without the acquiescence of his employer, the employee steps out of the "course of employment", and any injury occurring under such circumstances does not "arise out of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Arise out of Employment" and "Course of Employment".

6. Workmen's compensation ⚷609

The fact alone that an injury occurs while employee is in service of his employer is not sufficient to establish liability for workmen's compensation, but there must be some causal connection between the employment and the injury in the sense that by reason of the employment there was an unusual or additional exposure of the injured employee to the type or character of hazard and danger which caused the injury.

7. Workmen's compensation ⚷712

In order that an employee may be considered as upon his employer's premises at the time of the injury, it is not necessarily essential that the premises be circumscribed by walls or barriers, nor that the same be wholly under the control of the employer.

8. Workmen's compensation ⚷772

The "added risk doctrine" is that where an employee assumes a risk greater than that usually incident to his employment, he cannot recover, but it may well be asserted that the doctrine cannot be followed in California because it is in effect nothing more than contributory negligence. Const. art. 20, 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Added Risk Doctrine".

9. Workmen's compensation ⚷630

The circumstances giving rise to the "added risk doctrine" are pertinent in determining the issue regarding whether injury to employee arose out of, or in the course of, employment.

10. Workmen's compensation ⚷754

Where dock superintendent's duties required him to call at railroad freight depot in morning on his way to dock and obtain notices that railroad had received concerning cars of freight to be accepted by the superintendent's employer, take the notices to dock office and to take charge of cars of freight that had arrived, and after obtaining notices the superintendent obtained permission from locomotive fireman to ride on engine from freight depot to dock, and there was no prohibition against riding on engines, it was frequently done by employees, and it occurred on premises which were used in part for the conduct of the employer's business, the injury was compensable. St.1937, p. 269, § 3600.

11. Workmen's compensation ⚷754

Where dock superintendent's duties required him to call at railroad freight depot in morning on his way to dock and obtain notices that railroad had received concerning cars of freight to be accepted by the superintendent's employer, take the notices to dock office and to take charge of cars of freight that had arrived, and after obtaining notices, the superintendent obtained permission from locomotive fireman to ride on engine from freight depot to dock, the circumstance that the superintendent may have been a trespasser on the engine as to the railroad did not defeat right to workmen's compensation. St.1937, p. 269, § 3600.

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In Bank.

Petition to annul an award of the Industrial Accident Commission.

Proceeding by the Associated Indemnity Corporation against the Industrial Accident Commission of the State of California to annul an order of the Commission awarding compensation to Boyden Macfie.

Award affirmed.

Prior opinion, 105 P.2d 374.

Purvis, Jakobsen & Kennedy, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

CARTER, Justice.

Petitioner seeks annulment of the order of respondent, Industrial Accident Commission, awarding compensation to respondent, Boyden Macfie.

[1] On December 8, 1939, Macfie was in the employ of Parr-Richmond Terminal Company as dock superintendent at Port Costa, California, and at that time he sustained injuries causing temporary total disability for which an award for compensation was made by respondent Commission. The sole issue presented for determination by the Commission and here presented is whether or not Macfie's injury arose out of and occurred in the course of his employment, petitioner maintaining the negative. In examining the evidence bearing upon that issue we must be guided by the rule that the finding of the Commission will not be disturbed by this court

unless there is an entire lack of evidence to support it, and that with conflicts in the evidence we are not concerned. Drillon v. Industrial Accident Commission, 17 Cal. 2d 346, 110 P.2d 64; Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570.

Disregarding conflicts in the evidence, the facts appear to be as follows: Macfie had been employed by the Parr-Richmond Terminal Company for a period of over six years prior to the time he was injured. He had been employed at the dock hereinafter mentioned since November 21, 1939. At the time of the injury his employer in the course of its business was in possession of and using a dock at Port Costa, and Macfie was employed as superintendent in charge of that dock. His employer was engaged in the warehouse business and handled freight hauled by the Southern Pacific Company on its railroad. The dock and his employer's office were situated adjacent to the main line right of way of the Southern Pacific Company upon which were several railroad tracks, consisting of switch and main line tracks. About three-quarters or one-half of a mile up these tracks from the dock the Southern Pacific Company maintained a freight depot. The only practicable route of travel between the dock and depot was along and across the railroad tracks, and that route was generally used by the employer's employees. As superintendent, it was Macfie's duty to call at the freight depot in the morning on his way to the dock and obtain any notices that the Southern Pacific Company had received concerning cars of freight to be accepted by his employer, take those notices to the office at the dock, and further to take charge of the cars of freight that had arrived. At about 15 minutes to 8 o'clock on the morning of the accident, in performance of his duty, and as was his custom, he went to the freight depot and obtained the above-mentioned written notices from the Southern Pacific Company. His regular hours of work were 8 a. m. to 5 p. m., but he usually arrived at the depot about 10 minutes before 8 a. m. Macfie, intending to go down the tracks to take the above-mentioned notices to his employer's office at the dock, requested and obtained permission from a locomotive fireman in the employ of the Southern Pacific Company to ride on an engine of said company which was standing near the freight depot and was about to proceed down the tracks toward the dock. After riding about halfway to the dock on the steps of the engine, the engine stopped and "blew steam" and Macfie stepped off to avoid the steam and in so doing fractured his leg, this being the injury for which compensation was awarded. The accident occurred at about 5 minutes to eight. He had ridden on engines under the same circumstances on prior occasions and it was the practice for other of his employer's employees to ride on the engines, especially at noon from the dock to the depot. His employer had never forbidden such practice. It was Macfie's duty to go to the freight depot at night after leaving his employer's office and leave switching orders for disposal of cars of freight for the night and the following day. On such occasions he did not ride on the engines because it was dark, but walked along the tracks. Macfie, by virtue of his position as superintendent, was authorized to use his discretion in the performance of his duties, he being in complete charge of the dock. The engines were not designed to accommodate passengers. Petitioner introduced evidence to the effect that inasmuch as the fireman on the switch engine had no authority to grant permission to ride thereon, Macfie was a trespasser as to the Southern Pacific Company while riding on the same; and further that there was a path from the depot to the dock along the tracks, as a means of egress and ingress. Macfie testified that he did not know of such path. There is no occasion for the application of the "going and coming" rule in this case because it was conceded by petitioner at the hearing before the Commission that Macfie was acting in the course of his employment in going to the freight depot to obtain the notices of arrival of freight and in taking those notices to the office of his employer at the dock, which, of course, includes the concession that Macfie had commenced his day's work when he arrived at the freight depot, or at least, that he was performing work for his employer in going from the freight depot to the dock. Manifestly, that concession is in accordance with the facts above stated. Petitioner claims however that Macfie stepped out of the course of his employment when he rode on the switch engine, and that therefore the injury did not arise out of or occur in the course of his employment; that there was no causal connection between the employment and the injury.

[2] It is apparent from the foregoing facts that Macfie was engaged in the service of his employer when he was traveling from the freight depot to the dock. He was then carrying the notices of the arrival of freight to the dock and was as much engaged in his employer's business as when he performed other duties after arriving at the dock. The only question is then, whether his use of the switch engine as the instrumentality by which to reach the dock constituted a leaving of the course of the employment or whether the injury arose out of a risk or condition incident to the employment. The finding of the Commission that the injury arose out of and in the course of the employment must be sustained.

[3-5] It is fundamental that the rules applicable to a common-law action for negligent injury have no application to proceedings for compensation under the Workmen's Compensation Laws. (Labor Code, sec. 3600, St.1937, p. 269; 27 Cal. Jur. 255, 256.) It follows that whether or not Macfie was negligent or assumed the risk when riding on the switch engine cannot be considered as factors in the determination of this case. It is true, as contended by petitioner, that when an employee chooses for his own conveyance a hazardous means (a safe means being provided by the employer for his employees), not customarily used, of entering or leaving his employer's premises, without the acquiescence of his employer, such employee may be said to have stepped out of the course of his employment and any injury occurring under such circumstances does not arise out of his employment. Moore & Scott Iron Works v. Industrial Accident Commission, 36 Cal.App. 582, 172 P. 1114.

[6] Also the mere fact alone that the injury occurs while the employee is in the service of his employer is not sufficient to establish liability for compensation. There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured employee to the kind or character of hazard and danger which caused the injury. California Casualty Indemnity Exchange v. Industrial Accident Commission, 190 Cal. 433, 213 P. 257. But in the instant case, riding the switch engines between the freight depot and the dock was customarily done by Macfie and other employees, and such practice was not forbidden by the employer; the only method of travel between those points was along the railroad tracks. Macfie, by virtue of his position as superintendent, had large discretion in the means employed and the manner of performing his duties; such was the testimony of his immediate superior. On the occasion of the injury he had commenced his day's work when he arrived at the freight depot to obtain the notices of the arrival of freight and was acting in the course of his employment in taking those notices to the dock. He had charge of the freight cars, and as an incident thereto, the transfer of the freight arriving on the railroad to his employer's warehouse. From these circumstances it may reasonably be inferred that the employer impliedly consented or authorized him to ride on the switch engine; he would thereby save time and energy in reaching the dock to the advantage of his employer and in advancement of his employer's interests. Further, the facts justify the inference that he was in a legal sense on his employer's premises when he went from the depot to the dock. His duties were to attend to freight arriving and leaving on the railroad and the area necessary for the performance of those duties included the railroad right of way between the depot and the dock.

[7] In order that an employee may be considered as upon his employer's premises at the time of the injury it is not necessarily essential that the premises be circumscribed by walls or barriers (Makins v. Industrial Accident Commission, 198 Cal. 698, 247 P. 202, 49 A.L.R. 411); nor that the same be wholly under the control of the employer. Globe Indemnity Co. v. Industrial Accident Commission, 208 Cal. 715, 284 P. 661; Judson Mfg. Co. v. Industrial Accident Commission, 181 Cal. 300, 184 P. 1; Starr Piano Co. v. Industrial Accident Commission, 181 Cal. 433, 184 P. 860. These principles coupled with the circumstances that Macfie and other employees traveled along the railroad tracks and had ridden on the engines before, that he had large discretion in the performance of his duties, and that the employer had not forbidden its employees from traveling along the railroad track or riding on the engines, furnish sufficient basis for at least concluding that Macfie was on the premises with the consent and approval of his employer, and was

performing his duties thereon in going from the depot to the dock. Petitioner contends, however, that Macfie in riding on the switch engine adopted such an unreasonable and hazardous method of traveling from the depot to the dock that it constituted an abandonment of his employment. It must be kept in mind in this connection that Macfie and other employees had frequently ridden on the engines before, and that Macfie, by virtue of his position, had considerable latitude in the manner and means of performing his duties to his employer, and that he was, in legal effect, on his employer's premises and performing his duties when he set out to go to the dock, and that he asked and obtained permission from the fireman to ride on the engine. The doctrine urged by the petitioner must be applied with extreme caution for the reason that it is barely distinguishable from the rules of contributory negligence and assumption of risk which are not applicable in compensation cases.

[8, 9] Indeed it may well be asserted that the doctrine of "added risk", that is, where an employee assumes a risk greater than that usually incident to his employment, he cannot recover, cannot be followed in California because it is in effect nothing more than contributory negligence. Campbell, Workmen's Compensation, vol. 1, sec. 238; Calif.Const. art. XX, sec. 21. The circumstances giving rise to the doctrine are pertinent in determining the issue as to whether the injury arose out of or in the course of employment. In California Casualty Indemnity Exchange v. Industrial Accident Commission, 5 Cal.2d 185, 187, 53 P.2d 758, 759, a traveling salesman was asphyxiated while staying over night at an auto camp as the result of leaving a gas heater burn over night and failing to provide ventilation. In reply to the contention that such conduct was so unreasonable and unauthorized as to remove him from the scope of his employment, this court said: "It is practically impossible to distinguish this contention from a claim that the death of the employee was caused by his negligence. We must conclude that petitioner refrains from admitting this fact because it is so well known that negligence of the employee is no defense to a compensation claim of the kind presented in this case." In Stumar v. Industrial Accident Commission, 16 Cal.App.2d 429, 60 P.2d 557, it was held that a motion picture cameraman while inspecting a motion picture set in the performance of his duties, was in the course of his employment when using his own airplane to reach the set, because he had discretion in the means and manner of performing his duties, notwithstanding the fact that his employer would not have acquiesced in the use of such plane had he known that its use was contemplated.

[10] It is worthy of note that by the weight of authority, even the fact that an injury was received by an employee while violating an instruction or rule of his employer, does not necessarily prevent the injured employee from recovering on the ground that the injury did not arise out of or occur in the course of the employment. See cases collected, 119 A.L.R. 1409; 83 A.L.R. 1211; 58 A.L.R. 198; 26 A.L.R. 166; 23 A.L.R. 1161. This court discussed that rule in Pacific Employers Ins. Co. v. Chavez, 5 Cal.2d 247, 54 P.2d 701. If such is the law, then certainly, in a case such as this, where there was no prohibition against riding on the engines, it was frequently done by employees, and it occurred on premises which were used in part for the conduct of the employer's business, and the employee had wide discretion in the means and methods of performing his duty, and was performing service for his employer, there should be little doubt but that the injury is compensable. In Prentice v. Twin City Wholesale Grocery, 202 Minn. 455, 278 N.W. 895, an employee was injured when he jumped on a horizontal conveyor of goods, intending to ride to another portion of the building to perform a duty for his employer. Although he violated an order of the employer in riding on the conveyor, the injury was held to have arisen out of and in the course of the employment.

[11] The circumstance that Macfie may have been a trespasser on the engine as to the Southern Pacific Company does not alter the situation. This is not a common-law negligence case, and he was not a trespasser as to his employer. He acted in good faith in obtaining permission to ride from the fireman, and in view of the circumstances of the case it may be said that the employer authorized the trespass. See Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221, 72 L.Ed. 507, 66 A.L.R. 1402.

For the foregoing reasons we are not inclined to disturb the findings of the respondent Commission that Macfie's injury arose out of and in the course of his employment.

The award of the Industrial Accident Commission is affirmed.

We concur: GIBSON, C. J.; TRAYNOR, J.; CURTIS, J.; SHENK, J.

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17 Cal.2d 820

KUHLMAN v. PACIFIC STATES SAVINGS & LOAN CO. et al.

L. A. 16415.

Supreme Court of California.

April 24, 1941.

Fraudulent conveyances 🔑74(2), 159(1), 162(1)

Judgment creditor was not entitled to have judgment satisfied out of property of corporation to which debtor transferred all its assets pending suit with intent to defraud creditors unless consideration for transfer was inadequate and corporation intended or participated in or had knowledge of debtor's fraudulent intent, notwithstanding that corporation had assisted debtor in resisting creditor's claim.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Mary E. Kuhlman against the Pacific States Savings & Loan Company and others, to compel payment of a judgment against the Fidelity Savings & Loan Association out of property transferred by it to the Pacific States Building & Loan Company. Judgment for defendants, and plaintiff appeals.

Affirmed.

Halverson & Halverson and George Halverson, all of Los Angeles, for appellant.

John L. Mace and Mace & Tuthill, all of Los Angeles, for respondents.

EDMONDS, Justice.

The appellant brought suit to compel the payment of a judgment which she secured against Fidelity Savings and Loan Association out of property transferred by it to Pacific States Building and Loan Company. She insists that her complaint states a cause of action, although the superior court sustained the demurrer of the respondent corporations without leave to amend.

According to her allegations, in 1931 she sued Fidelity for damages upon the ground that it had converted to its own use certain personal property claimed by her, and secured the judgment she is now seeking to collect. A short time before her suit was filed and long before judgment, Fidelity "with intent to hinder, delay and defraud its creditors and particularly this plaintiff" entered into an agreement with Pacific States by which it transferred to the latter all of its assets, including the property for which she recovered judgment. The consideration for the transfer of the Fidelity's assets included an agreement by Pacific States to pay certain stated liabilities, not including the amount due to the appellant. As further consideration for the property transferred to it, Pacific States "agreed to pay" certain Definite Term Investment certificates payable in 1936, "and if the same have been issued, they are now in the hands of the Building and Loan Commissioner and not subject to execution".

At the time of entering into this agreement, so the appellant charges, Pacific States had information concerning her demands, and "caused its attorneys to appear on behalf of said defendant Fidelity Savings and Loan Association and defend said action, with full knowledge and notice of all plaintiff's rights". Other allegations are that Fidelity has no assets out of which she can collect her judgment, and that execution against it would be unavailing.

The appellant contends that Pacific States cannot take over all of the assets of Fidelity without becoming responsible for its liabilities. But there is no allegation that the consideration was inadequate, and a charge that Fidelity entered into an agreement to defraud its creditors is not an allegation that Pacific States participated in the transaction with this intent. The fact that Pacific States knew of the appellant's claim to certain personal property and assisted in resisting that claim is not a ground for subjecting the property received by it to the judgment thereafter rendered. A conveyance made for a valuable consideration may not be attacked by the grantor's creditor, even though the transaction was entered into by the debtor with intent to delay or defraud his creditors, unless the grantee so intended or participated in or had knowledge of the fraudulent intent. Rossen v. Villanueva, 175 Cal. 632, 166 P. 1004; Ross v. Wellman, 102 Cal. 1, 36 P. 402; Cohen v. Knox, 90 Cal. 266, 27 P. 215, 13 L.R.A. 711; Abbey v. Zimmerman, 12 Cal.App.2d 311, 55 P.2d 903.

The judgment is affirmed.

We concur: CARTER, J.; CURTIS, J.; SHENK, J.; TRAYNOR, J.

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17 Cal.2d 834

BITTINGER v. NEW YORK LIFE INS. CO.

L. A. 17756.

Supreme Court of California.

April 24, 1941.

Rehearing Denied May 22, 1941.

1. Insurance 🔑392(1)

Even if life policy provision that if premium or interest on policy loan was not paid on or before date when due, and if there was any indebtedness to insurer policy would continue as term insurance, was construed as providing that policy would immediately lapse on nonpayment of interest, such provision was "waived" by insurer's acceptance of premium payment at time when interest was due, since insurer could not at the same time accept the premium payment and declare the policy lapsed, and policy could not lapse automatically at that time.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Insurance 🔑392(11)

Where insured elected to use dividend as part payment of premium on life policy and gave check for difference of $12.38, which check was accepted by insurer which issued premium receipt, attempted rescission, on nonpayment of interest due on loan, by offer to refund the $12.38 and application of the dividend to payment of term insurance, was ineffective, where the refund was not accepted by the insured.

3. Insurance 🔑392(11)

After accepting money for payment of premium on life policy, insurer could not without consent or even knowledge of insured apply money in another way which would result in converting the original policy to term insurance.

4. Insurance 🔑392(11)

Insurer's purported rescission of premium payment, because of insured's nonpayment of interest on life policy loan, was ineffective where the purported rescission was attempted after the insured's death.

5. Insurance 🔑146(1)

In interpreting provision of life policy that if any premium or interest is not paid on date when due the insurer will restore policy as of the date of such nonpayment, on payment by insured of such premium or interest within one month thereafter with interest, it was necessary to look at the policy as a whole and to be governed by the general rules regarding the interpretation of insurance policies.

6. Insurance 🔑310(2)

Where life policy did not contain express provision for forfeiture for nonpayment of premiums or interest, another provision that if any premium or interest is not paid on date when due, the insurer will restore policy as of date of such nonpayment, on payment by insured of such premium or interest within one month thereafter with interest, would not be interpreted in such a way as to result in immediate forfeiture.

7. Insurance 🔑146(3)

A forfeiture of a life policy will not be declared unless expressly provided for in the policy.

8. Insurance 🔑310(2)

In the absence of statutory regulation to the contrary, a life policy by express provision of the policy may be made immediately forfeitable upon nonpayment of premium or interest due on policy loan.

9. Contracts 🔑318

Forfeitures generally are not favored.

10. Insurance ⚷146(3)

A forfeiture of a life policy will be permitted only when expressed in the policy in clear and unmistakable terms.

11. Insurance ⚷310(2)

The use of the word "restore" in reinstatement clause of life policy providing that if any premium or interest is not paid on date when due the insurer will restore policy as of the date of such nonpayment, on payment by the insured of such premium or interest within one month thereafter with interest did not imply a forfeiture for nonpayment of premium or interest, especially where the clause appeared in the portion of policy entitled "this policy is automatically nonforfeitable."

See Words and Phrases, Permanent Edition, for all other definitions of "Restore".

12. Insurance ⚷349(1)

Reinstatement clause of life policy providing that if any premium or interest is not paid on date when due, the insurer will restore policy as of date of such nonpayment, on payment by insured of such premium or interest within one month thereafter with interest, prevents a lapse of the policy immediately and extends its effectiveness for the period of one month, and where insured died within one month after default, the beneficiary was entitled to recover death benefits, less indebtedness due insurer at time of insured's death.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Adalyn B. Bittinger against the New York Life Insurance Company upon a life policy. From a judgment for defendant, plaintiff appeals.

Reversed with directions.

Prior opinion, 105 P.2d 646.

Rehearing denied; SHENK and EDMONDS, JJ., not participating.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for respondent.

CURTIS, Justice.

This is an appeal from a judgment in favor of defendant insurance company in an action by plaintiff, as beneficiary under a life insurance policy, to recover the death benefit provided therein.

On April 1, 1905, a $20,000 life insurance policy was issued by respondent company on the life of appellant's husband. There was a provision for cash loans on the sole security of the policy and a further provision that if any indebtedness remained unpaid at the death of the insured, then the full sum of $20,000 would not be paid in installments as provided, but one sum of $13,000 would be paid, less any indebtedness due on the policy. The premiums were paid regularly until April 1, 1933. On that date there was a loan outstanding against the policy of $6,630, which was the full amount of the cash loan or reserve value at that time. There was also declared due on that date a cash dividend on the policy of $189.77. There was due from the insured on said date a semi-annual premium of $202.15 and interest on the loan in the sum of $331.50, which was payable in advance for the next ensuing year. The insured elected to use the dividend as part payment of the premium and gave his check for the difference of $12.38. The check was accepted and on May 1, 1933, the company issued its premium receipt showing full payment of the premium. The insured also sent a check for $331.50 to the company as interest payment, but it was dishonored and has since remained unpaid. Thereafter, the company wrote requesting payment of the interest due. On August 8, 1933, the company sent the insured a check for $12.38, as a refund of the portion of the premium paid in excess of the dividend, and advised him that the policy was lapsed. This check was never cashed.

The insured died on October 21, 1933, and the company refused payment to the beneficiary on the ground that the policy was not in force on that date.

It is claimed by respondent company that the policy lapsed on April 1, 1933, because of non-payment of the interest on the loan; that thereafter under the provisions of the policy it became term insurance for the amount purchased by the $189.77 dividend; and that this term insurance expired October 7, 1933. The trial court so found.

Appellant contends that the policy continued in full force and effect to October 1, 1933, by virtue of the payment of the premium and that after the acceptance of the premium and issuance of a receipt therefor, the company could not later rescind such acceptance by refunding the

$12.38 and applying the dividend amount on term insurance. Appellant further contends that although no premium payments were made on or after October 1, 1933, the policy was still in effect on October 21, either because of the application of extended term insurance or because of a month grace period.

The first question to be decided is whether the policy was in full force and effect up to October 1, 1933, because of the acceptance of the premium payment even though the interest payment due on April 1 was not paid.

[1-3] The policy provides that "If any premium or interest is not paid on or before the date when due, and if there is an indebtedness to the Company, * * *" then the policy would continue as term insurance in a manner to be detailed later in this opinion. From this provision respondent company argues that because the interest due April 1 was not paid, the policy automatically lapsed and the term insurance began to run, even though the premium due had been paid. This is a strict interpretation of the provision which results in a forfeiture even though there is no express provision for forfeiture anywhere in the policy. But assuming that respondent company is correct in its contention that the policy provided that it would immediately lapse on non-payment of interest, such provision was waived by the acceptance of the premium payment. The company could not at the same time accept the premium payment and declare the policy lapsed, nor could it lapse automatically at that time. Naify v. Pac. Ind. Co., 11 Cal.2d 5, 76 P.2d 663, 115 A.L.R. 476. There is no question that such acceptance was made because receipts were issued therefor and the letter of May 8, 1933, from the company advising the insured that the interest was due, acknowledged the payment of the premium. Under these circumstances it is idle to argue that the policy was not in effect to October 1, 1933. It is true that there was an attempted rescission by the offer to refund $12.38 and application of the dividend sum of $189.77 to the payment of term insurance. Such attempted unilateral rescission was wholly ineffective. There was no acceptance of the refund by the insured because the check for $12.38 was never cashed. Furthermore, this sum was only a minor part of the premium paid. The respondent company argues that the remainder of the premium money was refunded by applying it to term insurance and that the insured waived any right to a further cash refund by failing to object to the tender as made. There is no merit to such contention. After accepting the money for one purpose, the insurer could not then, without the consent or even knowledge of the insured, apply the money in another way which would result in converting the original policy to term insurance. Naify v. Pac. Ind. Co., supra. Section 349 of the Restatement of the Law of Contracts quoted by respondent company is of no aid to it. The money here was not "credited" to the insured in such a way that at any time he could have actually obtained the cash. This was merely a purchase by the company of something else. By the same reasoning, a creditor could waive his right to the payment of a debt if he failed to make any objection when his debtor said he was buying him a race horse or a yacht instead of making payment.

[4] A further reason why the purported rescission of the premium payment was ineffective is that it was actually attempted after the insured's death. It was only in January, 1934, that the insurance company, in a letter to appellant's attorney, declared that it had applied the dividend money to term insurance. The letter of August 8, 1933, refers only to the $12.38.

It being established therefore that the original policy was in effect to October 1, 1933, the question remains as to whether it was in effect on October 21, the date of insured's death, because of either automatic term insurance or a grace period.

The table of cash loans as prepared by the actuarial department of the insured company shows that on April 1, 1933, or after the expiration of twenty-seven years, the cash loan or reserve value of the policy was $6,630. The policy provides that "* * * If any premium or interest is not paid on or before the date when due, and if there is an indebtedness to the Company,—

"Insurance for the net amount that would have been payable in one sum as a death-claim on said due date, namely; $13,000, less the amount of the indebtedness, will automatically continue from said due date as Term Insurance for such time as any excess of three-fourths of the reserve under this policy over such indebtedness will purchase at the age of the insured on said due date, according to the Company's present published table of Single Premiums for Term Insurance, and no longer."

In figuring term insurance from April 1, 1933, the respondent company used not three-fourths, but the full reserve value of $6,630. On that date, as previously stated, there was an outstanding loan of $6,630; therefore, according to the company's theory, the only surplus reserve on which term insurance could be figured was the $189.77 dividend which had originally been used as premium payment. By using this sum the insurance company extended the term insurance to October 7, 1933.

We have already determined, however, that the original policy was effective to October 1, 1933, by the acceptance of the premium due April 1, 1933. Appellant argues that if the policy was effective to that date, then the automatic term insurance carried it far beyond October 21, 1933, the date of death of the insured. This conclusion is reached in the following manner. The same table above referred to shows that the cash loan or reserve value at the end of the twenty-eighth year, which would have been April 1, 1934, was $6,880, or $250 more than the reserve on April 1, 1933. On October 1, 1933, the end of the first half of this annual period, one-half of this added reserve or $125 had accrued. This $125 then was available as surplus reserve which would carry the term insurance beyond October 21, 1933.

The weakness of the above theory is properly pointed out by the respondent company. It is true that the reserve value had increased $125 by October 1, 1933, but the indebtedness had increased in greater proportion. Interest of $331.50 declared due on April 1, 1933, was for the next ensuing year. On October 1, 1933, one-half of that sum or $165.75 had become a part of the indebtedness due from the insured to the company. Therefore, on October 1, we find an indebtedness of $6,795.75, which exceeds the reserve value of $6,755 as of the same date by $40.75. The result is that on that date there was no surplus reserve on which to base any extended term insurance. To reach any other conclusion is a mathematical impossibility.

The remaining ground on which appellant bases her contention that the policy was still effective on October 21, 1933, is that there was a grace period provided for in the policy which would carry it beyond that date. The appellant argues that the "Reinstatement" provision of the policy is a grace period provision and, as such, kept the policy in effect for the full month of October. That provision reads in part as follows: "If any premium or interest is not paid on the date when due, the Company will restore this policy as of the date of such nonpayment, on payment by the insured of such premium or interest within one month thereafter, with interest. * * *"

[5] Considering the above-quoted provision, standing alone, it cannot be denied that by the use of the word "restore" its apparent meaning is that the policy will lapse immediately upon nonpayment of premium or interest and that it will remain ineffective unless such payments are made within one month by the insured. However, before so interpreting this provision, it is necessary to look at the policy as a whole and to be governed by the general rules regarding the interpretation of insurance policies.

[6, 7] It should first be reiterated that nowhere in the policy is there any express provision made for forfeiture for nonpayment of premiums or interest on the due date. This fact alone should be sufficient to deter this court from interpreting the provision in such a way as to result in an immediate forfeiture. That a forfeiture will not be declared unless expressly provided for in an insurance policy is well established. The necessity for such rule and the numerous authorities supporting it are best reviewed in a detailed discussion in the case of Haas v. Mutual Life Ins. Co., 84 Neb. 682, 121 N.W. 996, 26 L.R.A.,N.S., 747, 19 Ann.Cas. 58.

[8-10] There is, however, a further reason why the provision in question should not be interpreted in such a way as to result in an immediate forfeiture. The "Reinstatement" clause above-quoted falls under that portion of the policy entitled "This Policy is Automatically Non-Forfeitable". If the respondent company's interpretation is accepted, the result will be an automatic forfeiture directly contrary to the title under which the provision falls. There are therefore two conflicting provisions in the same policy. There is no question that by express provision and in the absence of statutory regulation to the contrary, a life insurance policy may be made immediately forfeitable upon the non-

payment of premium or interest due. Haas v. Mutual Life Ins. Co., supra. However, it is well-established that forfeitures generally are not favored. Ballard v. MacCallum, 15 Cal.2d 439, 101 P.2d 692; Ebbert v. Mercantile Trust Co., 213 Cal. 496, 2 P.2d 776. This is particularly true of insurance contracts, and a forfeiture will be permitted only when expressed in the policy in clear and unmistakable terms. As stated in the case of Bolton v. Standard Life Ins. Co., 219 Ill.App. 177, 182, "A policy of life insurance cannot legally be forfeited merely for nonpayment of the premium when it is due where no express provision is made therefor in the policy. 25 Cyc. 828; Keeton v. National Union (Mo.[App.]), 182 S.W. 798; McMaster v. New York Life Ins. Co. [C.C.] 90 F. 40; Ohio Farmers' Ins. Co. v. Stowman, 16 Ind.App. 205, 44 N.E. 558 [940]; Taylor v. Provident Savings Life Assur. Society [C.C.] 134 F. 932; Haverstick v. Penn Tp. Mut. Fire Ass'n, 156 Pa. 333, 27 A. 245. It is a well-recognized principle of law that forfeitures are not favored and will not be upheld in contracts for insurance if by a reasonable construction it can be avoided; and that when the words of a contract are susceptible of two interpretations, that interpretation which will sustain the claim must be given preference. Globe Acc. Ins. Co. v. Gerisch, 163 Ill. 625 [45 N.E. 563, 54 Am.St.Rep. 486]; United States Life Ins. Co. v. Ross, 159 Ill. 476 [42 N.E. 859]; Healey v. Mutual Acc. Ass'n, 133 Ill. 556 [25 N.E. 52, 9 L.R.A. 371, 23 Am.St.Rep. 637]; Bailey v. Fraternal Reserve Life Ass'n, 202 Ill.App. 430; Northwestern Life Assurance Co. v. Schulz, 94 Ill. App. 156. It is only when it is required by the strict letter of a contract of insurance that a forfeiture will be enforced. And where there is a clause providing for a forfeiture, it will not receive any aid by judicial construction. Ingersoll v. Mutual Life Ins. Co., 156 Ill.App. 568; Benes v. Bankers Life Ins. Co. of Nebraska, 204 Ill.App. [425], 427; 25 Cyc. 821." The language in the case of Woodmen of the World v. Gilliland, 11 Okl. 384, 67 P. 485, is equally emphatic in regard to non-forfeiture. It is there stated at page 491 of 67 P.: "We believe that the true rule of construction in cases like this is that the court will give to the language such a liberal construction as will tend rather to sustain than to defeat the certificate, consistent with the laws and rules of the order; that beneficiary certificates of insurance, having been designed for the relief of those who are needy and helpless, should not be defeated of their purpose on grounds and for reasons which are purely technical; that a forfeiture will not be enforced unless it is clearly demanded by the rules governing the construction of written agreements. When a policy of insurance contains inconsistent or contradictory provisions, it is the rule that the provisions most favorable to the insured will be adopted. [Citing authorities.] Courts will construe a contract of insurance liberally, so as to give it effect, rather than to avoid it. Conditions which create forfeitures will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify the policy." See, also, Bachman v. Independence Indem. Co., 214 Cal. 529, 6 P.2d 943, and Kautz v. Zurich Gen. Acc., etc., Co., 212 Cal. 576, 300 P. 34.

[11] To hold that an automatic forfeiture resulted from the nonpayment of premium and interest due on October 1, 1933, it would be necessary to imply a forfeiture provision from the use of the word "restore" in the "Reinstatement" clause. Such implication would result in an interpretation in favor of a forfeiture even though the clause is made a part of that portion of the policy entitled "This Policy is Automatically Non-Forfeitable". In view of the authorities above cited and quoted, we do not feel authorized to so interpret the reinstatement clause.

[12] Having concluded that the clause under consideration cannot be interpreted to provide for an immediate forfeiture, it is still necessary to determine what, if any, meaning may be given to it. It is true that this provision differs from the modern grace period provision in that the modern policy usually contains an express provision to the effect that the policy will remain in force during the period after default. However, the provision here provides a method for the curing of a default at any time within one month after such default. It being determined that the clause does not provide for an automatic forfeiture there remains only one possible purpose which it can serve, and that is to prevent a lapse of the policy immediately and extend its effectiveness for the period of one month. State Mut. Life Ins. Co. v. Forrest, 19 Ga.App. 296, 91 S.E. 428. The insured having died within one month after the default the appellant beneficiary is entitled to recover the death benefit. Cilek

v. New York Life Ins. Co., 97 Neb. 56, 149 N.W. 49, 1071; 3 Couch-Cyc. of Ins. Law., sec. 633b, note 5 and cases there cited.

The appellant is entitled to the sum of $13,000, the commuted face amount of the policy, less all indebtedness due the respondent company at the time of the death of the insured.

The judgment is reversed and the superior court is directed to enter judgment accordingly.

We concur: CARTER, J; TRAYNOR, J.; HOUSER, J.

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17 Cal.2d 851

PEOPLE v. LININGER.

Cr. 4344.

Supreme Court of California.

April 28, 1941.

Criminal law 🔑1177

In murder prosecution, trial court's erroneous belief, as shown by statement in summing up case, that accused had committed another killing before committing the killing for which he was tried did not require reversal of judgment imposing death sentence, where court's other remarks showed that death sentence was not imposed because of supposed prior killing but because evidence did not justify punishment, under life sentence, by imprisonment for what might be a term much less than life through parole.

In Bank.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

John Lininger was convicted of murder, and he appeals.

Affirmed.

C. C. Barkley, of Red Bluff, for appellant.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and Clair Engle, Dist. Atty., of Red Bluff, for respondent.

EDMONDS, Justice.

The appellant pleaded guilty to the crime of murder and following a hearing at which evidence was introduced concerning the circumstances under which it was committed, the court imposed a death sentence. In summing up the case, the trial judge incorrectly stated that the appellant "has already killed two men". It is now urged that the judge's belief that the appellant had killed a man before he committed the crime for which he is now under sentence caused him to assess the maximum penalty rather than a sentence of life imprisonment, and constitutes prejudicial error requiring a reversal of the judgment.

This evidence discloses that appellant, a married man, forty years of age, and Louis E. Jette, who was some years his junior, for some time prior to the homicide had been having unnatural sexual relations which commenced when the two were cell mates in a Montana prison. The appellant was then serving a sentence for having shot, although not fatally, a man with whom he had engaged in similar practices. After the appellant's release from prison he assisted in procuring a parole for Jette. Thereafter the appellant went to work on the Montana farm where Jette lived with his family. The families of the two men discovered their improper relations and apparently Jette placed the entire blame on the appellant. This and the asserted threat of Jette to commit similar acts on the appellant's wife and stepdaughter, then living in Alaska and Texas, respectively, were advanced by him as the motivating force leading to the homicide. He admitted that he followed Jette to this state and killed him by placing a can of cyanide poison used in exterminating rodents, in his cabin. He then fled but was soon apprehended.

The appellant testified at length concerning the circumstances surrounding the commission of the crime and in imposing sentence the judge said: "In this case the defendant is a sexual pervert. He has already killed two men." But he also commented at length upon the evidence and stated that there were no mitigating circumstances which would justify a life sentence. True, he did say: "Life imprisonment is practically a joke, fifteen years at the outside." This language is unjudicial but there can be no question that it was intended to express a view that a life sentence with the possibility of parole within a few years was not a sufficient punishment for the crime which had been committed. Among other things, the judge said that "the only argument in his favor, that is to say why the death penalty should not be imposed, is apparently that he has pleaded guilty and saved the county some expense. * * * There is nothing in the evidence to indicate to me that he would come out cured or any better. He would still be of an age when he might commit those acts with other people and might take other people's lives. * * *"

It is, therefore, apparent that although the judge was mistaken in his statement concerning the previous crime committed by the appellant, the death sentence was not imposed for that reason but because, in his opinion, the evidence did not justify punishment by imprisonment for what might be a term much less than life.

The judgment is affirmed.

We concur: GIBSON, C. J.; TRAYNOR, J.; SHENK, J.; CURTIS, J.

CARTER, Justice (concurring).

I concur in the judgment of affirmance.

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17 Cal.2d 843

HAUPT v. CHARLIE'S KOSHER MARKET et al.

L. A. 16957.

Supreme Court of California.

April 25, 1941.

1. Judgment 🔑180

Action wherein attorney sought to recover an amount representing attorney's fee due under contingent-fee contract, plus amount advanced by attorney for costs and enforcement of lien therefor, was proper case for summary judgment under statute authorizing such a judgment in an action upon liquidated demand and to enforce a lien therefor. Code Civ.Proc. § 437c.

2. Attorney and client 🔑176

A lien on a judgment for attorney's compensation for services rendered in favor of client may be created by contract of the parties.

3. Attorney and client 🔑176

An agreement for lien on judgment recovered by attorney for services rendered for client is decisive as to its existence and amount, and constitutes a valid "equitable assignment" of the judgment pro tanto, and creates a "lien" upon the specific fund regardless of whether the cause of action on which the judgment is based is assignable.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Assignment" and "Lien".

4. Attachment 🔑178, 180

An attachment lien reaches only the interests of the debtor in the attached property and is subject to prior equities against the debtor.

5. Attorney and client 🔑184

An attorney's lien on judgment recovered from client, created by contract with the client, was entitled to priority over subsequent attachment levied on amount due under the judgment by a creditor of the client.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by William H. Haupt against Charlie's Kosher Market and others, for recovery of an attorney's fee and enforcement of lien therefor, and for other relief. Plaintiff's motion for summary judgment was granted, and defendant Lucretia M. Whitehead appeals.

Affirmed.

E. O. Leake and J. J. Leake, both of Los Angeles, for appellant.

De Forrest Home and J. H. O'Connor, Co. Counsel, both of Los Angeles, for defendants.

Charles W. Cradick, of Los Angeles (William H. Haupt, of Los Angeles, of counsel), for respondent.

GIBSON, Chief Justice.

This is an appeal by an attaching creditor from a judgment giving priority to an attorney's lien.

Plaintiff, an attorney, was employed by one Mason to prosecute a personal injury action against certain of the above-named defendants. Plaintiff proceeded under a contingent-fee contract which provided that he should receive one-third of any recovery and should have a "lien on the said cause of action, judgment, settlement, amount due or to be paid or become due" for his fee and to repay costs advanced by him.

As a result of plaintiff's successful prosecution of the personal injury action, a judgment was entered for his client on April 8, 1938, for $2,750. On motion for new trial and pursuant to stipulation the amount was reduced to $1,800. Judgment in the latter amount became final on May 26, 1938. Under his contract, plaintiff thereby became entitled to a fee of $600 plus $189.13 advanced by him for costs. Immediately upon return of the verdict in favor of his client, plaintiff notified the defendants in the personal injury action of the lien which he claimed on the proceeds. At or about this time the defendant Whitehead, a creditor of plaintiff's client, levied two attachments on the entire amount due under the judgment. The first attachment was levied after verdict but before entry of judgment, while the second was levied after entry of judgment but before it became final.

In view of the conflicting claims to the proceeds of the judgment, the defendants in the personal injury action and their insurance carrier asserted the right to withhold payment until the issue of priority was determined. Plaintiff then brought this action naming as defendants his client, the defendants in the personal injury action, their insurance carrier, the attaching creditor and the sheriff. The complaint is in three counts, the first for declaratory relief, the second for recovery of $789.13 and enforcement of the lien therefor, and the third to enjoin pendente lite payment of the judgment to the sheriff under the attachment. The attaching creditor alone filed an answer, whereupon plaintiff made a motion, supported by affidavits, for summary judgment as provided in section 437c of the Code of Civil Procedure. Again, the attaching creditor alone offered opposition, urging priority of her attachment claim. The court below granted the motion and decreed that plaintiff had a lien in the amount of $789.13 upon the proceeds of the personal injury judgment, and gave judgment in that amount, with interest and costs. The attaching creditor prosecutes this appeal.

[1] It is argued by appellant that this is not a proper case for summary judgment. The second count of the complaint states a cause of action "upon a liquidated demand" and "to enforce * * * a lien" therefor, within the meaning of section 437c of the Code of Civil Procedure authorizing summary judgment in such cases.

[2, 3] The priority issue was properly resolved in favor of plaintiff's attorney's lien, created by written contract with his client. In Tracy v. Ringole, 87 Cal.App. 549, 262 P. 73, 74, wherein was involved an attorney's contingent-fee contract with provision for a lien, as here, it is declared that: "The special or charging lien of an attorney has been held to be an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in the particular action, the attorney to the extent of such services being regarded as an equitable assignee of the judgment. It is based, as in the case of a lien proper, on the natural equity that a party should not be allowed to appropriate the whole of a judgment in his favor without paying for the services of his attorney in obtaining such judgment. The use of the term lien in this connection has been criticized as inaccurate, and the right of the attorney has been said to be merely a claim to the equitable interference of the court. 6 C.J. [p.] 767. In California there is no statute giving a lien to an attorney upon a judgment for services rendered in favor of his client. * * * A lien, however, may be created by contract of the parties. Here the contract did provide for a lien * * *. In such a case it has been held that the agreement for a lien is decisive as to its existence and amount, and it constitutes a valid equitable assignment of the judgment pro tanto and creates a lien upon the specific fund, notwithstanding that the action in which the judgment was obtained was on a cause of action for a tort in itself unassignable. 6 Cyc. [p.] 742. See, also, Goad v. Hart, 128 Cal. 197, 60 P. 761, 964; Hoffman v. Vallejo, 45 Cal. 564."

[4, 5] The foregoing case is cited with approval in City of Los Angeles v. Knapp, 7 Cal.2d 168, 173, 60 P.2d 127. See, also, Cassetta v. Del Frate, 116 Cal.App. 255, 2 P.2d 533; 11 S.C.L.Rev. 291, 293; 7 C.J.S., Attorney and Client, p. 1146, § 211, b. It is settled that an attachment lien reaches only the interest of the debtor in the attached property and is therefore subject to prior equities against the debtor. McGee v. Allen, 7 Cal.2d 468, 473, 60 P.

2d 1026; Burns v. Peters, 5 Cal.2d 619, 625, 55 P.2d 1182. Plaintiff's attorney's lien, created by contract with his client, was therefore properly given priority over the subsequent attachment, assuming the propriety of the latter. 7 C.J.S., Attorney and Client, pp. 1176, 1177, § 229; 2 Thornton on Attorneys at Law 986, sec. 589. As stated in the latter text, "an attorney's lien will prevail as against proceedings in attachment [or] garnishment * * *".

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.

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17 Cal.2d 873

HAUPT v. CHARLIE'S KOSHER MARKET et al.

L. A. 16948, 16949.

Supreme Court of California.

April 25, 1941.

Appeal and error 🔑781(1)

Where judgment for plaintiff was affirmed by Supreme Court, plaintiff's appeal from orders entered after rendition of judgment by trial court, by which trial court recalled execution of judgment, directed deposit in court of amount of lien claimed by plaintiff, and ordered a stay of execution pending appeal from the judgment, were dismissed as involving "moot questions".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by William H. Haupt against Charlie's Kosher Market and others, for an amount representing attorney's fee and costs advanced by attorney and enforcement of lien therefor, and for other relief. From adverse orders, plaintiff appeals.

Appeals dismissed.

Charles W. Cradick, of Los Angeles (William H. Haupt, of Los Angeles, of counsel), for appellant.

De Forrest Home, E. O. Leake, and J. J. Leake, all of Los Angeles, for respondents.

J. H. O'Connor, Co. Counsel, of Los Angeles, for defendant E. W. Biscailuz, Sheriff of Los Angeles County.

GIBSON, Chief Justice.

The appeals in these two consolidated cases are related to the case of Haupt v. Charlie's Kosher Market et al., L.A.No. 16957, Cal.Sup., 112 P.2d 627, this day decided. In the decision in that case the judgment appealed from was affirmed in favor of plaintiff therein.

These two appeals taken by plaintiff in said case L. A. No. 16957 are from separate but similar orders made by the trial court therein after rendition of judgment, by which the trial court recalled execution of the judgment, directed a deposit in court of the amount of the lien claimed by plaintiff, and ordered a stay of execution pending the appeal from the judgment.

Our affirmance of the judgment in L. A. No. 16957 obviates any question as to plaintiff's right to take appropriate steps to realize on the judgment, and necessarily renders the present appeals moot.

The appeals from the orders are, and each is, dismissed.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.

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18 Cal.2d 31

MOURA v. STATE BAR OF CALIFORNIA.

S. F. 16540.

Supreme Court of California.

April 29, 1941.

Rehearing Denied May 26, 1941.

1. Attorney and client 🔑57

Ordinarily, the findings of a local administrative committee which have been approved by the Board of Governors of the State Bar will be followed by the Supreme Court, although it is not bound thereby.

2. Attorney and client 🔑39

A member of the bar who appropriated $6,000 of his client's money by forging a check does not have the "good moral character" which is required of an attorney at law by the statutes and lacks all appreciation of the principles of common honesty and guilty attorney must be disbarred. St. 1939, p. 354, § 6062.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Moral Character".

3. Attorney and client ⚷54

An attorney's past conduct should be considered in connection with present charges against him.

4. Attorney and client ⚷58

The penalty imposed upon an attorney at law for professional misconduct is not only to punish the individual but to protect the public, the legal profession and the court.

◆

In Bank.

Proceeding by Alberto Moura to review action of the State Bar in recommending disbarment of petitioner.

Order that petitioner be disbarred.

Chauncey Tramutolo, of San Francisco, and Alberto Moura, in pro. per., of Oakland, for petitioner.

Felix T. Smith, and Claude Minard, both of San Francisco, for respondent.

PER CURIAM.

The recommendation of the State Bar that the petitioner be disbarred is challenged by him in this proceeding to review its action. He contends that the penalty imposed upon him is too severe, considering the offense which he committed.

There is no dispute concerning the facts. The petitioner raised the check of a client from $6 to $6,000, cashed it and appropriated the money. He later pleaded guilty to a charge of forgery. Upon a showing that he had made full restitution of the money, the court suspended the imposition of sentence and placed him on probation for a period of five years upon condition, among others, that he refrain from the practice of law during that time.

Following the disposition of the criminal charge, the State Bar instituted disciplinary proceedings against him. Upon hearing the evidence, a local administrative committee adopted findings, which were approved by the Board of Governors, that he should be disbarred. The petitioner contends that because he was granted probation in the criminal case, the penalty in the disciplinary proceeding should be only a suspension of his license to practice law for the period of probation. The fact that he was placed on probation, says the petitioner, "should be entitled to great weight and controlling importance".

[1-4] Ordinarily the findings of a local administrative committee which have been approved by the Board of Governors will be followed by this court, although it is not bound thereby. In the present case the facts fully justify the recommendation which has been made. A member of the bar who appropriated $6,000 of his client's money by forging a check certainly does not have the "good moral character" which is required of an attorney at law by the statutes of this state (sec. 6062, Bus. & Prof. Code, St.1939, p. 354) and he lacks all appreciation of the principles of common honesty. Moreover, his past conduct should be considered in connection with the present charges against him. Kennedy v. State Bar, 13 Cal.2d 236, 88 P.2d 920. The fact that in 1937 disciplinary proceedings were instituted against the petitioner and he was privately reproved indicates that he has not fulfilled his professional obligations in the past. The penalty imposed upon an attorney at law for professional misconduct is not only to punish the individual but to protect the public, the legal profession and the court (Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403), and the petitioner's abuse of his right to practice an honorable profession necessitates his removal from it.

It is ordered that the petitioner be disbarred and that his name be stricken from the roll of attorneys at law of this state.

18 Cal.2d 33

IMPERIAL ICE CO. v. ROSSIER et al.

L. A. 16558.

Supreme Court of California.

April 29, 1941.

1. Torts 🔑12

An action will lie for inducing breach of contract by resort to means in themselves unlawful, such as libel, slander, fraud, physical violence, or threats of such action.

2. Torts 🔑16

Generally, an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures in themselves lawful, unless there is sufficient justification for such inducement, and such justification exists when a person induces a breach of contract to protect an interest which has greater social value than insuring the stability of the contract.

3. Torts 🔑16

A person is justified in inducing the breach of a contract the enforcement of which would be injurious to health, safety, or good morals.

4. Master and servant 🔑339
Torts 🔑16

The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise unlawful though they have the effect of inducing breaches of contract between employer and employee, or employer and customer.

5. Torts 🔑4

In determining whether justification exists for inducing a breach of contract to protect an interest which has greater social value than insuring the stability of the contract, presence or absence of ill will, sometimes referred to as "malice", is immaterial except as it indicates whether or not an interest is actually being protected.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

6. Torts 🔑12

A person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other.

7. Torts 🔑12

Whatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom.

8. Torts 🔑10

Competitive freedom is of sufficient importance to justify one competitor in inducing a third party to forsake another competitor if no contractual relation exists between the latter two.

9. Torts 🔑12

A person is free to carry on his business, including reduction of prices, advertising and solicitation in the usual lawful manner, although some third party may be induced thereby to breach his contract with a competitor in favor of dealing with the advertiser.

10. Torts 🔑12

If two persons have separate contracts with a third, each may resort to any legitimate means at his disposal to secure performance of his contract, even though the necessary result will be to cause a breach of the other contract.

11. Torts 🔑12

A party may not under the guise of competition actively and affirmatively induce a breach of a competitor's contract in order to secure an economic advantage over that competitor.

12. Torts 🔑4

The act of inducing the breach of a contract must be an intentional one, and if the actor had no knowledge of the existence of the contract, or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts.

13. Injunction 🔑63

An injunction is a proper remedy for an unjustifiable interference with contractual relations.

14. Torts 🔑12

In California, an action will lie for unjustifiably inducing a breach of contract.

15. Injunction 🔑118(4)

Complaint, alleging that ice manufacturers had induced one who, upon sale of ice business, had agreed not to sell ice in certain territory, to violate his contract in order that ice manufacturers might sell such person ice, stated a cause of action as against ice manufacturer for an injunction on ground of inadequacy of damages.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by the Imperial Ice Company against Wayne Rossier and others to restrain named defendant and another from inducing a third person to violate contract not to compete in the sale of ice in a certain territory. From a judgment for the named defendant and another, the plaintiff appeals.

Judgment reversed.

Earl E. Moss and Everett A. Hart, both of Los Angeles, for appellant.

M. Tellefson, of Culver City, for respondents.

TRAYNOR, Justice.

The California Consumers Company purchased from S. L. Coker an ice distributing business, inclusive of good will, located in territory comprising the city of Santa Monica and the former city of Sawtelle. In the purchase agreement Coker contracted as follows: "I do further agree in consideration of said purchase and in connection therewith, that I will not engage in the business of selling and or distributing ice, either directly or indirectly, in the above described territory so long as the purchasers, or anyone deriving title to the good will of said business from said purchasers, shall be engaged in a like business therein." Plaintiff, the Imperial Ice Company, acquired from the successor in interest of the California Consumers Company full title to this ice distributing business, including the right to enforce the covenant not to compete. Coker subsequently began selling in the same territory in violation of the contract ice supplied to him by a company owned by W. Rossier, J. A. Matheson, and Fred Matheson. Plaintiff thereupon brought this action in the superior court for an injunction to restrain Coker from violating the contract and to restrain Rossier and the Mathesons from inducing Coker to violate the contract. The complaint alleges that Rossier and the Mathesons induced Coker to violate his contract so that they might sell ice to him at a profit. The trial court sustained without leave to amend a demurrer to the complaint of the defendants Rossier and Matheson and gave judgment for those defendants. Plaintiff has appealed from the judgment on the sole ground that the complaint stated a cause of action against the defendants Rossier and the Mathesons for inducing the breach of contract.

The question thus presented to this court is under what circumstances may an action be maintained against a defendant who has induced a third party to violate a contract with the plaintiff.

[1-5] It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action. See cases cited in 24 Cal.L.Rev. 208; 84 A.L.R. 67. Most jurisdictions also hold that an action will lie for inducing a breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement. See cases cited in 84 A.L.R. 55; 24 Cal.L.Rev. 208, 209; see Sayre, Inducing Breach of Contract, 36 Harv.L.Rev. 663, 671; Carpenter, Interference With Contractual Relations, 41 Harv.L.Rev. 728, 732; Restat. Torts, sec. 766.

Such justification exists when a person induces a breach of contract to protect an interest which has greater social value than insuring the stability of the contract. Restat. Torts, sec. 767. Thus, a person is justified in inducing the breach of a contract the enforcement of which would be injurious to health, safety, or good morals. Brimelow v. Casson, [1924] Ch. 302; Legris v. Marcotte, 129 Ill.App. 67; Restat. Torts, sec. 676[d]. The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer. Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; McKay v. Retail Automobile Salesmen's Local Union No. 1067, Cal.Sup., 106 P.2d 373; Kemp v. Division No. 241, 255 Ill. 213, 99 N.E. 389, Ann.Cas.1913D, 347; Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753, 6 L.R.A.,N.S., 1067, 116 Am.St.Rep. 272, 7 Ann.Cas. 638; Grant Const. Co. v. St. Paul Building Trades Council, 136

Minn. 167, 161 N.W. 520, 1055; Nat. Protective Ass'n v. Cumming, 170 N.Y. 315, 63 N.E. 369, 58 L.R.A. 135, 88 Am.St.Rep. 648; Roddy v. United Mine Workers of America, 41 Okl. 621, 139 P. 126, L.R.A. 1915D, 789; Jetton-Deckle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590; Clemmitt v. Watson, 14 Ind.App. 38, 42 N.E. 367; Gray v. Building Trades Council, 91 Minn. 171, 97 N.W. 663, 63 L.R.A. 753, 103 Am. St.Rep. 477, 1 Ann.Cas. 172; State v. Employers of Labor, 102 Neb. 768, 169 N.W. 717, 170 N.W. 185; see Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Restat. Torts, secs. 797 to 812. In numerous other situations, justification exists (see Restat. Torts, secs. 766 to 774) depending upon the importance of the interest protected. The presence or absence of ill-will, sometimes referred to as "malice", is immaterial, except as it indicates whether or not an interest is actually being protected. Boyson v. Thorn, 98 Cal. 578, 33 P. 492, 21 L.R.A. 233; Parkinson Co. v. Building Trades Council, supra; see cases cited in 84 A.L.R. 50; see Restat. Torts, sec. 766, comment M.

[6-12] It is well established, however, that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. See cases cited in 84 A.L.R. 83; 24 Cal.L.Rev. 208, 211; see Restat. Torts, sec. 768[2]. Whatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom. Competitive freedom, however, is of sufficient importance to justify one competitor in inducing a third party to forsake another competitor if no contractual relationship exists between the latter two. Katz v. Kapper, 7 Cal.App.2d 1, 44 P.2d 1060; Union Labor Hospital v. Vance Lumber Co., 158 Cal. 551, 112 P. 886, 33 L.R.A.,N.S., 1034; Debnam v. Simonson, 124 Md. 354, 92 A. 782; Walker v. Cronin, 107 Mass. 555; Restat. Torts, sec. 768[1]. A person is likewise free to carry on his business, including reduction of prices, advertising, and solicitation in the usual lawful manner although some third party may be induced thereby to breach his contract with a competitor in favor of dealing with the advertiser. Philadelphia Dairy Co. v. Quaker City Ice Cream Co., 306 Pa. 164, 159 A. 3, 84 A. L.R. 466; Citizens' Light, Heat & Power Co. v. Montgomery Light Co., C.C., 171 F. 553; Passaic Print Works v. Ely & Walker Dry Goods Co., 8 Cir., 105 F. 163, 62 L.R. A. 673. Again, if two parties have separate contracts with a third, each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause a breach of the other contract. Cumberland Glass Co. v. De Witt, 120 Md. 381, 87 A. 927, Ann.Cas.1915A, 702; affirmed 237 U.S. 447, 35 S.Ct. 636, 59 L.Ed. 1042; Knapp v. Penfield, 143 Misc. 132, 256 N.Y.S. 41; National Life & Acc. Insur. Co. v. Wallace, 162 Okl. 174, 21 P.2d 492; Diver v. Miller, 4 W.W.Harr., Del., 207, 208, 148 A. 291; Tidal Western Oil Co. v. Shackelford, Tex.Civ.App., 297 S.W. 279; see 84 A.L.R. 63; Restat. Torts, sec. 733. A party may not, however, under the guise of competition actively and affirmatively induce the breach of a competitor's contract in order to secure an economic advantage over that competitor. The act of inducing the breach must be an intentional one. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts. Restat. Torts, sec. 766, comment e; Hornstein v. Podwitz, 254 N.Y. 443, 173 N.E. 674, 84 A.L.R. 1; Sorenson v. Chevrolet Motor Company, 171 Minn. 260, 214 N.W. 754, 84 A.L.R. 35; Kerr v. Du Pree, 35 Ga.App. 122, 132 S.E. 393; New York Trust Co. v. Island Oil & Transport Corp., 2 Cir., 34 F.2d 649; Wissmath Packing Co. v. Mississippi River Power Co., 179 Iowa 1309, 162 N.W. 846, L.R.A.1917F 790; see Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290; see additional cases cited in 84 A.L.R. 49.

[13, 14] In California the case of Boyson v. Thorn, supra, has been considered by many as establishing the proposition that no action will lie in this state for inducing breach of contract by means which are not otherwise unlawful. In that case the manager of a hotel induced the owner of the hotel to evict plaintiffs in violation of a contract. The complaint expressly alleged the existence of malicious motives on the part of the manager. This court affirmed a judgment entered on an order which sustained a demurrer without leave

to amend, stating that an act otherwise lawful was not rendered unlawful by the existence of "malice". It is clear that the confidential relationship which existed between the manager of the hotel and the owner justified the manager in advising the owner to violate his contract with plaintiffs. His conduct thus being justified, it was lawful despite the existence of ill-will or malice on his part. The statements to the effect that no interference with contractual relations is actionable if the means employed are otherwise lawful were not necessary to the decision and should be disregarded. This interpretation is substantiated by the construction placed upon Boyson v. Thorn in the case of Parkinson Co. v. Building Trades Council, supra [154 Cal. 581, 98 P. 1032, 21 L.R.A., N.S., 550, 16 Ann.Cas. 1165], wherein it is stated: "In the first named case [Boyson v. Thorn] it was concluded upon an extensive review of the authorities, American and English, that 'an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.'" In California Grape Control Board v. California Produce Corporation, 4 Cal. App.2d 242, 40 P.2d 846, the District Court of Appeal held that an unjustifiable interference with contractual relations was actionable and issued an injunction restraining continued interference, which is a proper remedy in cases of this type (see cases cited in 84 A.L.R. 85), despite defendant's reliance on Boyson v. Thorn. Appellant's Reply Brief, p. 7, First Div., Second Dist., Civ. No. 9615. This case marks an outright adoption of the majority view. The case of Katz v. Kapper, 7 Cal.App.2d 1, 44 P.2d 1060, 1061, relied upon by defendants, held only that a person by the use of lawful means could interfere with advantageous business relationships of a competitor by inducing customers to trade with him instead. The case did not involve a breach of contract, and the court specifically stated: "In deciding whether the conduct of defendants alleged in the complaint is actionable, it is necessary to apply certain well-settled rules relating to competition in business. These may be generally stated as follows: 'Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader is left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, *or the procurement of the violation of contractual relations.* * * *'" (Italics added.) In California, therefore, an action will lie for unjustifiably inducing a breach of contract.

The complaint in the present case alleges that defendants actively induced Coker to violate his contract with plaintiffs so that they might sell ice to him.

[15] The contract gave to plaintiff the right to sell ice in the stated territory free from the competition of Coker. The defendants, by virtue of their interest in the sale of ice in that territory, were in effect competing with plaintiff. By inducing Coker to violate his contract, as alleged in the complaint, they sought to further their own economic advantage at plaintiff's expense. Such conduct is not justified. Had defendants merely sold ice to Coker without actively inducing him to violate his contract, his distribution of the ice in the forbidden territory in violation of his contract would not then have rendered defendants liable. They may carry on their business of selling ice as usual without incurring liability for breaches of contract by their customers. It is necessary to prove that they intentionally and actively induced the breach. Since the complaint alleges that they did so and asks for an injunction on the grounds that damages would be inadequate, it states a cause of action, and the demurrer should therefore have been overruled.

The judgment is reversed.

We concur: GIBSON, C. J.; EDMONDS, J., SHENK, J.

I concur in the judgment: CURTIS, J.

18 Cal.2d 48

STEINER v. AMSEL et al.

L. A. 17042.

Supreme Court of California.

April 30, 1941.

1. Trusts ⚷44(1), 372(3)

Evidence supported finding that deceased held title to one-third of a tract and one-third of a beneficial interest under a trust agreement relating thereto for the plaintiff, and that plaintiff was the equitable owner of one-third of the beneficial rights under the trust agreement, and that the wife and daughters of deceased had knowledge of plaintiff's interest in the property so as to make their interest subject to the interest of the plaintiff.

2. Limitation of actions ⚷102(5)

Under agreement for sale of lands owned jointly by plaintiff and deceased, and the application of the proceeds in trust, trust subsisting during deceased's lifetime and which was not repudiated by him was a "voluntary" and "continuing trust" whether intended as express or resulting trust, as distinguished from an "involuntary trust", as respects claim that plaintiff's right to an adjudication of her ownership in the trust property was barred by the four-year statute of limitations. Code Civ.Proc. § 337, subd. 1, and § 343.

> See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Trust", "Involuntary Trust" and "Voluntary Trust".

3. Appeal and error ⚷1010(1)

The question whether evidence was sufficient to create a voluntary or continuing trust was primarily addressed to trial court and its determination thereon should be deemed conclusive.

4. Limitation of actions ⚷102(11)

The rule that statute of limitations commences to run against trust beneficiary from date of death of trustor depends upon existence of a trust in decedent at time of his death before an involuntary trusteeship can be created. Code Civ.Proc. § 337, subd. 1, and § 343.

5. Trusts ⚷356(1)

Where legal title to voluntary trust property was transferred by trustor to trustee and no consideration was paid therefor, property continued impressed with same trust to which it was subject when trustor held the legal title.

6. Trusts ⚷356(1)

That trust might have been a secret trust in so far as trustee was concerned would not excuse trustee from duty of executing the trust as soon as its existence was made known to trustee.

7. Trusts ⚷348

Under agreement between plaintiff and deceased for sale of jointly owned property and application of the proceeds in trust, the right by succession of the heirs of the deceased in the trust property did not cut off plaintiff's beneficial interest therein where such heirs did not part with value and they had knowledge of the nature and extent of plaintiff's interest in the trust property.

8. Limitation of actions ⚷83(2), 102(4)

An action by plaintiff seeking an adjudication as to her ownership in properties jointly held with defendant, and which they had contracted to sell and for the application of the proceeds in trust was not barred by the four-year statute of limitations, where trust was a voluntary and continuing one, deceased died on December 30, 1931, plaintiff presented to his administratrix on July 30, 1932, a claim of ownership in the trust property, claim was rejected on March 31, 1936, and plaintiff commenced her action on June 30, 1936. Code Civ.Proc. § 337, subd. 1, and § 343.

9. Limitation of actions ⚷184

In action to recover an interest in property held by trustee of a voluntary trust, denial of request by trustee, made at close of plaintiff's case, for amendment of answer to include defense of statute of limitations was within trial court's reasonable discretion. Code Civ.Proc. § 337, subd. 1, and § 343.

10. Limitation of actions ⚷184

In action to recover an interest in property held by trustee of a voluntary trust, denial of trustee's request to amend its answer by including defense of statute of limitations was not an abuse of discretion, where trustee was not a personal representative of either deceased trustor or his wife, and trustee's duty was to protect property for owners thereof. Code Civ.Proc. § 337, subd. 1, and § 343.

11. Trusts ⚷365(2)

A corporate trustee of a voluntary trust which was not a personal representative of the deceased trustor or his wife, and whose duty it was to protect the property for the owner thereof, had no right to plead laches as against claim to plaintiff who sought to recover an interest in the property held by the trustee.

12. Trusts ⚷365(2)

A claim to recover an interest in property held by trustee of a voluntary trust was not barred by "laches" because action was not brought until almost five years after trustor's death, in view of claimant's limited education, relationship of trust and confidence existing between claimant and trustor, and claimant's promptness in endeavoring to protect her rights by filing of claim against estate of trustor and by commencement of action shortly after denial of claim.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

In Bank.

Appeal from Superior Court, Los Angeles; Percy Hight, Judge.

Action by Rosa Steiner against Irma Amsel, administratrix of the estate of Sam Amsel, deceased, and others, to recover a one-third interest in certain properties held by defendant Farmers & Merchants Trust Company of Long Beach as trustee and to obtain an adjudication that the rights of other defendants were subordinate to plaintiff's. From a judgment for plaintiff, defendants appeal.

Affirmed.

Stewart, Shaw & Murphey and Arvin B. Shaw, Jr., all of Los Angeles, for appellants.

Swaffield & Swaffield, of Los Angeles, Kenneth Sperry and Joseph E. Madden, both of Long Beach, and Thomas F. McCarry, of Los Angeles, for respondent.

SHENK, Justice.

By her complaint the plaintiff sought an adjudication that she was the owner of and entitled to a one-third interest in certain properties held by the defendant Farmers and Merchants Trust Company of Long Beach, as trustee, and that the rights of the other defendants were subordinate to hers. The plaintiff had judgment and the defendants appealed.

The events leading up to the filing of the action are briefly the following:

In 1906 the plaintiff, Rosa Steiner, with her husband and two daughters, came to this country from Hungary. Here they became acquainted with Sam Amsel, who had also come to this country, leaving his wife and four daughters in Hungary. Sam Amsel took up his abode with the Steiners in Southern California. Steiner and Amsel engaged in the business of peddling vegetables on a partnership basis. They went into the dairy business together. In 1912, under the name of Steiner & Amsel, they commenced and carried on the raising and selling of sugar beets. Each had an equal share in the business. On November 14, 1915, Steiner died. Amsel and the plaintiff then carried on the business under an agreement to share it equally; but after consultation with a representative of the sugar beet company who knew of the plaintiff's half interest, it was decided to carry on the business in the name of Sam Amsel alone. During the subsequent period both the plaintiff and Amsel worked diligently raising beets on large rented acreages. The plaintiff cared for the ranch house and prepared the meals for the ranch help. She also assisted Amsel in supervising the work of the ranch hands. She kept the books of account and paid the hired help. In the early period the profits were not large, but such thereof as were not needed to defray household expenses were sent by Amsel to his family in Hungary. The plaintiff's two daughters also helped with the chores when at home from school and earned money which they contributed to the household. The plaintiff spoke only a little English and her education had been limited. Hungarian was the language spoken in the household and at family conferences.

In 1920 a representative of the sugar beet company suggested that the plaintiff and Amsel purchase 183 acres of land at Long Beach at $600 an acre. The plaintiff and Amsel decided to buy the land and title was taken in the name of Sam Amsel. The plaintiff's share was fixed at one-third instead of one-half. The sugar beet company advanced the down payment of $10,000, secured by a 900-acre crop of growing beets. Shortly thereafter Amsel's wife and their four daughters came to the United States and lived at the ranch house. Difficulties arose and at the end of the summer of 1921 Mrs. Amsel and the four Amsel girls removed to Los Angeles. There is evidence that they were aware of the partnership interest of the plaintiff and of the extent thereof.

In August, 1922, 101.8 acres of the 183-acre tract were sold for $114,052. The proceeds from this sale were sufficient to liquidate the balance owing on the original purchase contract. At that time Sam Amsel paid or promised to pay to or invest for the plaintiff the sum of $20,000, whereupon the two signed a mutual general release and discharge of all demands.

In March, 1923, 13.48 acres of the tract were sold for $40,000 under a subdivision trust, and the plaintiff received an additional $10,000.

On February 2, 1924, the remaining 67.84 acres were contracted to be sold to one Burrows at $4,000 per acre, a total purchase price of $271,360. Title was transferred by Amsel to the defendant Farmers and Merchants Trust Company of Long Beach, as trustee under a trust agreement naming Sam Amsel as trustor and Burrows as beneficiary. The trustee was authorized to liquidate certain indebtednesses and the purchase price of the land from the proceeds received by it from sales of subdivided lots.

In the meantime Sam Amsel and his wife had arrived at a settlement of their property rights. Thereupon, also on February 2, 1924, Sam Amsel executed an assignment to said Farmers and Merchants Trust Company of Long Beach, authorizing it to pay to Mrs. Amsel one-half of the moneys coming to him under the trust agreement until the sum of $85,000 should have been paid to her, without interest. Mrs. Amsel also received Sam Amsel's note for $5,000 as a part of the settlement.

There is evidence that the plaintiff knew of the sale of the remainder of the 183-acre tract under the trust agreement and that Amsel was receiving payments thereunder. Discussions and arguments arose, the plaintiff asking for her share of the proceeds. The record shows that Amsel stated to the plaintiff that he needed all available funds to settle with his family, and requested the plaintiff not to bother him and he would see that she got her share as soon as he had completed his obligations to his family. In the meantime he paid her sums aggregating $1,700.

Mrs. Amsel died on April 11, 1927. She had received $13,118.17 under the $85,000 trust assignment. Sam Amsel died on December 20, 1931, and his daughter, Irma Amsel, was appointed administratrix of his estate. On July 30, 1932, soon after publication of notice to creditors, the plaintiff presented to the administratrix of Amsel's estate a claim of ownership in the trust property and for moneys claimed to be due to her from the estate. On March 31, 1936, the administratrix rejected the claim, and on June 30, 1936, the plaintiff commenced this action.

The defendants answered and, with the exception of the Farmers and Merchants Trust Company of Long Beach, each defendant interposed the defense of the statute of limitations. At the close of the plaintiff's case the Trust Company asked leave to amend its answer to include the defense of the statute, but the request was denied.

At the time of trial it appeared that the Trust Company had in its possession as undistributed or undisposed of property under the trust agreement, the sum of $5,670.-66 proceeds from sales, about 50 subdivided lots valued at $100 per lot, and 19 acres of land valued at $1,500 per acre.

[1] The trial court found that Sam Amsel held title to one-third of the 183-acre tract, and one-third of the beneficial interest under the trust agreement, for the plaintiff, and that the plaintiff was the equitable owner of one-third of the beneficial rights under the trust agreement. It was found that the moneys received by the plaintiff from Sam Amsel in 1922 and 1923 were paid and received in recognition of her one-third beneficial interest in the land sold in those years and that the release executed by the plaintiff in August, 1922, was not intended by the parties to exclude the plaintiff from her interest in the lands remaining unsold at that date; that subsequently Sam Amsel admitted and recognized the plaintiff's one-third interest in the remaining lands. It was also found that the claimed rights of the defendants were subject and subordinate to the claims of the plaintiff. The evidence that the wife and daughters of Sam Amsel had knowledge of the plaintiff's interest in the partnership property was sufficient to support the court's finding and conclusion that their interests were subject to the interest of the plaintiff.

The court also found that the plaintiff's cause of action was not barred by any statute of limitations. It found that during the administration of the trustee under the trust agreement, Sam Amsel, his heirs of assigns, had received a total of $137,027.23 of the moneys payable to the trustor thereunder; that of such moneys the plaintiff had received but $1,700; that the wife or daughters of Amsel had received all but $10,588.73 of the $85,000 assigned by Amsel; that the trustee held the sum of $5,670.66, and title to a large amount of real property, the value of which was so speculative as to render it doubtful whether sufficient property remained to secure the payment of the balance of the purchase price of the 183-acre tract; that to do equity between the parties it was necessary and proper that the plaintiff receive the sum of $66,813.61 before any further distribution be made to any of the defendants claiming an interest in the trust property.

There is sufficient support for the findings of the court. The court concluded therefrom that the plaintiff was the owner of an undivided one-third interest in all the properties transferred by Sam Amsel under the trust agreement and that she was entitled to receive, and the trustee was directed to pay to her, all moneys and property available for distribution from the trust estate until she should have received the equivalent of $66,813.61 before any distribution be made to the defendants claiming an interest, and one-third of all money or property thereafter available for distribution.

The principal controversy revolves around the contention that the trial court erred in its ruling that the cause of action was not barred by the four-year statute of limitations. Code Civ.Proc., secs. 337, subd. 1, and 343. It is also contended that the plaintiff's action was barred by laches.

[2, 3] It is clear that the trust subsisting in Sam Amsel's lifetime, and which was not repudiated by him, was a voluntary and continuing trust, whether intended as an express or a resulting trust, as distinguished from an involuntary trust. Schroeder v. Jahns, 27 Cal. 274; Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360; Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 196 P. 884; England v. Winslow, 196 Cal. 260, 237 P. 542; Mix v. Yoakum, 200 Cal. 681, 254 P. 557. As stated in the case of Title Ins. & Trust Co. v. Ingersoll, supra, 158 Cal. at page 484, 111 P. at page 364, the question whether the evidence was sufficiently convincing to create such a trust was a question primarily addressed to the trial court, and its determination thereon should be deemed conclusive.

Relying on Norton v. Bassett, 154 Cal. 411, 97 P. 894, 129 Am.St.Rep. 162, the defendants contend that the statute of limitations commenced to run from the death of Sam Amsel and that therefore the plaintiff filed her action too late. They urge that this is not a case such as Schroeder v. Jahns, supra, wherein it was held that the statute commenced to run from the rejection of the claim filed against the estate of the deceased trustee. It is stated that the plaintiff herein was not a creditor of the estate but was seeking to recover or impress with a trust certain property which she claimed as her own and that the filing of a claim was unnecessary (Roach v. Caraffa, 85 Cal. 436, 25 P. 22; Mix v. Yoakum, supra, 200 Cal. page 685, 254 P. 557; Newport v. Hatton, 195 Cal. 132, 150, 231 P. 987); that the personal representative of Sam Amsel did not succeed to the trusteeship of an express and continuing trust, but became merely an involuntary trustee for the plaintiff's benefit; that the statute of limitations was set in motion at the creation of the involuntary trusteeship, that is, upon the death of Sam Amsel, and that the plaintiff, having brought her action more than four years after Amsel's death, could not rely upon any repudiation by such involuntary trustee to extend the period of the statute.

[4-8] The facts of this case do not bring it within the rule relied upon by the defendants. That rule depends upon the existence of a trust in the decedent at the time of his death before an involuntary trusteeship could be created. In this case, in so far as we are concerned with the properties remaining in the trust, it was the defendant Farmers and Merchants Trust Company of Long Beach, and not Sam Amsel, who held the legal title. When the legal title was transferred to that company, no consideration having been paid therefor, it continued impressed with the same trust to which it was subject when Sam Amsel held the legal title. Allen v. Meyers, 5 Cal. 2d 311, 54 P.2d 450. The evidence discloses no repudiation by the trustee. Although the existence of the original trust was known to the other defendants, it might have been a secret trust in so far as the defendant trustee was concerned. But that fact would not excuse the defendant trustee from the duty of executing the trust as soon

as its existence was made known to it. Estate of Lyon, 163 Cal. 803, 127 P. 75; Thompson v. Bank of California, 4 Cal. App. 660, 88 P. 987; see, also, England v. Winslow, supra. The rights by succession of the other defendants in the trust property did not cut off the plaintiff's beneficial interest. Those defendants did not part with value, and they and their mother had knowledge of the nature and extent of the plaintiff's interest. In so far at least as the controversy relates to the specific trust property in the hands of the defendant trustee, they are not protected against the claims of the true owner (see Newport v. Hatton, supra, 195 Cal. page 151, 231 P. 987), and the judgment confined the plaintiff to a recovery of her beneficial interest from the property remaining in the hands of the trustee.

[9, 10] The defendant trustee contends that the court erred in denying its request to amend its answer by including the defense of the statute of limitations. The denial of the request, made at the close of the plaintiff's case, was within the trial court's reasonable discretion (see Wrightson v. Dougherty, 5 Cal.2d 257, 266, 54 P. 2d 13, and cases cited), and no abuse thereof is here disclosed. The refusal to permit the plea by the defendant trustee did not prejudice any of its rights. That defendant was not the personal representative of either Sam Amsel or his wife. Its duty was not to preserve the property for their heirs exclusively. Its duty was to protect and preserve the property for the owners thereof.

[11, 12] The defendants assert that although they did not plead the defense of laches, the trial court, sitting as a court of equity, should have concluded that the plaintiff delayed unreasonably in bringing her action. See Chapman v. Bank of California, 97 Cal. 155, 159, 31 P. 896. What has been said respecting a plea by the defendant trustee of the statute of limitations applies also to its asserted right to plead laches. See England v. Winslow, supra; also, Cohn v. Cohn, 7 Cal.2d 1, 59 P.2d 969. The like contention of the other defendants is fully answered by the evidence and the findings concerning the plaintiff's limited education, the relationship of trust and confidence existing between her and Sam Amsel, her promptness in endeavoring to protect her rights by the filing of a claim against the estate of Sam Amsel, and by the commencement of this action shortly after the denial of the claim.

The record fully supports the judgment and no error is disclosed.

The judgment is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; TRAYNOR, J.; CARTER, J.

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44 Cal.App.2d 386

COY v. E. F. HUTTON & CO. et al.

Civ. 11420.

District Court of Appeal, First District, Division 1, California.

April 23, 1941.

Hearing Denied June 19, 1941.

1. Limitation of actions 🔑55(5), 95(1)

Where customer's stock was sold by broker on May 12, 1932, customer's action for conversion filed more than four years and nine months after that date was barred by the three-year statute of limitations, since even if the evidence was sufficient to establish a conversion, the statute began to run from the date of the alleged conversion and it was not tolled by the fact that customer might have been ignorant of the conversion. Code Civ.Proc. § 338, subd. 3.

2. Limitation of actions 🔑55(5), 66(2)

Where possession of property is obtained lawfully and there has been an actual conversion, the statute of limitations begins to run from that time, and no demand is necessary, since the cause of action for conversion is complete at the time of the wrongful disposal of the property. Code Civ.Proc. § 338, subd. 3.

3. Limitation of actions 🔑55(5), 66(2), 67, 68

A customer's cause of action for conversion of securities by broker is complete on date of conversion and limitation period commences on that date, no tender or demand is necessary, and the running of the statute cannot be extended by making of tender and demand at a later date, nor is it necessary that customer be informed of the fact that his securities have been converted.

4. Appeal and error ⚷882(3)

The theory on which a case was tried in the court below must be followed on appeal, and hence a theory advanced on appeal different from that on which case was tried and decided by the trial court could not be considered.

5. Limitation of actions ⚷193

Where customer's action against broker for conversion of stock was barred by three-year statute, customer could not contend on appeal that allegation of demand and refusal showed that cause of action was also one for breach of contract governed by four-year statute which does not start to run until breach and that breach did not occur until refusal because it will be presumed, in absence of contrary proof, that until refusal broker had similar stock available for delivery to customer, where customer did not allege and prove that broker could deliver similar stock, and complaint contained no other allegations essential to support a cause of action based on theory sought to be invoked, since the law does not recognize such a presumption. Code Civ.Proc. § 338, subd. 3.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Elmer W. Coy against E. F. Hutton & Co. and others to recover damages on account of the sale of stock which the company had purchased for plaintiff and held pursuant to a customer's agreement. From a judgment for defendants, plaintiff appeals.

Affirmed.

J. Benton Tulley and Keyes & Erskine, all of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco (Eugene M. Prince, Eugene D. Bennett, and Gerald S. Levin, all of San Francisco, of counsel), for respondents.

KNIGHT, Justice.

The plaintiff, Elmer W. Coy, a customer of the Oakland office of the brokerage firm of E. F. Hutton & Company, brought this action for the recovery of damages on account of the sale of corporate stock which the firm had purchased for plaintiff and held pursuant to a a customer's agreement. Judgment was entered in favor of defendants, and plaintiff appeals.

The complaint contained two counts. The first was for conversion, and the second was based on allegations of breach of contract. Defendants' demurrer to the second count was sustained; and by written stipulation plaintiff elected not to amend, but to proceed to trial solely on the first count. Besides denying the allegations of conversion, the defendants pleaded several special defenses, among them being the statute of limitations; that plaintiff was a margin customer, that a balance was owing from him to the brokerage firm, and that the sale of the stock was authorized by the specific terms of the customer's agreement; also that plaintiff had ratified the sale and was bound by an account stated.

The stock consisted of 200 shares of Real Silk Hosiery Preferred, and at the time plaintiff was doing business as a customer with the brokerage firm he was western supervisor of salesmen of the Real Silk Hosiery Company, whose main offices were in Ohio. In April, 1932, plaintiff advised the brokerage firm he was leaving California and returning to Ohio, and on May 11, 1932, the firm received a telegram from Dayton, Ohio, purporting to have been sent by plaintiff, directing that the stock be sold and that a check be mailed to him care of 511 Heiss avenue, Dayton. On the following day, May 12, 1932, in conformity with said telegraphic instructions, the firm sold the stock at current market prices, and on June 7, 1932, mailed its check payable to plaintiff to the address given in the telegram for the balance due him, amounting to $845.85, sending therewith a closing statement of plaintiff's account. The firm heard nothing further about the matter for over two years, at which time to wit, in July, 1934, plaintiff called at the San Francisco office of the firm and made inquiry as to the disposal of the stock. He was informed that in accordance with plaintiff's telegraphic instructions the stock had been sold on May 12, 1932, and a check mailed to him for the balance of the proceeds received from the sale, together with a closing statement of his account. Eight months later, and on March 26, 1935, plaintiff wrote the firm from Columbus, Ohio, giving instructions to sell the stock, pay a certain indebtedness he was owing to a bank, and send him the balance. The firm replied that the stock had been sold in May, 1932, and that his account had been closed, adding, "with all of which matters you are entirely familiar". Approximately two years thereafter plaintiff made demand for the return of the stock and two days later, to wit, on February 15, 1937, filed the present action.

The telegram of May 11, 1932, directing the sale of the stock was signed "E. M. Coy", but it appears that it was sent by plaintiff's mother under circumstances hereinafter stated; and the cause of action alleging conversion was based upon the ground that plaintiff had not authorized the sending of the telegram and knew nothing about the sale of the stock until nearly two years afterwards.

The circumstances attending the sending of the telegram and relating to the disposition of the firm's check, as they are shown by the evidence, are as follows: Upon leaving California in April, 1932, plaintiff went to the home of his mother and stepfather in Dayton. When he arrived there he was apparently on the verge of a nervous breakdown, and was placed in a private rest home in Cincinnati wherein he was confined for twenty-two months. In order to help meet the expenses of plaintiff's care his mother sent the telegram of May 11, 1932, directing the sale of the stock, and upon receiving the firm's check for the balance of the proceeds of the sale she endorsed plaintiff's name thereon and subsequently deposited the money in a joint account in Dayton which plaintiff, in 1931, had opened in their names, and all of the money so received on said check together with considerably more which plaintiff's mother had deposited in said account was from time to time paid out by her for plaintiff's care in said rest home. Some of the additional money she so deposited was received by her on insurance policies carried by plaintiff, and the remainder was her own money.

Plaintiff left the rest home on February 22, 1934, escaping therefrom, so he claimed; and about a week later he learned for the first time, so he testified, about the sale of the stock and read the closing statement of his account sent by the brokerage firm. About a month subsequently he withdrew the small balance remaining in the joint bank account, and in July, 1934, returned to California. According to plaintiff's own testimony, neither before returning to California nor afterwards did he make any inquiries of or ask for any explanation from his mother about the sale of the stock, the sending of the telegram, or the disposition of the proceeds of the check.

[1] The trial took place before the court sitting without a jury, and the court made no finding as to whether or not there had been a conversion. Its decision in favor of defendants was based on the finding that plaintiff's cause of action "if any arose", was barred by the three-year statute of limitations (subd. 3, sec. 338, Code Civ. Proc). In so finding the court held as shown by its written opinion that in an action for conversion as distinguished from an action for damages based on fraud (and here it is conceded that the firm acted in good faith), the statute starts to run from the date of the alleged conversion and is not tolled by the fact that the owner may have been ignorant of the conversion; and that therefore in the present case, even though the evidence were sufficient to establish a conversion (Byer v. Canadian Bank of Commerce, 8 Cal.2d 297, 65 P.2d 67; Poggi v. Scott, 167 Cal. 372, 139 P. 815, 51 L.R.A.,N.S., 925), plaintiff's cause of action was barred because admittedly the sale of the stock took place on May 12, 1932, and the action was not filed until February 15, 1937, or more than four years and nine months subsequent to the date of the alleged conversion. The conclusion so reached by the trial court is amply supported by authority in this state and in other jurisdictions. The case of Rose v. Dunk-Harbison Co., 7 Cal.App.2d 502, 46 P.2d 242, wherein numerous authorities are cited, is directly in point. See also 65 Corpus Juris p. 72. Among other supporting authorities are Meyer on the Law of Stock Brokers and Stock Exchanges, section 180, p. 674; Burt v. Myers, 37 Hun. 277; Ganley v. Troy City National Bank, 98 N.Y. 487.

[2, 3] It was plaintiff's contention at the trial that his cause of action for conversion did not accrue and hence that the statute did not start to run until the making of the demand. It is well settled, however, that where possession is obtained lawfully and there has been an actual conversion, a demand is not necessary (Mier v. Southern California Ice Co., 56 Cal.App. 512, 206 P. 83; Yamada v. Osawa, 12 Cal.App.2d 133; 54 P.2d 1135; Metzler v. Foster Holding Co., 5 Cal.2d 278, 54 P.2d 447; Fiedler v. Allen, 117 Cal.App. 622, 4 P.2d 292; Fitzgerald v. Walser, 102 Cal.App.

719, 283 P. 351); the cause of action for conversion is complete at the time of the wrongful disposal of the property, and the statute starts to run from that time. Bell v. Bank of California, 153 Cal. 234, 94 P. 889; Ganley v. Troy City National Bank, supra. In other words, as said in Meyer on the Law of Stock Brokers and Stock Exchanges, section 180, at page 673: "In an action by the customer for conversion of his securities the period of limitation commences on the date of the conversion. The cause of action is then complete. No tender or demand is necessary and the running of the statute cannot be extended by making a tender and demand at a later date. Nor is it necessary that the customer be informed of the fact that his securities have been converted. The time starts running even though he is ignorant of his rights."

As stated, the cause of action pleaded in the first count was conversion, and the case was tried by the parties and decided by the trial court as such. The second count, based on breach of contract, was abandoned by stipulation, and therefore was out of the case. In this respect the trial court in its findings specifically stated, "By reason of the foregoing findings and the conclusions of law thereon [which are based entirely on the conversion theory], the court makes no further findings with respect to the other issues made by the complaint of plaintiff and the answer of defendants E. F. Hutton & Company and Alan J. Lowrey". But in presenting the appeal plaintiff advances a new theory. It is contended in substance that notwithstanding the fact that the first cause of action upon which he rested his case before the trial court was for conversion, the allegation contained therein of demand and refusal to deliver the stock is sufficient to justify the construction that the cause of action pleaded therein is also one for breach of a written contract; that such an action is governed by the four-year statute of limitations, which does not start to run until the breach occurs; that the breach here did not occur and consequently the cause of action based thereon did not accrue until plaintiff's demand for the return of the stock was refused, because, so plaintiff contends, it will be presumed in the absence of proof to the contrary that until such demand was refused the brokerage firm had in its possession similar stock which was available for delivery to plaintiff.

[4] It is evident, however, that the state of the record will not permit plaintiff's new theory to be considered, for as said in Gibson Properties Co. v. City of Oakland; 12 Cal.2d 291, 83 P.2d 942, it is well settled that the theory upon which a case was tried in the court below must be followed on appeal. Story v. Nidiffer, 146 Cal. 549, 80 P. 692; Durkee v. Chino Land & Water Co., 151 Cal. 561, 91 P. 389; Kaufman v. Tomich, 208 Cal. 19, 280 P. 130. The same rule is stated in Ernst v. Searle, 218 Cal. 233, 22 P.2d 715, 718, as follows: "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. 2 Cal.Jur. § 68 p. 237."

[5] Moreover and in any event, the law does not recognize any such presumption as contended for by plaintiff. It was definitely so held in Bell v. Bank of California, supra, wherein a similar contention was made, and in ruling adversely thereon the court held that if the pledgee seeks delivery of similar property, he must allege and show that the defendant is in a position to make such delivery. In the present case there is an entire absence of any such allegations and proof; nor does the first count contain any of the other allegations which are essential to the support of a cause of action based on the theory plaintiff now seeks to invoke. The facts of the case relied upon by plaintiff in support of his point (Kagee v. Bencich, 27 Cal.App.2d 469, 81 P.2d 265) are materially different from those here involved.

The remaining points are incidental to those already discussed, and therefore do not require special attention.

The judgment is affirmed.

We concur: PETERS, P.J.; WARD, J.

44 Cal.App.2d 561

HJORTH et al. v. BERNSTEIN et al.

Civ. 2643.

District Court of Appeal, Fourth District, of California.

April 28, 1941.

1. Appeal and error ⇨1033(9)

A defendant could not complain because court erred in calculating plaintiffs' damages, where error resulted in plaintiffs recovering less damages than they were actually entitled to.

2. Fraud ⇨47

A complaint, alleging that defendant induced plaintiffs to purchase oil royalty by false representation that royalty had produced income of not less than $134 per month, that royalty had not produced such income for many months, that first royalty check received by plaintiffs was for $47.22, and that subsequent checks never exceeded $42.50, sufficiently alleged damages to state cause of action for fraud. Code Civ.Proc. § 426.

3. Appeal and error ⇨193(8)

A defendant could not raise plaintiffs' alleged failure to specifically allege damages for the first time on appeal, where defendant did not interpose demurrer for ambiguity or uncertainty and raised no objection when evidence as to damages was introduced.

4. Fraud ⇨31

One who has been induced to enter into contract by false representations may rescind contract or affirm it and claim damages, but he cannot do both.

5. Fraud ⇨31

A contract which is induced by fraudulent representations must be effectually disaffirmed before defrauded party's right to damages is lost, and an ineffectual attempt to disaffirm the contract will not bar right to damages.

6. Appeal and error ⇨173(9)
Fraud ⇨31

Purchasers of oil royalty were not barred from recovering damages for false representation which induced purchase because they prayed for rescission, where rescission was denied on ground that it would have been ineffectual, especially where defendant did not raise defense of election of remedies in trial court.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by A. W. Hjorth and others against Sam Bernstein and others, for rescission of a contract and for money had and received. From an adverse judgment, named defendant appeals.

Affirmed.

Abe Richman, of Los Angeles, for appellant.

Hansen & Cope, of Long Beach, for respondents.

CONWAY, Justice pro tem.

Plaintiffs commenced an action against defendants for rescission of a contract for the purchase of an oil royalty upon the ground of fraud, and in a second count of the complaint alleged a cause of action upon the common count of money had and received. No demurrers were filed and after issue was joined the case proceeded to trial. The court, sitting without a jury, rendered judgment in favor of all of the defendants upon the cause of action based upon the theory of rescission of the contract, and gave plaintiffs judgment for $1,553.71 against the defendant Sam Bernstein under the second count of the complaint for money had and received.

The material facts are as follows: Robert Lison and Helen Allen Lison are husband and wife, and she was the owner of a 1 per cent royalty interest in the production of four oil wells in Los Angeles county. Appellant Bernstein, who it was admitted was not the agent of either of the Lisons, in order to induce plaintiffs to purchase said royalty fraudulently represented to them that said interest had theretofore produced an income of not less than $134 per month and that the month immediately preceding the making of the contract the 1 per cent royalty had produced a sum in excess of $134 and which, under the contract, plaintiffs were entitled to receive as a part of the deal. Plaintiffs made no independent investigation and purchased the royalty solely upon said false representations. Neither of the Lisons made any false representations of any character and were entirely innocent of the fraud perpetrated by Bernstein. Plaintiffs paid the sum of $3,000 for the royalty interest and their first check representing the said royalty interest from the sales amounted only to $47.22, and thereafter they received no checks which were in excess of $42.50 per month.

[1] Upon discovery of the fraud perpetrated by Bernstein plaintiffs tendered the royalty interest which they had received, and demanded a return of the purchase price in order to place the parties in status quo. Upon refusal to return the purchase price a trial followed, and the court decided it would be inequitable to declare a rescission of the contract as against the Lisons, who were in no way tainted by or responsible for Bernstein's fraudulent representations. A rescission would have been equally ineffective against Bernstein who was not and never had been the owner of the royalty. Therefore, the court gave judgment for damages sustained by the plaintiffs and found that the reasonable value of the interest sold was not in excess of $1,300. From the difference of $1,700, the purchase price being $3,000, the court set off the royalties received by plaintiffs and gave judgment for the balance. Inasmuch as the court denied rescission but gave judgment for damages upon the contract, the miscalculation as to the amount injured plaintiffs only as it seems clear that plaintiffs were entitled to retain all of the royalties under the contract. Obviously, the error was in favor of the appellant and he is in no position to complain because the damages were not larger.

[2, 3] Appellant does not attack the findings of the trial court to the effect that the contract was induced by the fraudulent misrepresentation. Under the caption of questions involved he states that his principal contentions are, first, that the complaint does not state a cause of action and, second, that plaintiffs are barred from recovery by the application of the doctrine of election of remedies. We shall consider these questions in the order in which they are presented. He claims that the complaint is fatally defective because there is not any specific allegation that the plaintiffs have been damaged in any respect by the fraudulent representations. The complaint, after alleging the misrepresentations made by appellant, sets forth that said royalty assignment had not, for many months prior to the date of the contract, ever produced a revenue of $134 per month, and that the first royalty check received by plaintiffs was in the sum of $47.22 and that the royalty checks thereafter received by plaintiffs never exceeded $42.50. We have looked over the transcript and find that all of plaintiffs' testimony showing the falsity of appellant's representations and showing the reasonable value of the royalty sold was admitted without objection, and the record is replete with testimony which was introduced without objection showing the damages which occurred to plaintiffs by reason of the misrepresentations. We feel that the complaint in its entirety was sufficient to meet the requirements of section 426 of the Code of Civil Procedure. No demurrer was interposed for ambiguity or uncertainty, and when the evidence was offered for the purpose of showing damages it was received without objection. He cites the case of Bailey v. Fox, 78 Cal. 389, 20 P. 868, 871, in support of his first contention. In that case, there was no evidence offered or admitted to show that there were any damages which flowed from the false representations, and the court specifically states "The findings make no better case for the plaintiff than the complaint". In the case at bar, the findings of fact specifically show the damages which plaintiffs have suffered by reason of the false representations. We reviewed the cases cited by appellant and find that none of them presents facts analogous to the case at bar. We are of the opinion that the complaint sets forth sufficient ultimate facts to show the actual damages which plaintiffs have suffered under the contract and, under the circumstances of this particular case, the appellant may not permit the evidence as to damages to be introduced at the trial without objection and then take advantage of the alleged failure to specifically allege damages for the first time on appeal.

[4, 5] Appellant contends, secondly, that the law is well settled that a person claiming to be defrauded by false representations has a choice of two inconsistent remedies, to-wit, he may elect to rescind the contract; or, to affirm it and claim damages. He cannot do both. We quite agree with appellant in this connection. However, it is well settled in California that the right to damages exists in cases of this character unless and until the transaction is effectually disaffirmed. It is, of course inconsistent for the party defrauded to rely upon the contract and seek damages thereon for fraud, and in the event that he is prevented from recovery to thereafter file an action for rescission. But, in this case, an action for rescission was denied for the reason that the court

deemed the same inequitable for the reason that the Lisons, who owned the oil royalty, had never participated in the fraud and for the further reason that appellant Bernstein, who had committed the fraud, was not an agent of the Lisons. Rescission, therefore, would have been ineffectual. In the case of Bancroft v. Woodward, 183 Cal. 99, 190 P. 445, 446, the court had before it a case which clearly enunciates the law with reference to the cases of the character here under consideration. In that action the defendant Woodward, who was sued for rent, set up by way of counterclaim fraud and alleged damages in a considerable amount. He also filed a cross-complaint at the same time, in which he sought a rescission of the lease, relying upon the identical fraud set forth in the counterclaim. The court said: "While it is true that a party induced to enter into a transaction by fraud affirms the transaction when he brings an action for damages, and because of the affirmance loses any right to disaffirm subsequently (Stuart v. Hayden, 169 U.S. 1, 18 S.Ct. 274, 42 L.Ed. 639 [see, also, Rose's U.S.Notes]), it is not true that if he seeks to disaffirm, but ineffectually, he loses the right thereafter to maintain an action for damages. The right to damages exists unless and until the transaction is effectually disaffirmed. It could hardly be questioned, for example, that under a complaint which, by proper and sufficient averments, set out that the plaintiff had been induced by fraud to enter into a contract and had endeavored to rescind it because of such fraud, and prayed relief upon the basis of a rescission, the plaintiff might be accorded damages in case the fraud were found but under such circumstances that the right of rescission did not exist. To put the matter in another way, it is wholly inconsistent for a party defrauded to ask for damages first and a rescission if he cannot have them. But there is nothing inconsistent in his asking for rescission first and damages if he cannot have it. The defendant here by his counterclaim and cross-complaint, filed at the same time, has gone no further than to say that he is entitled either to damages or to rescission, and that if he cannot have the latter he asks the former. There is nothing in this that constitutes an affirmance so that his right to rescission is gone. Upon this point the case comes directly within the rulings of Glover v. Radford, 120 Mich. 542, 79 N.W. 803, and Richardson v. Lowe [8 Cir.] 149 F. 625, 79 C.C.A. 317."

[6] In view of the rule of law enunciated in the Woodward case, we are of the opinion that the complaint and the evidence submitted without objection definitely entitles the plaintiffs to recover against appellant Bernstein for damages for the fraud perpetrated by him. In this connection it may be noted that the record shows that no request was made by appellant that plaintiffs be required to elect at the time of trial. No question was raised as to either of the matters complained of on appeal, so far as we can ascertain from the record, until the matter was brought before us on appeal.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

44 Cal.App.2d 566

FELDESMAN v. McGOVERN et al.

Civ. 11391.

District Court of Appeal, First District,
Division 1, California.

April 29, 1941.

Hearing Denied June 26, 1941.

1. Appeal and error 🔑854(3)

Affirmance of judgment based on order general in terms sustaining demurrer is required if it appears that demurrer was well taken as to any of grounds urged therein.

2. Attorney and client 🔑129(2)

A client seeking to recover against attorney for negligence in failing to perform some act in behalf of client must specifically allege and prove that, if attorney had performed the act, it would have resulted beneficially to client.

3. Attorney and client 🔑129(2)

In client's action against attorneys based on failure to file petition for client's discharge in bankruptcy, complaint which failed to allege directly or by implication that, if petition for discharge had been filed, client would have been entitled to have petition granted, failed to state a cause of action.

4. Attorney and client ⚷129(2)

The rule that a client, seeking to recover from attorneys for attorneys' failure to perform some act in behalf of client, must allege and prove that performance of act would have been beneficial to client, was applicable to act of filing petition for discharge in bankruptcy, as against contention that granting of discharge is mandatory unless bankrupt has committed certain prohibited acts and that those acts were in effect affirmative defenses which need not be pleaded.

5. Bankruptcy ⚷404(1)

The granting of discharge in bankruptcy is not mandatory, but bankrupt is entitled to discharge only if he has complied with provisions of Bankruptcy Act and has not committed any of offenses listed. Bankr. Act § 1 et seq., 11 U.S.C.A. § 1 et seq.

6. Appeal and error ⚷681

Where demurrer to complaint failing to state a cause of action was sustained, fact that defect in complaint could have been cured by an amendment, and that plaintiff asked permission to amend, did not preclude reviewing court from affirming trial court's order, in absence of any showing in record that plaintiff in asking leave to amend indicated how or in what manner he proposed to amend.

7. Pleading ⚷34(4)

The presumptions are always against the pleader and all doubts are to be resolved against him, since it is presumed that he stated his case as favorably as possible to himself.

8. Pleading ⚷37

A fact necessary to pleader's cause of action, if not pleaded, must be taken as having no existence.

9. Attorney and client ⚷129(2)

In client's action against attorneys for attorneys' failure to file petition for client's discharge in bankruptcy, complaint failing to allege that bankrupt would have been entitled to discharge if petition therefor had been filed was not rendered sufficient to state cause of action by allegations that attorneys "negligently omitted" to obtain discharge, and allegations relating to damages. Code Civ.Proc. § 452.

10. Pleading ⚷34(1)

The rule of liberal construction embodied in Code of Civil Procedure does not permit insertion in complaint, by construction, of averments which are neither directly made nor within fair import of those set forth. Code Civ.Proc. § 452.

11. Attorney and client ⚷129(2)

Where client seeks damages for attorney's breach of duty, attorney is entitled to insist that complaint contain all allegations essential to complete statement of a cause of action.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Solomon Feldesman against Walter McGovern and another, to recover damages for the failure of the defendant attorneys to perform one of the duties for which they were employed. From a judgment in favor of the named defendant, the plaintiff appeals.

Judgment affirmed.

Harry L. Myers and George Olshausen, both of San Francisco, for appellant.

Keyes & Erskine, of San Francisco (Douglas M. Moore, of San Francisco, of counsel), for respondent.

KNIGHT, Justice.

[1] This is an action by a client against his attorneys for damages, based on allegations to the effect that they negligently failed to perform one of the duties for which they were employed, namely, to file a petition for his discharge in bankruptcy. The respondent is one of the two attorneys sued. He appeared separately and his demurrer to the second amended complaint was sustained without leave to amend. Accordingly judgment was entered in his favor, and the client appeals. The record on which the appeal was taken does not disclose whether respondent's co-defendant was served with summons, or if so what disposition was made of the case as to him. The trial court's order sustaining the demurrer was general in terms; therefore, if it appears that the demurrer was well taken as to any of the grounds urged therein, the judgment based on the trial court's order must be affirmed. Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550, citing numerous authorities.

[2] The principal ground of demurrer was that the second amended complaint failed to state a cause of action, and the im-

portant point urged in this behalf is that in an action brought by a client against his attorney for the latter's alleged negligence in failing to perform some act in behalf of the client, the complaint must not only specify the act, but must specifically allege and the plaintiff must prove that if the attorney had performed the act it would have resulted beneficially to the client. A large number of cases from other jurisdictions, including one from the federal court, are cited by respondent, which doubtless sustain the rule contended for by him. Among them are Vooth v. McEachen, 181 N.Y. 28, 73 N.E. 488, 2 Ann.Cas. 601; Maryland Casualty Co. v. Price, 4 Cir., 231 F. 397, Ann.Cas.1917B, 50; Laux v. Woodworth, 195 Wash. 550, 81 P.2d 531; Martin v. Nichols, 110 Wash. 451, 188 P. 519; Schmitt v. McMillan, 175 App.Div. 799, 162 N.Y.S. 437. And in the following cases cited by him the attorney's demurrer was sustained and the judgment affirmed on appeal because of the fact that the client failed to allege specifically that if the attorney had not been negligent, the client would have been successful in the litigation: National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S.W. 561; Brainard v. Singo, 164 Ala. 353, 51 So. 522; Jones v. Wright, 19 Ga.App. 242, 91 S.E. 265.

Respondent also cites the following California cases, which contain language indicating that the same rule prevails in this jurisdiction: Lally v. Kuster, 177 Cal. 783, 171 P. 961; McMillan v. Greer, 85 Cal.App. 558, 259 P. 995; Martin v. Hood, 203 Cal. 351, 264 P. 478. In this regard the decision in the first of the three cases just cited contains the following [177 Cal. 783, 171 P. 962]: "'*He* [the client] *must allege and prove* that the claim was turned over to the attorney for collection; that there was a failure to collect; that this failure was due to the culpable neglect of the attorney; *and that, but for such negligence, the debt could, or would, have been collected.* * *' 6 Corpus Juris, p. 710, § 260, cited as authority in Vooth v. McEachen, 181 N.Y. 28, 73 N.E. 488, 2 Ann.Cas. 601." (Italics ours.)

[3] The bill of exceptions upon which the appeal herein is presented embodies the first and second amended complaints, and neither contains any allegation which directly or by implication alleges that if appellant's attorneys had filed a petition for his discharge in bankruptcy, it would have been or he would have been entitled to have the same granted. Therefore, under the rule of the cases above referred to, the second amended complaint was fatally defective in stating a cause of action.

[4] Appellant in effect concedes the existence of the rule as declared by the cases cited by respondent, but contends that while such rule is applicable where the attorney has been employed in contested civil litigation, it is not here controlling, because, so he contends, the granting of a discharge in bankruptcy is mandatory, unless the bankrupt has committed certain prohibited acts, and that these prohibited acts are in effect affirmative defenses which need not be pleaded. In this behalf appellant argues that other things being equal, the bankrupt is entitled to his discharge upon the mere filing of his petition, and any attempt to plead facts showing that the discharge would have been granted would be merely pleading that plaintiff had not committed any of the prohibited acts which might have prevented his discharge, which would amount to anticipating a defense.

[5] As pointed out by respondent, however, the granting of a discharge is not mandatory; that is to say, a bankrupt is entitled to a discharge only if he has complied with the provisions of the Bankruptcy Act, 11 U.S.C.A. § 1 et seq., and has not committed any of the offenses listed. It is in effect so held in In re Northridge, D.C., 53 F.2d 858, 859, wherein the court said: "The right to a discharge is not something which a bankrupt is entitled to for the mere asking. It is a high privilege which should not be granted except in clear cases where all the statutory conditions and requirements have been fully met and complied with * * *." See, also, In re Weisberger, D.C., 41 F.2d 275; Holmes v. Davidson, 9 Cir., 84 F.2d 111. Furthermore, as respondent points out, in cases where the attorney was sued by the client for failure to enforce the collection of a note, it is held that the client must allege and prove not only that he would have obtained judgment on the note, but that the debtor was solvent and the judgment would have been collected; all of which are really matters of defense. Nevertheless, as contended by respondent, the cases hold they are not matters of defense in an action against the attorney, but are essential elements to the cause of action. See Lally v. Kuster, supra, and authorities cited therein.

[6-8] Appellant also contends that even if such an allegation were necessary to the statement of a cause of action, its absence is not ground for affirmance of the trial court's order, because the defect could have been cured by amendment; and appellant asked permission to amend. However, so far as the record shows, in asking leave to amend he did not indicate how or in what manner he proposed to amend. As said in Stewart v. Douglass, 148 Cal. 511, 83 P. 699: "When a demurrer is sustained to a complaint, it is within the discretion of the court either to allow an amended complaint to be filed, or to give judgment forthwith in favor of the defendant. The appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. The plaintiff merely asked leave to file an amended complaint, and, so far as the record discloses, did not show that there were any allegations of fact omitted from the complaint to which the demurrer had been sustained which, if inserted therein, would in any respect change its legal effect, nor make any statement whatever of the grounds or reasons for making the application for leave to amend. There was clearly no abuse of discretion shown. Kleinclaus v. Dutard [147 Cal. 245], 81 P. 516, 518." See, also, Marsh v. Lott, 156 Cal. 643, 105 P. 968. The action was pending prior to the adoption of section 472c of the Code of Civil Procedure, and therefore said section by its express terms has no application here. Furthermore it is well settled that the presumptions are always against the pleader, and all doubts are to be resolved against him, for it is to be presumed that he stated his case as favorably as possible to himself. (Joseph v. Holt, 37 Cal. 250; Silvers v. Grossman, 183 Cal. 696, 192 P. 534; Burrowes v. Bosworth, 68 Cal. App. 117, 228 P. 667; Higgins v. Security Trust & Savings Bank, 203 Cal. 398, 264 P. 744; Smith v. Buttner, 90 Cal. 95, 27 P. 29); if a fact necessary to the pleader's cause of action is not alleged it must be taken as having no existence. Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395; Callahan v. Loughran, 102 Cal. 476, 36 P. 835.

[9-11] Appellant makes the further contention that the complaint is sufficient even without the allegation in question, because it is alleged that his attorneys "negligently omitted" to obtain appellant's discharge; also because of the allegations relating to the matter of damages, citing Dunn v. Dufficy, 194 Cal. 383, 228 Pac. 1029. However, that was a medical case, and presents an entirely different situation from the one with which we are here dealing. Nor does the rule of liberal construction embodied in section 452 of the Code of Civil Procedure permit the insertion, by construction, of averments which are neither directly made nor within the fair import of those which are set forth. On the contrary, facts necessary to a cause of action but not alleged must be taken as having no existence. 21 Cal. Jur. p. 54. Moreover, it would seem that where as here a charge of breach of duty by an attorney has been made by a client, for which he is seeking damages, the attorney is entitled to insist that the complaint contain all allegations essential to the complete statement of a cause of action. As said in Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am.Dec. 262: "As, in the very nature of things, a charge of this nature, if well founded, must seriously affect the professional character of the attorney, he is entitled, to the fullest extent, to the benefit of that rule of universal application extending to all the relations of society, that every one shall be presumed to have discharged his legal and moral obligations until the contrary shall be made to appear. [Citing cases.]"

Appellant has stated his cause of action in two counts, but what has been said applies with equal force to both counts; and in view of the conclusion reached on the point discussed it becomes unnecessary to inquire into the remaining points made in support of the judgment, including the question of the statute of limitations, or to consider the correctness of the trial court's ruling striking out certain allegations relating to the elements of damages.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

44 Cal.App.2d 399

DEL REY REALTY CO. v. FOURL.

Civ. 11563.

District Court of Appeal, First District, Division 2, California.

April 23, 1941.

Hearing Denied June 19, 1941.

1. Contracts ⚷138(1)

The rule that illegal contracts are unenforceable is not based on consideration for party against whom relief is sought, but on sound public policy.

2. Brokers ⚷42

An agreement for performance of, and payment of compensation for, services by person not licensed as broker in obtaining oil sublease for another, was illegal. St.1919, p. 1252.

3. Brokers ⚷42

Where terms of illegal agreement for performance of, and payment for, services by person not licensed as broker in obtaining oil sublease for another were carried into instrument leaving certain obligations to be performed in future, an action by assignee of rights of corporation, in favor of which instrument was made at such person's request, for accounting by and moneys due from sublessee thereunder, was in substance and effect an action to enforce terms of original agreement, so that defense of illegality was available to sublessee. St. 1919, p. 1252.

4. Brokers ⚷42

In action by assignee of rights of corporation, in favor of which an instrument, embodying terms of illegal agreement for performance of, and payment for, services by person not licensed as broker in obtaining oil sublease for other party thereto, was made at such person's request, for accounting by, and moneys due under instrument from, such other party, trial court correctly determined that parties should be left where it found them and properly denied relief to either. St.1919, p. 1252.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by the Del Rey Realty Company against Charles W. Fourl for an accounting and money due under a contract, in which defendant filed a cross-complaint for rescission of the contract and restoration of moneys paid thereunder. From so much of the judgment rendered as denied plaintiff any relief under the complaint, plaintiff appeals.

Affirmed.

Wm. P. Mealey, of Los Angeles, for appellant.

Charles W. Fourl, of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff, as assignee of certain rights of the Adriatic Corporation under an instrument dated September 7, 1934, sought an accounting and a judgment for money claimed to be due from defendant under the terms of said instrument. Defendant filed an answer and also a cross-complaint seeking the rescission of said instrument and the restoration of moneys paid thereunder. The trial court entered its judgment denying plaintiff relief under the complaint and denying defendant any relief under the cross-complaint. Plaintiff appeals from the portion of the judgment denying plaintiff relief under the complaint.

There appears to be no dispute concerning the material facts. In 1934, B. C. McCabe had certain dealings with defendant and it was agreed between them that in the event that McCabe obtained for defendant from a certain lessor an oil sublease on certain premises, defendant would give said McCabe a 10 per cent interest in the proceeds of the oil produced thereunder. McCabe obtained said sublease for defendant and, as compensation for said services, defendant executed and delivered to McCabe the instrument in question. This instrument was prepared by McCabe and was made in favor of Adriatic Corporation at McCabe's request. It is conceded by the parties that for the purposes of this case, McCabe and the Adriatic Corporation are "one and the same". Said instrument read as follows:

"This agreement, made and entered into this 7th day of September, 1934, by and between Charles W. Fourl, hereinafter called First Party, and Adriatic Corporation, a California Corporation, hereinafter called Second Party;

"Witnesseth:

"Whereas, on or about the 28th day of June, 1934, an oil and gas sublease was duly entered into between Herndon Development Company, Ltd., a sublessor and the first party herein as sublessee covering the following described property, to wit:" (Description of property); and

"Whereas, the Adriatic Corporation, second party, herein rendered valuable services to the first party in connection with the securing of said sublease; and

"Whereas, at said time it was agreed that said second party should have a portion of the interest secured by the first party arising out of said sublease;

"Now, therefore, in consideration of the sum of One Dollar ($1.00) in hand paid to the first party by the second party, receipt of which is hereby acknowledged, and for other good and valuable considerations, it is agreed as follows:

"1. That the first party does hereby assign, transfer and convey unto second party an undivided ten (10%) percent participating interest in and to the proceeds from the sale of all oil, gas and other hydrocarbon substances produced, saved and sold from the above described premises.

"2. That the second party shall not participate in the proceeds from the first well now being drilled upon said premises, or in any well that may thereafter be drilled, until the first party has received back from the sale of oil and/or gas the total amount expended by him to drill said well or wells and place the same upon production.

"3. The second party's interest shall be subject to its pro rata part of the necessary operating expenses of said lease including cleaning, deepening and/or redrilling, and shall bear the proportionate part of all necessary overhead.

"In witness whereof the parties hereto have hereunto affixed their signatures the day and year first above written.

"Chas. W. Fourl
"First Party
"Adriatic Corporation
"By W. M. Franklin
"V. P.
"Second Party"

It is conceded that when said services were performed by McCabe for an agreed compensation, neither said McCabe nor Adriatic Corporation was licensed to perform such services. It is further conceded that the performance of said services by an unlicensed person was prohibited by law and that the payment of compensation to an unlicensed person for the performance of such services was likewise prohibited by law.

Defendant drilled two wells under said sublease and produced large quantities of oil. In 1936, Adriatic Corporation assigned to plaintiff "all royalty due and payable to the Adriatic Corporation prior to April 1st which remains unpaid". Defendant had made certain payments but thereafter refused demands for an accounting made by plaintiff and McCabe. Thereupon this action was brought.

The trial court found among other things that neither McCabe nor Adriatic Corporation "had any broker's license or any license from the Real Estate Commissioner of the State of California, as provided by the California Real Estate Act" [St.1919, p. 1252] and concluded that plaintiff was not entitled to recover upon the complaint and that defendant was not entitled to recover on the cross-complaint. In other words, the trial court left the parties where it found them because it concluded that each of the parties was seeking affirmative relief on an alleged cause of action arising out of an illegal transaction.

The parties seem agreed that if this were an ordinary action upon an executory contract for the recovery of compensation by an unlicensed person, neither Adriatic Corporation nor plaintiff, as the assignee of said corporation, could recover compensation for the services performed. Wise v. Radis, 74 Cal.App. 765, 242 P. 90; Firpo v. Murphy, 72 Cal.App. 249, 236 P. 968. Plaintiff takes the position, however, that the illegal agreement was executed by the execution and delivery of the instrument dated September 7, 1934, and that the defense of illegality was therefore not available to defendant. Defendant, on the other hand, takes the position that the illegal agreement was executory rather than executed and that in any event the defense of illegality was available to defendant even if the illegal agreement may be said to have been executed by the execution and delivery of the instrument dated September 7, 1934.

[1] Numerous authorities have been cited by both parties but we find none directly in point. The general rules relating to the effect of illegality have been frequently discussed and have been applied under varying circumstances. 6 Cal.Jur. 148 et seq., and cases cited; see, also, 17 C.J.S., Contracts, § 272, 656 et seq.; 12 Am.

Jur. 713 et seq. The reason underlying said rules is stated in 6 California Jurisprudence, page 153, as follows: "The rule as to the nonenforceability of illegal contracts is not based upon any consideration for the party against whom the relief is sought, and who may be benefited by the refusal of the court to grant the same, but upon consideration of sound public policy. It is not for the sake of a party, but for the sake of the law itself, that a court refuses to be made use of for the enforcement of illegal contracts and leaves the parties where it finds them."

It does not appear necessary in this case to discuss the exact nature of the interests created by the instrument dated September 7, 1934. It has been said with respect to such assignments in Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 64 P.2d 1081, 1088, "Such assignments by reason of the unique and specialized nature of the interests involved must to a certain extent be sui generis." Nor does it appear necessary to discuss the question of whether the original agreement, which was admittedly illegal, may be said to have become an executed agreement upon the execution and delivery of said instrument dated September 7, 1934, for the question of whether an illegal agreement has become an executed agreement or remains executory is not necessarily controlling here.

[2, 3] As we view the situation in the present case, the following are the controlling considerations. The original agreement for the performance of services by an unlicensed person and for the payment of compensation for such services was illegal. The terms of said agreement were carried into the instrument dated September 7, 1934, which instrument left certain obligations to be performed in the future. This action was brought for the enforcement of an alleged obligation of the defendant under said instrument. The obligation which plaintiff was seeking to enforce was not an obligation which arose independently of the terms of the original illegal agreement (see 6 Cal.Jur. 160) but was an obligation which arose out of the terms thereof as carried into the instrument of September 7, 1934. Under these circumstances, the action was, in substance and effect, an action to enforce the terms of the original illegal agreement and we are of the opinion that the defense of illegality would have been available to defendant as against plaintiff's assignor and we are further of the opinion that said defense was available to defendant as against plaintiff. Firpo v. Murphy, 72 Cal.App. 249, 236 P. 968.

[4] Under the settled rules relating to the effect of illegality, we believe that the trial court correctly determined that the parties should be left where it found them and correctly denied relief to either party.

The portion of the judgment from which the appeal was taken is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

44 Cal.App.2d 422

PEOPLE v. NOBLES.

Cr. 3437.

District Court of Appeal, Second District, Division 2, California.

April 23, 1941.

Hearing Denied May 22, 1941.

1. Witnesses 🔑**395, 414(2)**

Ordinarily, witness' prior extrajudicial statements consistent with his testimony will not be admitted in evidence for purpose of bolstering such testimony, but such evidence is proper to rebut inferences created by witness' cross-examination and rehabilitate his evidence after attempts to impeach him by showing that his testimony was actuated by base or ulterior motives or recently fabricated.

2. Witnesses 🔑**395**

In trial for statutory rape and lewd or lascivious acts with defendant's minor daughter, admission of deputy sheriff's testimony as to her conversation with prosecutrix for limited purpose of refuting suggestion previously made that prosecutrix fabricated her testimony in revenge for acts of unkindness by defendant was not erroneous. Pen.Code, § 288.

3. Criminal law 🔑**1129(3)**

Where one appealing from conviction of crime cites no page of record showing trial court's asserted error in allowing district attorney to refresh prosecuting witness' recollection by reading to her portion of her testimony at preliminary hearing, such asserted error should not be considered by appellate court.

4. Criminal law ⚷1170½(1)

Where prosecuting witness could not remember her testimony at preliminary hearing either before or after her mind was refreshed by reading thereof to her by district attorney, defendant was not prejudiced by trial court's error, if any, in allowing such refreshment of witness' recollection.

5. Witnesses ⚷260

Where prosecuting witness gave testimony contrary to her testimony at preliminary hearing, district attorney was within his rights in reminding her of such previous testimony by reading portion thereof to her while she was on witness stand.

6. Infants ⚷20
Rape ⚷52(1)

Evidence *held* sufficient to support court's judgment convicting accused of statutory rape and lewd and lascivious acts with girl under 14 years of age. Pen.Code, § 288.

7. Criminal law ⚷1159(2)

The District Court of Appeal is not warranted in reversing trial court's judgment of conviction for crime, unless it clearly appears that evidence is insufficient to support judgment on any hypothesis whatever.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Russell E. Nobles was convicted of attempted rape and lewd or lascivious acts on the body of a girl under 14 years of age, and he appeals.

Affirmed.

Hearing denied; CURTIS, J., dissenting.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused by information of the district attorney of eleven felonies. By counts 1, 4, 7 and 10, he was charged with statutory rape, and was convicted of attempted rape under all four counts. By counts 2, 3, 6 and 9, he was accused of violating section 288 of the Penal Code and was convicted on those four counts. By counts 5, 8 and 11, he was accused of incest but of these he was acquitted. Defendant waived trial by jury. His motion for a new trial having been denied, judgment was entered sentencing appellant to the state prison at San Quentin for the term prescribed by law on each of the eight convictions. But the language of the judgments is such that appellant is required to serve only four consecutive terms. Defendant appealed from the order denying his motion for a new trial and from the judgment of the court.

The contentions made on appeal are: (1) error of the court in admitting certain testimony, and (2) insufficiency of the evidence to support the judgment.

It will not be necessary to unfold the sordid details of a series of acts committed by appellant in his association with two girls, one of whom was his own daughter. From the brief resume here recorded, one may readily perceive the loathsome facts, unhappily if not unwillingly recited by the two children to the trial court.

In the late fall of 1939, the wife of appellant, step-mother of Betty Nobles, was holding a revival meeting in a tent at Sunshine Acres. Bessie Cook, fifteen years of age, visited the Nobles family and slept in a tent with Betty. Appellant slept in a house opposite the sleeping quarters of Betty and her friend. On one occasion, while Bessie was alone in the tent, appelant visited her as she lay in bed and, to abbreviate the story which was extended by reason of her unwillingness, she testified that at that time appellant pulled down her panties, touched her genital organs with his private parts and left "wet" upon her garment. This was sufficient to convince the trial court that appellant at least made an attempt at sexual intercourse with this girl. Bessie testified that on a number of occasions, he occupied the same bed with Betty and herself.

The story of Betty June, who was in her 13th year at the time of the tragical occurrences, was that while at Sunshine Acres she lived in a one-room house and slept alone in the church tent; that some unusual things happened before Thanksgiving of 1939; that appellant required her to enter his bed on a number of occasions where acts occurred violative of section 288 of the Penal Code and by reason of his exercise of his genital organs upon her she suffered some pain in her private parts. The last occurrence in the series took place about the 11th of April, 1940, when his former conduct was repeated while in bed with his daughter. A physician testified that the hymen of Bessie May Cook had suffered a rupture and that the same organ of Betty June was slightly ruptured.

[1] Over objections the court permitted deputy sheriff Bess Bailey to testify to the conversation she had had with Betty Nobles at the time of the commencement of her investigation of the charges. Prior to the testimony of Miss Bailey, an attempt had been made to create an inference that Betty June had given her testimony against her father in revenge for alleged acts of unkindness on his part. In admitting the recitals of the deputy sheriff, it was made clear by the court that such testimony was not received for the purpose of proving the facts which had been told to the witness by Betty June but for the limited purpose of refuting the suggestion that Betty had fabricated her testimony out of revenge. It is a well known rule that, under ordinary circumstances, prior extra-judicial statements of a witness consistent with his testimony on the stand will not be admitted for the purpose of bolstering such testimony. But the exception to that rule is that such evidence is proper to rebut inferences created by the cross-examination of the witness and to rehabilitate his evidence following attempts to impeach him by endeavoring to show that his testimony is actuated by base or ulterior motives, or that his testimony in court is of recent fabrication. Davis v. Tanner, 88 Cal.App. 67, 262 P. 1106; Clark v. Dalziel, 3 Cal.App. 121, 124, 84 P. 429, 3 Wigmore on Evidence [2d] p. 1766.

[2] In view of the limitation placed upon the testimony of Miss Bailey at the time it was admitted, it was not inadmissible for the reason that it was introduced and received solely to prove that her state of mind, on the date anterior to the trial with respect to the subject under consideration, was the same as that disclosed at the trial and that her testimony was not a fabrication. After receiving the testimony of the deputy sheriff for the purpose above stated, it was for the trial court to determine whether or not Betty June had fabricated her story out of false tissues to injure her father. The court impliedly found that she had not. The testimony of the deputy sheriff was appropriate and competent for the purpose of assisting the court to derive such finding.

[3-5] Appellant contends that he suffered prejudicial error when the court allowed the district attorney, over objection, to refresh the recollection of Bessie Cook by reading to her, while on the stand, a portion of her testimony, given at the preliminary hearing. But appellant cites no page of the record where this asserted error occurred and it should not for that reason be considered on appeal. People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186; People v. Balmain, 16 Cal.App. 28, 116 P. 303. We may say, however, that the witness could not remember before her mind was refreshed, and answered that she could not remember after her mind had been refreshed. Consequently no prejudice was suffered. But, in view of the apparent reversal of the witness from her testimony at the preliminary hearing, the district attorney was within his rights to remind her of her former testimony. People v. Crawford, 24 Cal.App. 396, 141 P. 824.

[6] With reference to the claim of the insufficiency of the evidence to support the judgment, the resume heretofore recited should be sufficient to demonstrate that the proof was ample to support the conclusion of the trial judge. To extend the story by detailed description of each incident could serve no end except to enlarge the reader's disgust of the species sapiens. There is no similarity between the facts of this case and those of People v. Adams, 14 Cal.2d 154, 93 P.2d 146, 151. In that case the trial court erroneously permitted the mother of five year old Cornelia to give a detailed statement of alleged occurrences two years anterior to the trial, which she asserted had been related to her by the child at or about the time of the first alleged incident. The child's testimony was wholly uncorroborated, to say nothing of many discrepancies, inconsistencies and improbable statements in her story. In fact she was not sworn because her age rendered her incompetent. Her friend, Janet, age five, satisfied the trial court that she had been coached preparatory to giving her testimony. She was unable to grasp intelligently the purport of simple qualifying questions. In view of her utter incompetency, offering her as a witness "borders on prejudicial misconduct" for the reason that "her appearance on the witness stand constituted an implied assurance on the part of the prosecution

that her testimony would corroborate that of Cornelia respecting the particular misconduct of defendant". The entire atmosphere of that case reeks with the aroma of vengeful parents who sought retribution against a man whom they conceived to have wronged their child.

In the case at bar, the principal witness is appellant's own daughter, thirteen years of age at the time of the trial, who displayed no zeal to give incriminating testimony against her father. The record is wholly void of any declaration on the part of Betty June that she would seek revenge against her father for punishment he had administered to her. She was supported by splendid corroboration in the person of her friend, Bessie Cook, fifteen years of age, who was unwilling, if not hostile to the prosecution.

[7] Certainly, in view of the evidence contained in the record, this court would not be warranted in reversing the judgment unless it be made clearly to appear that upon no hypothesis whatever is the evidence sufficient. People v. Gilbert, 26 Cal.App.2d 1, 78 P.2d 770; People v. Kneiling, 127 Cal.App. 151, 15 P.2d 561; People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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44 Cal.App.2d 572

PEOPLE v. HARSCH.

Cr. 3438.

District Court of Appeal, Second District, Division 1, California.

April 29, 1941.

1. Criminal law ⊂⇒1159(2)

The strength or weakness of identification of accused as the person who committed crime, the incompatibility of and discrepancies in testimony, if any, and uncertainty of witnesses in giving their testimony are matters solely for the observation and consideration of the jurors and for consideration of the trial court on motion for new trial.

2. Criminal law ⊂⇒1160

Where trial court has approved findings of jury, appellate court will not disturb such finding and action of court unless the appellate court can say as a matter of law that there was no evidence to support conviction.

3. Robbery ⊂⇒24(3)

In robbery prosecution, evidence with respect to identification of defendant as the man who committed the robbery was sufficient to sustain conviction.

4. Criminal law ⊂⇒404(4)

In robbery prosecution where evidence definitely established that the money taken from cash register consisted mainly of small change, coins found in defendant's automobile at the time of defendant's arrest were admissible in evidence.

5. Criminal law ⊂⇒1171(5)

In robbery prosecution, statement of deputy district attorney concerning defendant's failure to take stand did not constitute prejudicial error, since Constitution authorizes court or counsel to comment to jury on the defendant's failure to explain or deny by his testimony any evidence in case against him. Const. art. 1, § 13.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Edwin B. Harsch was convicted of robbery in the second degree, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged in an information with the crime of robbery, together with a prior conviction of felony. At the trial appellant appeared in propria persona and was found guilty as charged, the jury fixing the crime as robbery in the second degree. This appeal is prosecuted from the judgment of conviction and from the order by which appellant's motion for a new trial was denied, upon the grounds: (1) The verdict is contrary to the evidence; (2) errors of law committed by the court during the trial; and (3) prejudicial misconduct on the part of the deputy district attorney, who prosecuted the cause.

The alleged robbery took place at about 1:40 o'clock in the morning of April 25, 1940, when appellant entered the Avalon Coffee Shop at 5957 Avalon boulevard in the city of Los Angeles, stepped to the counter, pointing a gun at Charles McKinnon, a waiter, in the presence of a customer named William Le Doux, and said: "All right, let's have it"; referring to the money in the cash register which was resting on the counter nearby. The witness McKinnon testified that he handed appellant the contents of the cash register which was later checked and found to be the sum of $31.50, consisting of $20 in change, a $5 bill and some $1 bills. The said robber then took a wallet from the pocket of Le Doux and finding it empty threw it on the counter. During all the time appellant was in the café, he held his gun partly concealed by a handkerchief pointing either at McKinnon or at Le Doux. Appellant was arrested in the morning of April 25th in an automobile parked in front of 918 West Second street, Los Angeles, in which automobile he was found lying in an intoxicated condition on a bag of coins.

At the trial the silver coins enclosed in a light brown paper envelope were offered in evidence and marked for identification, the denominations of the coins being noted as follows: one 50¢ piece, twenty-four 25¢ pieces, ninety-six dimes, sixty nickels and five pennies, totalling $19.15. There was also placed in evidence a $5 bill and three $1 bills which were found on appellant's person at the time of his arrest.

In connection with his first point, appellant urges that the evidence is insufficient to justify his conviction for the reason that he was not identified beyond a reasonable doubt as the person who robbed the coffee shop.

The witness McKinnon positively identified appellant as the man who committed the robbery at the time and place in question. He selected appellant from a group of men at a police "show-up", and upon cross-examination conducted by appellant in propria persona, said witness testified with regard to the subject of identification as follows:

"Q. Yet you were able to study the man, were you, being nervous? A. I can't say that I studied him. I would know the man if I ever saw him again, yes. * * *

"Q. Did you actually see him? A. I saw you there, if that is what you mean.

"Q. You did not see me at all. A. You are a damned liar. (Spoken very low.) * * *

"Q. When you got over to jail with Mr. Olson, what occurred there? A. They lined the persons up in the hall and I went down and picked you out. * * *

"Q. You thought I resembled the man that held you up? A. I didn't think; I knew.

"Q. You could not be mistaken? A. I would know you ten years from now, as far as that goes. * * *

"Q. Did you at the preliminary trial say that when the man told you to produce the money out of the cash register that you laid it on the counter, that you did not hand it to him? A. Personally, I did as you told me to, 'Put your hands up' and the rest of it, and I put the rest of it in your hands and you put it in your coat pocket.

"Q. In speaking of the robber in the future, speak of him as the robber, and not as me. A. There is no doubt you are the man.

"Mr. Harsch: I am here to prove you are wrong. When you say I resemble the man that held you up you are wrong, and I am here to prove it.

"Mr. Brandler (Deputy District Attorney): I think the witness has the right, when he is questioned concerning the similarity of the suspect and the defendant, I think he has the right to identify that person as the defendant.

"The Court: That is correct. * * *

"Q. When you saw me in jail with what you think was wrong with me, black eye or something, did I still resemble the man that robbed you? A. You are the man!

"Q. The question is, did I still resemble the man? A. Yes.

"Q. I still resemble him? A. Yes.

"Q. Even though there might have been something wrong with my face? A. Yes. * * *

"Q. By Mr. Harsch: Do you recall exactly what there was about my face that made you think perhaps I had been in a fight, as you put it? A. No, I really don't.

"Q. Do you think now that your identification then was absolutely infallible? A. I am sure it was you.

"Q. Sure it was me? A. I am sure you are the man who held me up.

"Q. Despite anything that might have been wrong with my face? A. That's right. * * *

"Mr. Harsch: Q. Did you notice at the time that the robber had a tooth missing or a prominent scar on his face? A. No.

"Q. Didn't notice anything like that? A. No.

"Q. And yet I have those defects and yet you claim I look like the man? A. You don't *look like* the man, you *are* the man."

In addition, William Le Doux identified appellant as the person who committed the robbery in question.

[1, 2] The claimed inconsistencies in the testimony of these witnesses are of such a trivial nature that they are ineffective to weaken the positive testimony as above outlined. As stated in People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814, 815: "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction. People v. Erno, 195 Cal. 272, 283, 232 P. 710. On the record before us, we cannot say that this is such a case." See, also People v. Hightower, 40 Cal.App.2d 102, 106, 104 P.2d 378.

[3] The evidence with respect to identification of appellant as the man who committed the robbery was amply sufficient to sustain the conviction herein.

Appellant claims that the court erred in admitting into evidence the money and coins found in his car and on his person at the time of his arrest, for the reason that such money was not identified nor connected in any way with the robbery.

[4] While it is true that the coins were not capable of identification, and appellant said he obtained them in a crap game, nevertheless, it was definitely established by the testimony of the two men, who were held up, that the money taken from the cash register consisted mainly of small change, consequently, the coins found in appellant's car at the time of his arrest were "admissible in evidence, not as being sufficient in themselves to warrant or sustain his conviction, but as a circumstance which it was proper to place before the jury for their consideration in passing upon the guilt or innocence of the defendant. People v. Lang, 142 Cal. 482, 76 P. 232." People v. Ferns, 27 Cal.App. 285, 287, 149 P. 802, 803.

[5] There is no merit in appellant's final point that the statement of the deputy district attorney concerning appellant's failure to take the stand constituted prejudicial error. Article I, section 13 of the Constitution of this state authorizes the court or counsel to comment to the jury upon defendant's failure to explain or deny by his testimony any evidence of facts in the case against him. People v. Cowling, 6 Cal.App.2d 466, 473, 44 P.2d 441.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

We concur: DORAN, J.; WHITE, J.

44 Cal.App.2d 410

MOSS et al. v. BOYLE et al.

Civ. 12951.*

District Court of Appeal, Second District,
Division 2, California.
April 23, 1941.

1. Appeal and error 🔑907(3)

Where an appeal is taken on the judgment roll alone, the findings are conclusively presumed to be supported by the evidence, and they must be liberally construed so as to sustain, if possible, rather than defeat, the judgment appealed from, and any ambiguity or inconsistency in the findings must be resolved in favor of the judgment.

2. Appeal and error 🔑907(3)

Where an appeal is taken on the judgment roll alone, the judgment will not be reversed except for some fatal error appearing on the face of the judgment roll.

3. Executors and administrators 🔑96

An executor or administrator cannot by virtue of his general powers as such make any contract which binds the estate or create any debt or liability against the decedent or the estate which will authorize a judgment de bonus decedentis, even though it is made in the interest of and for the benefit of the estate he represents, and although he is described in the contract as personal representative.

4. Executors and administrators 🔑97

An executor is personally liable on contracts whereby he employs an accountant to render a service relating to the administration of the estate, such as for services required of a personal representative in the performance of his official duties.

5. Executors and administrators 🔑97

Though an executor is personally liable on his contracts for services to be rendered in the administration of the estate, he is entitled to be reimbursed out of the assets of the estate.

6. Executors and administrators 🔑96

The only obligations which an executor or administrator may create against an estate are those which are authorized by the will of the decedent or by statute.

7. Executors and administrators 🔑97

Though an executor may avoid personal liability on a contract for services to be rendered in the administration of the estate by special agreement with a creditor providing that the creditor should expect payment only from the estate, in absence of such a special agreement, the executor is personally liable only.

8. Executors and administrators 🔑453(2)

Where judgment roll contained no findings that executors were authorized by will or by statute to employ accountants to render services in the administration of the estate or that by the contract of employment executors were not to be personally liable, a judgment dismissing action for services rendered against executors in their individual capacities and awarding judgment against them in their representative capacities could not be sustained.

9. Appeal and error 🔑907(3)

Where an appeal is taken on judgment roll alone, though inferences may be drawn from facts found in support of judgment, such inferences must be deemed to have been made by the trial court.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Oscar Moss and others against Rose Elizabeth Boyle and others, individually and as executors of the estate of Allen R. Ratteree, deceased, to recover the value of services rendered. From a judgment dismissing the action against defendants in their individual capacities and awarding plaintiffs judgment against them in their representative capacities, plaintiffs appeal.

Reversed with directions.

John N. Hurtt, of Los Angeles, for appellants.

Walter Gould Lincoln, of Los Angeles, for respondents.

MOORE, Presiding Justice.

This is an appeal upon the judgment roll. The court below dismissed the action as to defendants in their individual capacities but awarded plaintiffs the sum of $862 against defendants in their capacity as executors of the estate of Allen R. Ratteree, deceased.

The complaint set forth three causes of action, the first of which was a common count on quantum meruit in the sum of $3,500. The trial proceeded upon the first count "and the denials thereof" and upon a plea of payment.

From the findings, it appears that plaintiffs are co-partners doing business as accountants, and that one of them is a practicing attorney at law; that defendants were duly qualified and acting executors of the Ratteree estate; that pursuant to the request of defendants, plaintiffs rendered services in connection with the accounting and tax problems arising in relation to the administration of such estate; that the reasonable value of services rendered was $862.50, no part of which was ever paid.

On motion of defendants, the court dismissed the action against the defendants in their individual capacities and entered judgment against them in their representative capacities.

The question for our determination is whether the judgment is supported by the findings.

[1-4] Where an appeal is taken upon the judgment roll alone, the findings are conclusively presumed to be supported by the evidence and they must be liberally construed so as to sustain, if possible, rather than defeat the judgment appealed from. Any ambiguity or inconsistency in the findings must be resolved in favor of the judgment. Keim v. Roether, 32 Cal.App.2d 70, 73, 89 P.2d 187, 188. "The judgment will not be reversed except for some fatal error appearing on the face of the judgment roll". Id. An executor or administrator "cannot by virtue of his general powers as such make any contract which binds the estate, or create any debt or liability against the deceased, or the estate, which will authorize a judgment de bonus decedentis, even though it is made in the interest of and for the benefit of the estate he represents, and although he is described in such contract as personal representative". First Nat. T. & S. Bank v. Industrial Acc. Com., 213 Cal. 322, 325, 2 P.2d 347, 348, 78 A.L.R. 1324. As a necessary corollary to the principle embodied in the quoted passage, an executor is personally liable on contracts whereby he employs an accountant to render a service relating to the administration of the estate, such as for services required of a personal representative in the performance of his official duties. Henderson v. Riggles, 110 Cal.App. 320, 294 P. 31; Southern Pac. Co. v. Swanson, 73 Cal.App. 229, 238 P. 736.

[5-8] Notwithstanding the law that the executor is personally liable upon his contracts for services to be rendered in the administration of the estate, it goes without saying that if it is a necessary expenditure he is entitled to be reimbursed out of the assets of the estate. Sterrett v. Barker, 119 Cal. 492, 51 P. 695; Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P. 922, 52 L.R.A.,N.S., 1152, Ann.Cas.1915D, 742. However, as a general proposition the only obligations which an executor or administrator may create against an estate are those which are authorized by the will of decedent or by statute. 11B Cal.Jur. 280, sec. 868. While the executor may avoid personal liability by special agreement with the creditor for the latter to expect payment only from the estate (Maxon v. Jones, 128 Cal. 77, 60 P. 516; In re Estate of Kasson, 119 Cal. 489, 51 P. 706), yet in the absence of such special agreement the personal representative is personally liable only. It follows that if the judgment appealed from is to be sustained, there must be findings to the effect that defendants were authorized by will or by statute to employ accountants to do the work which was done by plaintiffs or that by the contract of employment defendants were not to be personally liable. No such findings are contained in the judgment roll.

[9] While it is true that from facts found inferences may be drawn in support of the judgment, yet such inferences must be deemed to have been made by the trial court. Goldberg v. List, 11 Cal.2d 389, 79 P.2d 1087, 116 A.L.R. 900. The judgment of dismissal cannot be justified by applying such rule to the findings before us. These findings are sufficient to support a judgment in favor of plaintiffs and against defendants as individuals. They are insufficient to support a judgment against defendants as executors of the estate of Allen H. Ratteree. In order to sustain the judgment we would be required to infer ultimate facts which were in direct contradiction to the facts found. Such is beyond the province of this court.

The judgment is reversed with directions to the trial court to enter judgment in favor of plaintiffs against defendants and to dismiss the action as against defendants in their representative capacities.

We concur: WOOD, J.; McCOMB, J.

44 Cal.App.2d 417

PEOPLE v. ANGIER.

Cr. 3431.

District Court of Appeal, Second District, Division 2, California.

April 23, 1941.

Hearing Denied May 22, 1941.

1. Sodomy 🔑1

The "crime against nature", as contemplated by statute relating to sex perversion, is the perverted act of uniting the mouth of one participant with the sexual organ of the other, with a view of gratifying the sexual desire, and a mere kiss or lick of the private organ, even though lewdly done, is not a "copulation" within the statute. Pen. Code, § 288a.

> The word "copulate" has primarily an unvarying significance, to wit, the act of gratifying sexual desire by the union of the sexual organs of two biological entities.
>
> See Words and Phrases, Permanent. Edition, for all other definitions of "Crime Against Nature", "Copulation" and "Copulate".

2. Sodomy 🔑6

Evidence was insufficient to establish an oral copulation of accused with sexual organ of little girl, so as to sustain conviction for an act of sex perversion. Pen.Code, § 288a.

3. Criminal law 🔑308

Presumption of innocence follows accused who is charged with commission of sex perversion. Pen.Code, § 288a.

4. Sodomy 🔑6

The state had burden of proving crime of sex perversion charged against accused. Pen.Code, § 288a.

5. Sodomy 🔑1

That accused might have been guilty of some reprehensible behavior not named in accusation charging violation of statute relating to sex perversion, was no justification for his conviction for sex perversion. Pen. Code, § 288a.

6. Sodomy 🔑7

Trials of adults upon charges of sex perversion growing out of relation of adults to little children require the utmost vigilance on the part of the courts at every stage in the consideration of the causes. Pen. Code, § 288a.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

R. Hervey Angier was convicted of violating the Penal Code, § 288a, and he appeals.

Reversed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused by information with a violation of section 288a of the Penal Code. He was tried by the court without a jury, was convicted and sentenced to San Quentin penitentiary. He appeals from the judgment of conviction and from an order denying his motion for a new trial. He maintains that the verdict and decision are contrary to law and against the evidence.

Abbreviating the lengthy and conflicting stories told by two little girls aged seven and five, whom we shall refer to as AC and YZ, it is sufficient to recite that they resided in the vicinity of appellant's home and often played around his door; that appellant had a solarium above his garage which was reached by climbing a ladder and through an opening; that about the 30th day of July, 1940, the two children accompanied by AC's sister entered the solarium to play. At the same time appellant was at work in the machine shop of one Johnson, whose premises adjoined those of appellant. The children soon became noisy at their play, whereupon appellant twice left his work, proceeded to the garage, climbed the ladder and requested them to leave. The testimony of AC is that upon appellant's third call he stayed but a minute and that he "licked" her "potty" once as she stood near the aperture through which he projected his head in order to communicate with them. YZ testified in substance that appellant "kissed" AC's "pee-wee". AC's younger sister, aged five, was definitely present on the first two calls made by appellant to the solarium but she was not called to the witness stand. There is no testimony that at any time did appellant enter into the sunroom where the children were at play. At each call he merely stood on the ladder so that his eyes were on a level with a solarium floor. The only proof of a copulation is contained in the foregoing, except that when asked as to the location of her "potty" AC pointed, whereupon the district attorney stated: "She is indicating the crotch".

Appellant predicates his appeal upon the claim that the evidence is inadequate to uphold the conviction. He inveighs lengthily against the alleged inconsistencies and discrepancies in the testimonies of the two little girls. But these vices are such as naturally would occur in the narratives of little children concerning a sudden occurrence. However, in view of our construction of the statute the judgment should not prevail.

[1] The section of the Penal Code under which the information was drawn makes it a felony for a person to participate in the "act of copulating the mouth of one person with the sexual organ of another". That section comes under Chapter V of Title IX, § 281 et seq., of the Code, which chapter deals with bigamy, incest and the crime against nature. "The crime against nature," as contemplated by the legislature, is the perverted act of uniting the mouth of one participant with the sexual organ of the other with a view of gratifying the sexual desire. A mere contact of the mouth with the sexual organ of another, either by a "kissing" or a "licking", cannot be construed to mean a copulation. The word copulation has never had the meaning of mere contact. It has always had the significance of the verb "to couple", which is an English derivative. It is derived from the Latin copulare, which is translated "to couple, join, unite, band or tie together". White's Latin Dictionary. The Latin noun copula is translated by the lexicographers as "that which joins together, as a band, tie or leash". For over three hundred years the English derivative has had no other significance than that of uniting in sexual intercourse. Its popular significance now and for an indefinite past has been the union of the sexes in the generative act. Standard Dictionary; Webster's International Dictionary. The Oxford Dictionary (1893) defines the word thus: "To unite in sexual intercourse." In Stark's Elementary Natural History (1828) it is given the same usage. Gold-Smith's Natural History (1874) refers to the "copulating season". In Quick Dec. Wife's Sister (1703) appears: "An hainous sin * * * in the brother to have copulated with this widow." In the King James translation (1611) of Leviticus, 15:16-18, we find that the Mosaic laws ordained that "the woman with whom man shall lie with seed of copulation, they shall both bathe", etc.

Thus does it appear that since Shakespeare reinforced the static character of the English idiom the word copulate has had primarily an unvarying significance, towit, the act of gratifying sexual desire by the union of the sexual organs of two biological entities. This is the meaning of the word wherever found in statutes and decisions. 14 C.J.S., Coition, 1315; 18 C.J.S., Copulation, 130; 13 C.J. 933. Therefore, the legislature, in framing section 288a of the Penal Code, must have intended to punish only those who participate in an act whereby they are united or joined by the perverted act of one's holding in his mouth the sexual organ of another for the purpose of gratifying their sexual desires. A mere kiss or lick of the private organ, even though lewdly done (sec. 288, Pen. Code), is not a copulation.

[2] Indeed, the physical facts disclosed by the record here render practically impossible the occurrence of the act charged. That defendant, without laying his hand upon the child, standing on a ladder leading to a loft where the three girls were at play; standing only sufficiently high for his head to be level with the floor; his employer close at hand expecting his immediate return and a friend nearby awaiting his descent—that under such circumstances he could have developed a purpose to commit an act of sexual perversion does not accord with the universal concept of the psychology of humans who indulge in such practices. A person so addicted, if not surrounded by familiar pals, would have been prompted by his cunning and his fear of apprehension to seek retreat from the gaze of those whom he knew to be his superiors in the arts of virtue.

Moreover, conceding the contact of appellant's mouth with some part of the body of the little girl, the evidence herein is not sufficient to establish that he touched her sexual organ. AC's testimony is that he "licked" her "potty". No evidence identified "potty" as a sexual organ. The nearest approach to such identification was the language of counsel to which we above adverted. Such evidence does not measure up to that approach to reasonable moral certainty which the law requires in order to sentence a man for fifteen years in a state's prison. Neither is the testimony of YZ to the effect that appellant "kissed" the "pee-wee" of AC proof of an oral copulation of appellant with the sexual organ of AC. YZ's testimony is that AC was sitting on the floor near the aperture into the solarium, and that appellant's head came only to the level of the floor at the time he performed the alleged act. Wherever she sat, obviously it would have been necessary for YZ to have seen through the thigh and clothing of AC or through the head of appellant in order to know what his lips contacted the crotch or the sexual organ of her companion.

[3-6] This experience may become a bitter memory in the lives of these children, but its loathsome phases will not overcome the presumption of innocence that follows the accused or relieve the state of its burden to prove the crime alleged. That appellant might have been guilty of some reprehensible behavior not named in the accusation, which we do not affirm, is no justification for this conviction. Trials of adults upon charges of sex perversion and kindred crimes growing out of the relations of the accused to little children require the utmost vigilance upon the part of courts at every stage of the consideration of such causes. No charge is more easily made and none is with more difficulty disproved. As recently observed by the Supreme Court: "As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of 'guilty'; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt." People v. Adams, 14 Cal.2d 154, 167, 93 P.2d 146, 152.

While the record does not warrant the contention made that the testimony is of an irresponsible character by virtue of its discrepancies and of the mother's zeal, yet for the reasons suggested we are convinced that the judgment is an injustice which should be corrected now.

The judgment is reversed.

We concur: WOOD, J.; McCOMB, J.

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44 Cal.App.2d 453

CLAUSER v. TAYLOR.

Civ. 12948.

District Court of Appeal, Second District,
Division 2, California.
April 24, 1941.

1. Vendor and purchaser 🔑37(7)

Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee, and upon his failure to do so the vendee may rescind the transaction upon discovering the true state of facts.

2. Vendor and purchaser 🔑37(7)

Where vendor sold lots which she knew had been filled and value of which was materially affected by such filling without disclosing to vendee the fact that the lots had been filled, and vendee made no inquiry relative to whether the lots had been filled, the vendee, upon learning the true facts, could rescind.

3. Vendor and purchaser 🔑37(7)

Where vendor was aware of fact that lots which she sold had been filled and that filling materially affected value of lots, and defect was not apparent to observer, vendor was under duty to disclose the information to vendee.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Emma B. Clauser against Grace A. Taylor to rescind purchase of certain real estate. Judgment for plaintiff, and defendant appeals.

Affirmed.

Clark & Morgan, of Alhambra, for appellant.

C. E. Christopher, of Alhambra, for respondent.

McCOMB, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff after trial before the court without a jury in an action to rescind a transaction whereby plaintiff purchased certain real property from defendant.

These are the facts so far as material here:

Defendant owned two residential lots in Alhambra, California. These lots, as defendant knew, had been filled with débris in 1928, which, however, had been covered, and the fact that the lots had been filled did not appear from a casual examination of the property. Due to the fact that the lots had been filled, the cost of building on them was materially increased. In 1940 the lots were sold to plaintiff for $2,300. Plaintiff saw the lots but made no inquiry as to whether they were filled or not and neither defendant nor her agent made any representation concerning the lots. Upon discovering the fact that the lots had been filled, plaintiff tendered to defendant a deed to them and endeavored to rescind the transaction.

This is the sole question presented for determination:

When a vendor sells real property, which he knows has been filled and the value of which is materially affected by such filling, without disclosing to the vendee the fact that such property has been filled, and the vendee makes no inquiry relative to whether or not the property has been filled, may the vendee rescind the transaction upon learning the true facts?

[1] This question must be answered in the affirmative. It is the law that, where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee, and upon his failure to do so, the vendee may rescind the transaction upon discovering the true state of facts. 27 Ruling Case Law (1929) 367, sec. 67; 66 Cor.Jur. (1934) 575, sec. 124; see, also, Conlan v. Sullivan, 110 Cal. 624, 626, 42 P. 1081; O'Shea v. Morris, 112 Neb. 102, 198 N.W. 866, 867; Restatement of the Law of Contracts (1932), vol. 2, p. 897, sec. 472, subsec. b.

[2, 3] Applying the foregoing rule to the facts of the instant case, it is apparent that defendant was aware of the fact that the property which she sold had been filled, which filling materially affected its value. Since this defect was not apparent to the observer, which fact was also known to defendant, she was under a duty to disclose the information to the vendee, and, upon her failure to do so, plaintiff was entitled, upon learning the true state of facts, to rescind the contract.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WOOD, J., concurred.

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44 Cal.App.2d 615

HENDERSON v. OAKES-WATERMAN BUILDERS et al.

Civ. 12918.

District Court of Appeal, Second District, Division 1, California.

May 1, 1941.

1. Damages 🔑120(1)

The statute providing that no person can recover a greater amount in damages for breach of obligation than he could have gained by full performance thereof on both sides postulates a full performance of contract by both sides as a condition for determination of amount of damages that might be due. Civ.Code, § 3358.

2. Damages 🔑120(3)

The statute providing that no person can recover a greater amount in damages for breach of obligation than he could have gained by full performance thereof on both sides was inapplicable to action for wilful breach of builder's contract so as to limit amount of damages to price designated in contract. Civ.Code, § 3358.

3. Damages 🔑36

In action for breach of builder's contract, the item of damages for loss of use or rental value had nothing to do with contract itself, being a severable item, and hence recovery could be had for such item. Civ.Code, §§ 3300, 3359.

4. Damages 🔑120(3), 140

The amount of damages recoverable for breach of builder's contract was governed by statute providing that for breach of obligation, measure of damages is the amount which will compensate party aggrieved for all the detriment proximately caused thereby, and by statute providing that damages must in all cases be reasonable, and hence a judgment for $3,702.49, contract price being fixed at $2,500, was reasonable in view of wilful violation of contract and abandonment thereof. Civ. Code, §§ 3300, 3359.

5. Damages 🔑68

Where, by judgment for $3,702.49 for wilful violation of builder's contract and abandonment thereof, plaintiff was fully compensated for all detriment caused by breach including loss of use of dwelling, interest from date upon which contract price of $2,500 was paid should not be allowed. Civ.Code, §§ 3300, 3359.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by A. Ray Henderson against the Oakes-Waterman Builders, etc., and others, to recover damages for breach of a builder's contract wherein upon plaintiff's death Mabel Scott Henderson, his administratrix, was substituted as plaintiff. From a judgment, and from an order denying a motion to vacate the judgment and enter a new and different judgment under Section 663 of the Code of Civil Procedure, plaintiff appeals. Order reversed and judgment modified and as modified, affirmed.

William H. Haupt, of Los Angeles, for appellant.

Gordon Lawson and Samuel M. Garroway, both of Los Angeles, for respondents.

DESMOND, Justice pro tem.

This is an appeal from a judgment which the trial court refused to vacate in passing upon appellant's motion directed to that end as well as to the entry of another and different judgment, as provided by section 663 of the Code of Civil Procedure. An appeal is also taken from the order denying the motion to vacate.

Approximately seven days were required to try this case without a jury, but we have no transcript of the testimony before us, and must rely therefore upon the clerk's transcript, including the pleadings, findings, conclusions and judgment. It appears that on March 8, 1939, A. Ray Henderson signed a builder's contract with the defendants, calling for the construction, in a good, workmanlike and substantial manner, of a dwelling upon his lot, according to plans and specifications attached to said contract. These specifications described in great detail the quality of materials to be furnished in the building of the house, which by the terms of the contract was to be finished within 45 days after the date thereof. The contract price for the building so constructed was fixed at $2,500, which sum Mr. Henderson paid in full on the day he signed the contract. The court found that instead of completing the building in the manner provided by the contract and specifications within the stated period of 45 days, the construction commenced on the 13th day of March and was continued intermittently until on or about the 17th of August, 1939, "when the said defendants abandoned the said contract and ceased all work thereunder". The court further found that they "willfully failed and neglected to fulfill the said contract on their part * * * that the said defendants, in the doing of such work as was done by them under said contract, willfully used materials which were contrary to those specified under said contract and of inferior grade thereto and unsuitable therefor, and that the said defendants erected said building in so unskillful and negligent manner, that after such work was done as was done by the said defendants the said building was and is now entirely untenantable and useless".

Mr. Henderson passed away on January 25, 1940, and the suit was prosecuted by his administratrix, who was substituted as plaintiff herein.

Referring further to the findings, we note: "* * * that during the whole of the time that the said defendants were engaged in the said construction * * * the said A. Ray Henderson repeatedly complained to the said defendants of the inferior grade of material being used and that had been used in said construction, and of the poor workmanship employed by them in the doing of such work as was done by them; and that the said A. Ray Henderson did not at any time consent to the use in said building of such inferior materials of workmanship". Further, that "* * * it will be necessary, and the plaintiff will be required, to entirely tear down and dismantle the said building and remove the debris therefrom, and to reconstruct and rebuild the said building in its entirety". The reasonable cost of removing the debris and cleaning the usable material therein, the court fixed at $288.82, and found that the reasonable cost of constructing the building in accordance with the contract and the plans and specifications mentioned therein, using all material that might be salvaged, was the sum of $2,818.67, a total of $3,107.49.

Damages were claimed for the reasonable rental value of said dwelling, determined by the findings to be $35 per month, or a total of $595 for the period elapsing between the expiration of the 45-day period mentioned in the contract and the time when said building might be reconstructed and delivered to the owner. This item, added to the total cost of the reconstructed building, would warrant a total judgment, based upon the findings, in the sum of $3,702.49. The court, however, in fixing the amount of the judgment, undertook to apply section 3358 of the Civil Code, which reads, so far as pertinent to this discussion, as follows: "* * * no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides * * *". On this theory, as a conclusion of law the trial court determined that the plaintiff "is entitled to judgment * * * in the total sum of Three Thousand One Hundred Seven and 49/100 Dollars ($3,107.49), except for the fact only that the consideration named in the contract between A. Ray Henderson and said defendants was the sum of Two Thousand Five Hundred Dollars ($2,500.00), by reason of which * * * plaintiff may be permitted to recover and which she is entitled to recover against said defendants must be limited to the said sum of Two Thousand Five Hundred Dollars ($2,500.00) with interest thereon at the rate of seven per cent per annum from the 8th day of March, 1939". The court also concluded that the plaintiff was entitled, for damages suffered by reason of loss of use and rental of the building, to judgment in the amount of $595, but this sum was not included in the judgment, which as above stated, was limited to $2,500 and interest.

[1-3] We do not approve the action of the trial court which reduced the amount of the damages from $3,702.49 to $2,500, for the reason that we are unable to apply section 3358 of the Civil Code to the situation here presented. That section postulates a full performance of the contract by both sides as a condition for determination of the amount of damages that might be due. Attempting to apply it to the present case, our reasoning would be as follows: "As to the plaintiff was the contract fully performed?" The answer is, "Yes; by paying the contract price of $2,500, which was to secure the kind of house described in the contract." "As to the defendants, was it fully performed?" The answer is, "No, they abandoned the contract." We ask the further question: "If they had performed, what would the plaintiff have gained?" The answer to that question is: "The kind of house that he bargained for, namely, a house which now would cost, using all salvaged material and the cost of reclaiming it, $3,107.49." The other item of damages (loss of use or rental value) has nothing to do with the contract itself, being a severable item for which recovery may be had. 8 Cal.Jur. 832.

[4, 5] It seems to us that, in determining the question of damages in this case, section 3300 of the Civil Code is applicable, rather than section 3358. That section reads as follows: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." We also have in mind section 3359 of the Civil Code, which provides that damages must in all cases be reasonable. In view of the fact that in the present case there was a willful violation of the terms of the contract, and an abandonment thereof, we feel that a judgment in the full amount of $3,702.49 is reasonable, and at this time determine that a judgment in that amount should be

entered in favor of plaintiff and against the defendants. Since by such a judgment plaintiff will be fully compensated for all detriment caused by the breach of the contract, including loss of use of the dwelling, it appears that interest from the date upon which the sum of $2,500 was paid should not be allowed.

Accordingly, the order appealed from, namely, the order denying the motion to vacate the judgment originally entered and to enter another and different judgment, is reversed, and the cause remanded with instructions to the court below to enter another and different judgment in the sum of $3,702.49, with interest thereon at the rate of seven per cent per annum from the date of entry of the original judgment herein, together with costs. As so modified, the judgment will stand affirmed.

We concur: DORAN, Acting P. J.; WHITE, J.

44 Cal.App.2d 438

WEISKOPF et al. v. SMITH.

Civ. 12309.

District Court of Appeal, Second District, Division 1, California.

April 24, 1941.

Damages 🔑130(4)

$100 to 18-year-old girl for badly scarred cheek *held* inadequate in view of physician's testimony that he had already given services worth $100, that scar had bad effects upon girl's personality and attitude toward life, and that operations necessary to reduce scar would cost $200 or $250 plus hospitalization.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Irma Weiskopf, through her father, David W. Weiskopf, as her guardian ad litem, and another, against Clarence H. Smith, for injuries suffered in automobile collision. From a judgment on a verdict for plaintiffs in an insufficient amount, plaintiffs appeal.

Reversed and remanded.

Eugene L. Wolver and Louis Miller, both of Los Angeles, for appellants.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and White McGee, Jr., all of Los Angeles, for respondent.

DESMOND, Justice pro tem.

From a judgment entered upon a jury verdict in their favor, in the sum of $100, plaintiffs appeal. They claim that this judgment is contrary to the evidence and insufficiently supported in view of damages proven.

The suit was brought by Irma Weiskopf, a minor eighteen years old, through her father, David W. Weiskopf, as her guardian ad litem, David joining as a plaintiff in his own behalf.

The complaint alleged that, as a result of a collision on March 12, 1938, between her father's car, in which she was riding with her mother as driver, and that of defendant, Irma "suffered certain injuries, both temporary and permanent in nature, was made sick, ill and nervous and sustained grievous pain and suffering, and permanent scars and disfigurement".

The complaint also alleged that as a result of the collision and the injuries which ensued the coplaintiffs had been compelled, and would be compelled, to obtain professional and medical care and attention for the plaintiff, Irma. There was no other allegation of damage suffered by David Weiskopf, but at the trial he testified that damage to his car by reason of the collision amounted to approximately $60. Upon the hearing certain photographs were introduced as exhibits, which have been presented for our inspection. One shows the Weiskopf car with a badly battered right side; another the minor plaintiff, Irma, with a badly scarred right cheek. This photograph was taken by a plastic surgeon, Dr. Lindenberg, one week after the accident. He described the scar as a freshly healing wound when he first saw it—"an irregular 'Z' shaped ragged-looking wound two and one-half inches in length". It appears in the photograph to be in the middle of the patient's cheek. Another wound was described by the physician as "a straight wound two inches long, extending from the right eyebrow toward the middle of the forehead". This scar is much fainter in the photograph than the "Z" shaped scar, and Dr. Lindenberg testified that his prognosis was "that the wounds on the forehead and behind the ear probably will vanish, however, the wound on the cheek, while I believe we will be able to improve it, it will always be more or less marked. That such surgery cannot be resorted to until a year shall have elapsed after the injury, and a year thereafter will elapse before the wounds, as corrected by the operation or operations, will have sufficiently faded so as not to constitute a blemish upon the patient's looks. The 'Z' shaped wound on the cheek has a puffiness at its angles, which puffiness is caused by scar tissue and will probably take two operations to rectify this as only a certain amount of scar tissue can be removed at each operation. I have examined the patient on several occasions and have had the opportunity to observe her attitude toward the wounds and the effect that they have, particularly the 'Z' shaped wound, upon her personality and attitude toward life. She is extremely conscious of the wound and the same has made her nervous and irritable. The same has also made her introspective and she is extremely self-conscious of the scars as a result of the wounds". This testimony was given on October 27 or 28, 1938, more than seven months after the injuries were received, and on further examination the doctor stated his belief "that the maximum reduction by natural causes has now been reached upon the plaintiff, Irma Weiskopf, and that no greater reduction of her scars will be obtained by natural causes in view of the fact that on the 'Z' shaped scar there is a puffiness at the angles of the cut, which will not be removed by nature, since the same is caused by scar tissue that has formed there and that the only way that this puffiness can be reduced is by surgery". On cross-examination Dr. Lindenberg gave his opinion "that with surgery the scars upon the plaintiff, Irma Weiskopf, would be greatly reduced and that such an operation would be successful". He stated that the reasonable value of his services to time of trial was $100; that "the reasonable value of the services which will have to be necessarily rendered in operating upon the 'Z' shaped scar on the cheek would be Two Hundred ($200) or Two Hundred Fifty ($250) Dollars. That two (2) operations would be required, and that hospitalization would be necessary for two or three days at the time of each operation. That the reasonable costs of such hospitalization would be Five ($5) Dollars to Seven ($7) Dollars a day".

Having considered the principles involved in this appeal, in the light of authorities furnished by opposing counsel, and having reviewed the evidence brought up by the bill of exceptions, we find that the present case presents facts, conditions and circumstances very similar to those appearing in Bencich v. Market St. Ry. Co., 20 Cal.App. 2d 518, 67 P.2d 398. Under the reasoning of that case we believe the appeal has merit.

The judgment therefore is reversed and the cause remanded for a new trial.

We concur: DORAN, Acting P. J.; WHITE, J.

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44 Cal.App.2d 433

ROSS et al. v. BALDWIN.

Civ. 12276.

District Court of Appeal, Second District, Division 1, California.

April 24, 1941.

Rehearing Denied May 19, 1941.

Hearing Denied June 19, 1941.

1. Appeal and error 🔑1064(1)

In automobile collision case, instruction requiring plaintiffs to prove that defendant's negligence constituted the sole proximate cause of the accident constituted prejudicial error.

2. Negligence 🔑61(1)

The defendant's negligence is not required to be sole cause of plaintiff's injury to entitle plaintiff to damages therefor.

3. Trial 🔑296(1)

The omission of an essential element of cause in an instruction otherwise correct is ordinarily cured by inclusion of omitted element in another instruction, but prejudicial error arising from incorrect statement of essential principle of law will not ordinarily be cured by a correct declaration of principle in another instruction.

4. Appeal and error 🔑1064(1)

The giving of instructions which are contradictory in essential elements may war-

rant reversal because of impossibility of determining which charge controlled jury's determination.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Ruth A. Ross and others against George L. Baldwin to recover damages for the wrongful death of Cleo Francis Ross in an automobile collision. Judgment for the defendant, and the plaintiffs appeal.

Judgment reversed and cause remanded.

Hearing denied; EDMONDS, J., dissenting.

Nourse & Jones and Paul Nourse, all of Los Angeles, for appellants.

Sigurd E. Murphy, of Hollywood, and Bernard E. Allard, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment entered in favor of respondent George L. Baldwin in an action brought by the widow and minor children of Cleo Francis Ross to recover damages for his wrongful death by reason of the alleged negligence of the said respondent. It was consolidated for trial and tried upon the same evidence with an action brought by said respondent against the Davis Perfection Bread Company, the employer of decedent. The jury returned separate verdicts in each case in favor of the defendants, that is, the jury denied a recovery either to the heirs of decedent Ross or to Baldwin, thereby impliedly finding that both decedent Ross and respondent Baldwin were negligent.

The accident under consideration occurred after dark around 7:30 o'clock in the evening of April 30, 1938, at the intersection of Chase avenue and Sepulveda boulevard in the San Fernando valley within the limits of the city of Los Angeles. Sepulveda boulevard runs in a generally north and south direction and is approximately 30 feet in width at the site of the accident, 20 feet being paved concrete with a 5-foot asphalt shoulder on either side thereof. Chase avenue is 20 feet in width between curbs as it extends westerly from Sepulveda.

Cleo Francis Ross, the decedent, was driving a bread truck in an easterly direction on Chase avenue at a point slightly to the west of its intersection with Sepulveda. Respondent Baldwin, accompanied by Mrs. Degnan, was driving a Pontiac coupe south on Sepulveda. The two machines collided in the westerly half of Sepulveda at the said intersection. After the collision the Pontiac car veered in a southeasterly direction, jumped an embankment along the easterly side of Sepulveda and came to rest in a freshly plowed and harrowed field approximately 67 feet from the point of impact. The bread truck was thrown in a southeasterly direction by the force of the impact and came to rest on its side about 60 feet therefrom. Injuries sustained by the driver when he was pinned beneath the overturned bread truck resulted in his death a very short time thereafter.

Paul R. Merritt, the only eyewitness to the collision with the exception of respondent Baldwin and his companion, Mrs. Degnan, testified that he was sitting in an automobile facing west which was parked on Chase avenue about 300 feet east of its intersection with Sepulveda boulevard; that he saw the headlights of the bread truck, which was being driven by decedent Ross, to the south of the center of Chase avenue when it was about a block west of the intersection of Sepulveda. This witness further testified that he saw the Pontiac coupe coming south on Sepulveda boulevard at a speed of 35 or 40 miles per hour when it was about 200 feet north of the point of impact.

Respondent Baldwin testified that just prior to the accident, he was driving his car at a speed of between 40 and 45 miles per hour, and as he approached the intersection in question, he took his foot off the accelerator reducing his speed to between 30 and 40 miles per hour; that he was driving approximately 1 or 2 feet from the westerly or right-hand edge of Sepulveda boulevard; that when he was within 30 feet of the point of impact he swerved slightly to the left but did not apply his brakes, and the right front corner of his coupe came into contact with the left front corner of the bread truck; that the headlights of the truck were turned slightly to the north; that when said witness first saw the bread truck, its front end was "15 feet from the westerly edge" of the paved portion of Sepulveda boulevard, no part thereof having reached said paved portion at that time; that the back end of the truck was about even with the "stop" sign on Chase avenue, or about 36 feet west of the "westerly edge of the paved portion of Sepulveda"; that the bread truck continued to travel on a diagonal to the northeast across the intersection at a speed of 25 miles to the point of impact.

Mrs. Degnan testified that when she first saw the bread truck, the Pontiac coupe in which she was riding was about two and a half car lengths from the truck; that the truck was traveling at a speed of about 25 miles per hour and the coupe around 30 or 35 miles per hour. Asked to explain how the two machines came together, this witness replied: "The bread truck hit us, or hit the Pontiac, on the right front wheel, and then it seemed to me that the rear of the truck hit the back of the Pontiac, kind of glanced off to the side."

A review of the record discloses that no witness called at the trial was able to state whether or not the decedent had brought his automobile to a stop before entering the intersection, nor able to state the distance respondent's car was from the intersection at the time the decedent started to enter the intersection after making the boulevard stop, if he did make one.

Appellants urge that the giving of four specific instructions by the court to the jury constituted prejudicial error; also that the court erred in denying their motion for a new trial on the ground of newly-discovered evidence.

[1] The first instruction of which appellants complain reads as follows:

"You are instructed that the mere fact that there was an accident does not raise any presumption at all that the defendant George L. Baldwin was in any wise negligent, or is in any wise responsible therefor. It is necessary for the plaintiffs, in the action wherein George L. Baldwin is the defendant, to prove their case by a preponderance of all the evidence, and in order to establish a case it is necessary that they prove that the defendant George L. Baldwin was negligent, and that such negligence, if any, *was the sole proximate cause of the accident.* Even if you should find that George L. Baldwin was negligent, yet if you also find that Cleo Francis Ross was likewise negligent and that the negligence, if any, of Cleo Francis Ross proximately contributed to the happening of the accident in any degree, no matter how slight, then in such event your verdict must be in favor of the defendant George L. Baldwin, in the action wherein he is the defendant."

Appellants contend that this instruction "erroneously placed upon the plaintiffs the burden of proving that the decedent's negligence was not a proximate cause of the accident. This instruction was therefore in direct conflict with the instruction which told the jury that the burden of proving this fact was upon the defendant, and reading the instructions as a whole, it is impossible to harmonize the erroneous instruction with the correct instruction. If the jury believed and followed the instruction complained of, it was misled; if it believed and followed the other, then it was not misled. Who has the power to state which instruction governed the jury in their deliberations?"

[2] Unquestionably, the instruction complained of is an incorrect exposition of the law upon the issue presented to the jury. As was stated in Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 392, 212 P. 913, 914: "The law does not require that negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiff to damages therefor."

In the instant case the appellants were without direct evidence of decedent's conduct and were forced to rely upon the presumption that he used due care for his own concerns, and that he obeyed the law. Respondent and his passenger, on the other hand, gave testimony from which the decedent's failure to make a boulevard stop might be inferred. Therefore, if the jury followed the instruction complained of, it might have determined that appellants did not meet the burden of proving that respondent's negligence was the sole proximate cause of the accident because of their failure to produce any direct evidence to offset the evidence of respondent and his witnesses.

[3, 4] As was stated in Soda v. Marriott, 118 Cal.App. 635, 643, 5 P.2d 675, 678: "If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the

determination of the jury." See, also, Miner v. Dabney-Johnson Oil Corp., 219 Cal. 580, 583, 28 P.2d 23, where the above statement is quoted with approval.

Having determined that the trial court fell into error in giving this instruction, we cannot escape the conclusion that it was prejudicial. For this reason it is obvious that a reversal of the judgment herein must be directed, therefore, we do not deem it necessary to pass upon the other points raised by this appeal.

The judgment is reversed, and the cause remanded for a new trial.

We concur: DORAN, J.; WHITE, J.

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44 Cal.App.2d 441

HOOK et al. v. WREN et al.

Civ. 12335.

District Court of Appeal, Second District, Division 1, California.

April 24, 1941.

1. Pleading 🔑193(1)

A complaint in action to recover damages for alleged fraud in sale of stock was demurrable where allegations were uncertain, ambiguous, and unintelligible.

2. Pleading 🔑225(1)

Plaintiffs' motion for leave to further amend their amended complaint to demurrer, which had been sustained, was properly denied, where plaintiffs neither disclosed nature of alteration they desired to make therein, nor presented a copy of their proposed amendment to trial court.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Frank E. Hook and others against Charles F. Wren and others, to recover damages for fraud in the sale of stock by defendants to plaintiff. From a judgment of dismissal after trial court had sustained defendants' amended demurrer to the amendment to the amended complaint without leave to amend, plaintiffs appeal.

Affirmed.

J. Maxwell Peyser, of San Francisco, for appellants.

Warren E. Libby, of Los Angeles (Philbrick McCoy, of Los Angeles, of counsel), for respondents.

YORK, Presiding Justice.

This appeal, presented on the judgment roll alone, is prosecuted from a judgment of dismissal which was entered on February 8, 1939, after the trial court had sustained respondents' amended demurrer to the amendment to the amended complaint herein without leave to amend, and also denied appellants' motion for leave to further amend said complaint.

The action was commenced on October 31, 1935, to recover damages for alleged fraud in the sale by respondents to appellants of stock in The Pickwick Corporation, a California corporation.

Respondents demurred to the first amended complaint as amended on the grounds (1) it did not state facts sufficient to constitute a cause of action; (2) that the alleged cause of action was barred by the statute of limitations (sec. 359 and sub. 4 of sec. 338, Code Civ.Proc.); (3) misjoinder of parties plaintiff; (4) uncertainty; (5) ambiguity; (6) unintelligibility.

[1, 2] Regardless of whether the allegations of the amended complaint, as amended, were sufficient as against a general demurrer and the special demurrer raising the defense of the statute of limitations, they were clearly demurrable on the grounds of uncertainty, ambiguity and unintelligibility. Moreover, although the point is not discussed in this appeal, the court very properly denied appellants' motion for leave to further amend their complaint, for the reason that they neither disclosed the nature of the alteration they desired to make therein, nor presented a copy of their proposed amendment to the trial court. Martin v. Thompson, 62 Cal. 618, 45 Am.Rep. 663; Todhunter v. Klemmer, 134 Cal. 60, 66 P. 75; Ellerhorst v. Blankman, 102 Cal.App. 133, 282 P. 507; De L'Eau v. Williams, 139 Cal.App. 116, 33 P.2d 427.

For the reasons stated, the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.

44 Cal.App.2d 427

PERKINS et al. v. FIREMAN'S FUND INDEMNITY CO.

Civ. 11443.

District Court of Appeal, First District, Division 1, California.

April 24, 1941.

1. Insurance ⚷514

The extent of liability of insurance company issuing automobile public liability policy should be determined from terms of policy.

2. Insurance ⚷146(3)

The rule that ambiguities in insurance policy must be interpreted against insurer does not require court to give strained and unnatural construction to policy.

3. Insurance ⚷146(1)

An insurance policy must be construed in its entirety and given a reasonable construction.

4. Insurance ⚷514

Under automobile liability policy limiting insurer's liability for bodily injuries to or death of one person to $10,000, and total liability for bodily injuries to or death of more than one person in one accident to $20,000, words "one person" refer to injured person, and words "one accident" to injury of several persons, regardless of how many may suffer loss by reason thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "One Person" and "One Accident".

5. Insurance ⚷514

Under automobile public liability policy limiting insurer's liability for bodily injuries to or death of one person to $10,000, and total liability for bodily injuries to or death of more than one person in one accident to $20,000, total liability of insurer for personal injuries received by woman who was hit by automobile belonging to insured was $10,000, and when such amount was paid to woman as general damages, neither she nor her husband could recover an additional sum for special damages for loss of earnings and medical care.

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Appeal from Superior Court, San Francisco County; J. J. Trabucco, Judge.

Action by Charles Perkins and another against the Fireman's Fund Indemnity Company to recover amount of judgment secured by plaintiffs against a policyholder of the Fireman's Fund Indemnity Company. From the judgment, the plaintiffs appeal.

Affirmed.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellants.

Bronson, Bronson & McKinnon, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiffs, husband and wife, brought this action to recover from defendant insurance company the amount of a judgment secured by them against a policyholder of defendant company, which judgment had not been paid by the assured. The trial court held that under the terms of the policy the defendant company had already paid on behalf of the assured to the plaintiffs the total amount required by the policy, and that plaintiffs should only recover $15.25 costs incurred in the action. From a judgment so holding plaintiffs prosecute this appeal.

The appeal is taken on the judgment roll. It appears therefrom that in September of 1934, Vira Perkins received serious bodily injuries as a result of being hit by an automobile then being negligently operated by Orval Alden Van Kirk, who was driving the car with the knowledge and consent of O. A. Van Kirk, the owner. The latter carried an automobile public liability policy with $10,000-$20,000 limits with defendant company, which not only covered the owner but also any one driving with his consent. Vira Perkins brought an action against the two Van Kirks praying for $30,000 general damages and also for special damages for loss of earnings and medical care. During the course of that trial the plaintiff Vira Perkins voluntarily dismissed her claim for special damages. The plaintiff in that action secured a $30,000 judgment against Orval Alden Van Kirk, and a $5,000 judgment against O. A. Van Kirk, as owner, plus costs. Thereafter, the defendant, the insurance carrier, paid to Vira Perkins the total sum of $10,000, plus interest and costs, and received from her a satisfaction in full of her judgment against O. A. Van Kirk, and a partial satisfaction in the amount of the payment of the judgment against Orval Alden Van Kirk.

Thereafter, Vira Perkins and her husband, Charles Perkins, then commenced a separate action against the two Van Kirks for the special damages incurred as a result of the accident—loss of services, and medical and hospital expenses. In that action the two plaintiffs secured a judgment against Orval Alden Van Kirk in the total amount of $6,999.88, and costs of $15.25. That judgment has become final, and is unpaid. The two plaintiffs then brought the present action against defendant, as the insurance carrier of O. A. Van Kirk, to recover the whole or part of the judgment secured in the second action. The trial court ruled that the defendant insurance carrier had already fulfilled all of its obligations under the policy except for the payment of costs in the second action. Accordingly, it entered its judgment for plaintiffs in the sum of $15.25, plus interest, and denied plaintiffs any further relief.

It is the theory of the appellants that both the husband and wife suffered a loss as a result of the injuries to the wife—the wife for her bodily injuries, and the husband and wife for the special damages; that under the policy the total liability for injury to one person was $10,000, but for injury to more than one person, $20,000. They admit that another woman was injured in the same accident, and that the defendant carrier paid this other injured woman $4,750 in compromise of her claim. They, therefore, contend that defendant insurance carrier is liable for the difference between the amounts already paid ($10,000 plus $4,750, or $14,750) and the total liability of $20,000. It is their contention that they may recover $5,250 from the defendant carrier to apply on the second judgment secured against Orval Alden Van Kirk.

[1] The extent of the liability of the defendant insurance company is, of course, to be determined from the terms of the policy. On the first page of the policy, in the schedule of perils insured against, there appears as item "J" the following:

"J. Legal Liability for Bodily Injury or Death (Part 2, Agreement I).

"Limits:

"One Person—Ten thousand Dollars ($10,000).

"One Accident—Twenty thousand Dollars ($20,000)."

In the body of the policy appear these pertinent provisions:

"Does hereby agree with the assured named and described as such in this policy and named in Part II, Statement 1 of Declarations, subject to the representations, limitations, conditions and exceptions, as respects bodily injuries (or death, loss of service or expense resulting at any time therefrom) and property damage accidentally suffered or alleged to have been suffered during the policy period defined in Statement 2 of Declarations, by any person or persons (except those persons referred to in the proviso entitled 'Exclusions'), by reason of the ownership, maintenance or use, including loading and unloading of any automobile described in Statement 8 of Declarations, at any location within the United States or the Dominion of Canada, as follows:

"Agreement 1—Legal Liability for Bodily Injuries or Death—to Pay within the limits specified in item J of schedule, any loss by reason of the liability imposed by law upon the assured arising out of such bodily injuries (and death, loss of service and expense resulting therefrom);"

There then follows agreements II to VI providing for other forms of liability. The policy then continues:

"Limits of Liability—Always Provided that the company's liability under this policy whether it be issued in the name of one assured or of more than one assured shall be limited in the following manner:

"(1) For all claims arising out of bodily injuries or death under agreement I, the limit of the company's liability on account of bodily injuries to or the death of one person shall be the limit expressed for 'one person' in item J of schedule, and, subject to the same limit for each person, the company's total limit of liability on account of bodily injuries to or the death of more than one person as the result of any one accident, shall be the limit expressed for 'one accident' in item J of schedule, but the said limits apply to each automobile insured hereunder."

The appellants contend that the $10,000 limitation of liability in the policy should be construed as giving *each* person who suffers a loss on account of the injury or death of *one* person the right to recover on the policy to the extent of $10,000, provided that the total recovery by all persons for any one accident may not exceed

$20,000. In arriving at this interpretation of the policy the appellants emphasize the language above quoted to the effect that the insurer agrees to pay, within the limits specified in item "J", any loss by reason of the liability imposed by law on the assured arising out of bodily injuries and death, and loss of services and expenses resulting therefrom. The limit specified in item "J"—one person $10,000—appellants construe as meaning where one person is injured or killed *each* person who suffers an actionable loss by reason thereof may recover up to $10,000 provided that recovery by all persons shall not exceed $20,000. Stated another way, appellants in effect, construe the words "one person" as applying to the person suffering loss, rather than to the person injured or killed. If this construction were correct, it would inevitably follow that if one person suffered loss by reason of the death of two or more persons (for example mother and father of the plaintiff) then such person could recover but $10,000 in all.

In arriving at their strained and unnatural construction of the policy, appellants are forced to entirely disregard the paragraph entitled "Limits of Liability", supra, which is inserted in the policy for the express purpose of explaining the limits fixed in item "J".

[2-4] Appellants cite no cases interpreting similar provisions in such policies, but rely on the rule that all ambiguities in an insurance policy must be interpreted against the insurance company. That is a sound and salutary rule, but it does not require a court to give the policy a strained and unnatural construction. An insurance policy, like any other contract, must be construed in its entirety and given a reasonable construction. A court cannot seize on the words "one person", and give those terms a distorted meaning, when another clause in the policy expressly states what those terms mean. There is no ambiguity or uncertainty in the language used in the policy. Obviously, the words "one person" refer to the injured person, and the words "one accident" to the injury of several persons, regardless of how many may suffer loss by reason thereof.

Respondent cites several cases where the precise point under discussion was involved and was discussed. In each case the court held that the limit of liability applied to the person injured and not to the person suffering loss. In re Employers' Liability Assur. Corp., 180 La. 406, 156 So. 447; Ravenswood Hospital v. Maryland Casualty Co., 280 Ill. 103, 117 N.E. 485; Chattanooga Dayton Bus Line v. Burney, 160 Tenn. 294, 23 S.W.2d 669; Putnam v. Employers Liability Assur. Corporation, 90 N.H. 74, 4 A.2d 353; Wilson v. Capital Fire Ins. Co. of Lincoln, 136 Neb. 435, 286 N.W. 331. Although it is true that the language employed in the policies interpreted in the above cases is not identical with that used in the policy here involved, it is also true that the language used is so similar that the cases furnish strong authority to support the construction of the trial court.

Appellants cite Antichi v. New York Indemnity Co., 126 Cal.App. 284, 14 P.2d 598, as supporting their position. That was an action against an insurance company that had issued a $10,000 public liability policy. The wife secured a judgment against the insured for $7,733.30 for her personal injuries and property damage, and the husband a judgment for $2,500 consequential damages. In an action against the insurance carrier judgments holding it for the total of both judgments were affirmed. Thus, the husband and wife collected $10,233.30 when the policy apparently was limited to $10,000 for the injury to one person. The opinion does not discuss the question involved in the present case for the very good reason that an examination of the briefs and record in that case discloses that the wife's judgment for $7,733.30 was made up of $7,500 for personal injuries, and $233.30 property damage. This last item was covered by another clause of the policy. The result is that, under the public liability clause, the company was held liable only for $10,000, the exact amount of the policy. The case in no way supports appellants.

[5] We are of the opinion, for reasons already stated, that the total liability of the insurance company for the personal injuries received by Vira Perkins was $10,000. That sum has already been paid to Vira Perkins. Neither she nor her husband may lawfully collect any further sum from the insurance carrier of O. A. Van Kirk, the defendant herein.

The judgment appealed from is affirmed.

We concur: WARD, J.; GOODELL, J. pro tem.

CONSOLIDATED SHIPPERS, Inc., v. PACIFIC EMPLOYERS INS. CO. et al.

Civ. 12763.

District Court of Appeal, Second District, Division 2, California.

April 30, 1941.

Rehearing Granted May 29, 1941.

See 114 P.2d 34.

1. Insurance ⚿512½

Where public liability policy covered primary liability of an individual arising out of operation of individual's truck and extended coverage to plaintiff corporation for any liability which corporation might incur as result of such operation, and a nonownership public liability policy did not cover individual's primary liability but insured only secondary liability of corporation resulting from operation by independent contractors in corporation's employ, such as individual, of trucks not owned by corporation, policies were not "concurrent" or coextensive so as to render effective policy provisions for proration of loss in event that other insurance existed covering same loss.

See Words and Phrases, Permanent Edition, for all other definitions of "Concurrent Insurance".

2. Insurance ⚿512½

Evidence that insurer under public liability policy covering an individual's truck charged a premium of $275 for coverage of truck, and that insurer under a nonownership public liability policy charged only $263.33 to insure plaintiff against liability arising out of operation of at least four trucks, including that of individual, warranted inference that parties intended that public liability policy should afford primary coverage and that nonownership policy should afford secondary or excess coverage.

3. Insurance ⚿512½

Where coverage afforded by two insurance policies is not limited to same subject matter and risk involved is not identical or coextensive, in determining which policy is "primary" or basic insurance and which is "secondary or excess insurance" the court may properly decide which insurance is general and which is specific in nature, and generally that insurance which is specific is held to be "primary" and that which is general, "secondary or excess insurance."

See Words and Phrases, Permanent Edition, for all other definitions of "Primary Insurance" and "Secondary or Excess Insurance".

4. Insurance ⚿512½

Evidence that public liability policy covered primary liability of an individual arising out of operation of individual's truck and extended coverage to plaintiff for liability which plaintiff might incur as result of such operation, and that a nonownership public liability policy insured only plaintiff's secondary liability resulting from operation by independent contractors in plaintiff's employ, such as individual, of trucks not owned by plaintiff, and that public liability policy covered individual's truck only, and that nonownership policy was not limited to any particular truck, warranted conclusion that public liability policy afforded "primary coverage" and that nonownership policy afforded "secondary coverage," as respects liability of insurers thereunder to plaintiff which had paid judgments in actions arising out of operation of individual's truck.

See Words and Phrases, Permanent Edition, for all other definitions of "Primary Coverage" and "Secondary Coverage".

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Consolidated Shippers, Inc., against Pacific Employers Insurance Company and another to recover under two policies of insurance issued by defendants. From an unsatisfactory judgment, defendant Commercial Standard Insurance Company appeals.

Affirmed.

Fred Aberle, of Los Angeles, for appellant.

Kenneth J. Murphy, of Los Angeles (Henry E. Kappler, of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover under two policies of insurance issued respectively by the Commercial Standard Insurance Company and Pacific Employers Insurance Company hereinafter referred to respectively as Commercial and Pacific. A judgment for $14,522.21, was entered in favor of plaintiff and against Commercial and Pacific, which provided that it was to be first satisfied against Commercial to the extent of the limit of liability under its policy ($9,561.10) and that the balance of the judgment was to be satisfied against Pacific. From this judgment Commercial has appealed.

Commercial issued a policy of public liability insurance wherein it agreed to insure M. L. Harvey "and/or" Consolidated Shippers Inc., plaintiff herein, against any loss arising from or resulting from the ownership, maintenance or use of a certain Chevrolet truck which was owned by Harvey. The limits of liability under Commercial's policy were $5,000 for property damage and $10,000 for injury to or death of more than one person. A non-ownership policy of public liability insurance was issued by Pacific under the terms of which plaintiff alone was insured against loss by reason of any liability imposed by law resulting from the operation of all automobiles and trailers other than those owned by plaintiff which were transporting merchandise on a contract basis for the account of plaintiff. The liability under Pacific's policy was specifically limited to such loss as might result to plaintiff from the operation of trucks and trailers by independent contractors who had executed a prescribed form of hauling contract. The limits of liability under Pacific's policy were $5,000 for property damage and $100,000 for injury to or death of more than one person. Each policy contained a provision for the proration of insurance providing in effect that if the assured carried other insurance against the same loss the insurer would not be liable for a larger proportion of the entire loss than the amount named in the policy bore to the entire amount of collectible insurance.

The yearly premium charged by Commercial for its insurance was $275. Pacific charged a yearly premium of $263.33 for its insurance. The insurance afforded by Commercial's policy specifically covered any liability arising out of the operation of one truck only. Pacific's policy, however, covered liability arising out of the operation of any trucks or trailers operated by independent contractors for plaintiff with no limitation whatever as to the number of trucks or trailers. The evidence shows that while Pacific's policy was in force it actually covered any liability of plaintiff arising out of the operation of four different trucks owned by independent contractors.

During the time that both policies were in effect Harvey, while transporting merchandise in his Chevrolet truck as an independent contractor on a contract basis for the account of plaintiff, became involved in an accident in the state of Arizona which resulted in the death of two persons. Two actions to recover damages for the death of such persons were commenced in Arizona against Harvey and plaintiff herein. Prior to the trial of such actions the parties stipulated without admitting liability that compromise judgments might be entered in favor of plaintiff in each action and against both defendants for an aggregate amount of $11,600. The judgments which were accordingly entered were satisfied in full by plaintiff herein. Both Commercial and Pacific were notified of the accident and of the filing of the Arizona actions. Pacific denied liability and refused either to investigate or defend the actions. Commercial did investigate the accident and entered upon the defense of the actions but withdrew its defense prior to the entry of the judgments and refused to proceed further. By this action plaintiff sought to recover the amount which it had paid in satisfying the Arizona judgments and in addition attorneys' fees and costs incurred in defending such actions.

In order to comply with the provisions of the Arizona law which required a lease agreement when an interstate motor carrier operated equipment not owned by the carrier Harvey entered into an agreement with plaintiff by the terms of which he purported to lease his Chevrolet truck to plaintiff. This lease agreement had been executed and filed in Arizona prior to the happening of the accident. Although the trial court made no findings concerning the relationship existing between Harvey and plaintiff, and therefore no finding as to the manner in which plaintiff's liability arose, it concluded that Commercial was primarily liable for plaintiff's loss and that Pacific's policy was secondary insurance which did not attach or become collectible until the limits of Commercial's policy had been exhausted.

[1] It is earnestly contended by Commercial that the finding and conclusion of the trial court to the effect that Commercial's policy afforded primary coverage and Pacific's secondary coverage is not supported by the evidence and is contrary to the law but we find ample evidence to sustain the ruling of the trial court which is attacked by Commercial. Although both policies contained provisions for the proration of loss in the event that other in-

surance existed covering the same loss such provisions did not become effective in the instant case for the reason that the policies did not cover the same loss. Commercial's policy covered the primary liability of Harvey arising out of the operation of the Chevrolet truck which he owned and extended coverage to plaintiff for any liability which it might incur as a result of such operation. The insurance afforded by Pacific's policy did not cover the primary liability of Harvey but insured only the secondary liability of plaintiff resulting from the operation by independent contractors of trucks not owned by plaintiff. Under such circumstances the trial court was justified in inferring that the two policies were not concurrent or coextensive because they did not cover the same risk with sufficient identity of scope and purpose.

[2] There are additional reasons why the judgment appealed from must be affirmed. From the fact that Commercial charged a premium of $275 for the coverage of Harvey's Chevrolet truck and that Pacific charged but $263.33 to insure plaintiff against liability arising out of the operation of at least four trucks including Harvey's, it may fairly be inferred that the parties intended Commercial's policy to afford primary coverage and Pacific's secondary or excess coverage. It would be unreasonable to assume that, in view of the fact that Pacific's premium charge for each truck covered was less than one-fourth of the premium charged by Commercial, the parties to the Pacific contract intended that Pacific would incur the same liability as was incurred by Commercial. (For a discussion of the matter of the disparity in the premiums charged in determining which of two insurers is primarily liable, see vol. 7, Ins. Decs. p. 315.)

[3, 4] Where as here the coverage afforded by the two insurance policies is not limited to the same subject matter and the risk involved is not identical or coextensive, in determining which is actually primary or basic insurance and which is secondary or excess insurance the court may properly decide which insurance is general and which is specific in its nature. As a general rule that insurance which is specific is held to be primary and that which is general, secondary or excess insurance. Hartford Steam Boiler I. & Ins. Co. v. Cochran O. M. & G. Co., 26 Ga.App. 288, 105 S.E. 856; Commercial Cas. Ins. Co. v. Hartford Acc. Indem. Co., 190 Minn. 528, 252 N.W. 434, 253 N.W. 888. Unquestionably the Commercial policy afforded specific insurance for it covered the operation of Harvey's Chevrolet truck only and covered the liability of Harvey, who was the primary tort-feasor, and although it extended coverage to plaintiff it covered no other risk nor any other person. Pacific's policy on the other hand was general in nature since it did not specifically cover the truck involved in the accident nor did it cover the liability of the primary tort-feasor. The coverage which was afforded plaintiff by Pacific's policy was not limited to any particular truck or trucks but applied generally to all trucks operated by independent contractors in plaintiff's employ. The trial court properly concluded that Commercial was primarily liable and Pacific secondarily liable.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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44 Cal.App.2d 448

TODD v. McNICHOLS et al.

Civ. 12898.

District Court of Appeal, Second District, Division 2, California.

April 24, 1941.

Hearing Denied June 19, 1941.

1. Municipal corporations 🔑220(9)

In computing minimum annual retirement allowance of member of Los Angeles City Employees' Retirement System, who had been in city's employ for 6¾ years immediately preceding retirement at age 70 and for 8 years at a time some 30 years earlier, under city charter provision for minimum allowance equal to 30 per cent. of the average annual compensation earnable by such member during the last 10-year period or such portion thereof as he was employed immediately preceding his retirement, such member's salary for the 6¾-year period immediately prior to his retirement only could be considered.

2. Constitutional law ⚷70(3)

The fact that basis provided by Los Angeles city charter for calculation of minimum retirement allowance of member of City Employees' Retirement System, retired at age 70, might in specific instances work injustice or that some other basis of calculation might be more equitable did not authorize court to deviate from the clear language of the charter provision itself.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding upon the petition of Robert A. Todd for a writ of mandate directed to William J. McNichols and others, to compel calculation of amount of retirement allowance due petitioner as a city employee in a certain manner. From an adverse judgment, petitioner appeals.

Judgment reversed, with directions.

Robert A. Todd, of Los Angeles, in pro. per.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal on the judgment roll from a judgment denying any relief to petitioner, a retired member of the City Employees' Retirement System of the City of Los Angeles, who sought a writ of mandate to compel the respondents to calculate the amount of his retirement allowance in the manner for which he contends as opposed to the method so far used in other similar cases by respondent. The trial judge sustained a demurrer without leave to amend to the petition.

Article XXXIV of the Charter of the City of Los Angeles was adopted in May of 1937 to become effective as of July 1st of that year. It for the first time provided a retirement or pension system for employees of the city other than firemen and policemen. Very briefly, and with certain specific exceptions not necessary to be herein noted, all civil service employees must, and noncivil service employees may, become members of the Retirement System. Those members who have completed ten or more years of city service as defined in the article may, upon their own application, at any time after age sixty, be retired; and every member reaching age seventy is automatically retired. Upon retirement every member is to be paid a retirement allowance which consists of three items:

(1) An annuity purchased by his own contributions to the retirement fund;

(2) A pension to be paid by the city on account of service subsequent to July 1, 1937, and

(3) A pension to be paid by the city on account of service prior to said date.

In addition to the three items just mentioned there is a fourth item to be allowed in certain cases of compulsory retirement at age seventy. The only question involved on this appeal has to do with the manner in which the amount of this additional pension to be paid by the city shall be computed.

There is no dispute as to the facts in this case. Appellant, for a period of eight years, commencing January 1, 1897, and ending December 31, 1904, served first as secretary to the Mayor and then as a member of the City Council. He re-entered the city service July 1, 1933, as a deputy city attorney, which position he continued to occupy until April 1, 1940, a period of six and three-quarters years. He became a member of the Retirement System as of July 1, 1937, and was compulsorily retired on account of having reached age seventy April 1, 1940.

In determining the amount of his retirement allowance the respondents calculated first the amount of annuity purchased with his contributions paid into the fund between July 1, 1937, and the date of his retirement. There is no dispute as to this item. They next calculated the amount of the pension to be paid appellant on account of service rendered subsequent to July 1, 1937, and in doing so, took the average salary received by appellant over the last ten-year period of his city service which included the six and three-quarters years served between July 1, 1933, and April 1, 1940, as well as three and one-quarter years served next preceding December 31, 1904. The third item, calculated for the purpose of determining the total retirement allowance to be paid appellant, was the amount of pension to be paid on account of service prior to July 1, 1937. In computing this amount respondents took the total of the number of years served by appellant prior to July 1, 1937, which included the eight years served between 1897 and 1904, plus the four years elapsing between 1933 and 1937, and allowing for each such year the fractional part of his "final compensation" allowed on account of his prior service, arrived at the amount of pension to be paid by the city on account of such service.

There is no complaint from petitioner as to any of the calculations or amounts up to this point. The total of the three items so far determined did not, however, equal 30 per cent of the final compensation of appellant, which amounts to $201.04 per month, being the average of $249.69 per month for the six and three-quarter year period he served as deputy city attorney (1933–1940) and $100 per month for three and one-quarter years which appellant received as a member of the City Council during his former employment. Petitioner was therefore allowed, under the special provision with reference to compulsory retirement at age seventy, the difference between the total of items (1), (2) and (3) as calculated and 30 per cent of his final compensation which gave to him a total retirement allowance of $60.31 per month. It is the contention of appellant that so far as the calculations of this minimum retirement allowance is concerned, only the salary or compensation earnable during the last ten calendar-year period of the members' service may be considered, and where, as in this case, there has not been a full ten-year period of employment immediately preceding retirement, the minimum retirement allowance is to be predicated upon the salary received during the time of actual employment, whatever that period may have been.

In the instant case the average salary paid to petitioner over the last ten-year period of service is $201.04 per month, while his average salary during the last ten-year calendar period immediately preceding retirement amounts to $249.69 per month. Petitioner, as a member of the Retirement System, compulsorily retired at age seventy, is entitled to such additional pension that his total retirement allowance shall be not less than 30 per cent of a certain figure. Query: What is this figure?

Subsection C of section 508 of the Charter of the City of Los Angeles reads thus:

"C. Any member retired on account of service shall receive a retirement allowance which shall consist of:

"(1) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement, calculated in accordance with approved actuarial methods.

"(2) A pension for services rendered subsequent to July 1, 1937, which pension shall be equal to one-one-hundred-fortieth (1/140) of the final compensation of such member, multiplied by the number of years and parts thereof of such subsequent service.

"(3) Each member having credit for prior service shall receive an additional pension provided by the city equal to one-seventieth (1/70) of the final compensation of such member, multiplied by the number of years of such prior service; provided that every member who becomes such by virtue of being an employee on the 1st day of July, 1937, and who is compulsorily retired by reason of having reached the age of seventy (70) years as herein provided, *shall receive such additional pension that his retirement allowance shall be not less than thirty (30) per cent of the average annual compensation earnable by such member during the last ten-year period or such portion thereof as he was employed immediately preceding his retirement.*" (Italics added.)

Petitioner relies for reversal of the judgment on this proposition:

In computing the 30 per cent of the average annual compensation earned by him referred to in paragraph (3) of subsection C of section 508 of the Charter of the City of Los Angeles, his salary for the 6 3/4-year period immediately prior to his retirement should be used and not his average annual compensation for the 10 years during which he was last employed by the city of Los Angeles.

[1, 2] We are of the opinion that this proposition is valid. The language in paragraph (3) of subsection C of section 508 of the City Charter is clear and unequivocal. It provides that, when a city employee entitled to compensation is compulsorily retired for the reason that he has reached seventy years of age, he "shall receive such additional pension that his retirement allowance shall be not less than thirty (30) per cent of the average annual compensation earnable by such member during the last ten-year period or such portion thereof as he was employed immediately preceding his retirement." This provision is clear and leaves no room for judicial construction or interpretation. The fact

that some other basis of calculation might be more equitable or that in specific instances the present basis of calculation might work injustice does not authorize a court to change, add to, alter, or otherwise deviate from the clear and unequivocal language of the Charter provision itself.

For the foregoing reasons the judgment is reversed with directions to the trial court to overrule the demurrer to the petition, allowing respondents a reasonable time within which to file an answer, if they be so advised.

MOORE, P. J., and WOOD, J., concurred.

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44 Cal.App.2d 491

BROWN, et al., v. MacDOUGALL.

Civ. 2640.

District Court of Appeal, Fourth District, California.

April 25, 1941.

Hearing Denied June 23, 1941.

1. Executors and administrators 🔑59

Ordinarily, a presumption of fraud and undue influence in deceased's execution of joint tenancies with defendant with right of survivor would arise from the fact that defendant had been acting as agent of the deceased.

2. Executors and administrators 🔑59

In action by heirs of deceased and administrator of deceased's estate to recover money and property which had formerly been owned by deceased but which at time of his death stood in the name of deceased and defendant as joint tenants with right of survivorship, evidence was sufficient to overcome presumption of fraud and undue influence in connection with execution of the joint tenancies which arose from fact that defendant had acted as agent for deceased, and sustained judgment for defendant.

3. Stipulations 🔑14(10)

In action by deceased's heirs and administrator of deceased's estate to recover money and property that had formerly been owned by deceased, but which at time of his death stood in name of deceased and defendant as joint tenants with right of survivorship, stipulation that joint tenancies were complete, that they were in full effect, and that all steps necessary to set forth and establish them as joint tenancies had been taken, conceded that there was no fraud or undue influence in connection with their creation.

4. Appeal and error 🔑882(3)

Where action to recover money and property of deceased was tried on theory that, while joint tenancies of deceased and defendant were properly created, there was fraud of defendant after deceased's death, as a result of which deceased's heirs had been deprived of property, the case could not be decided on appeal on ground that defendant did not overcome presumption of fraud in the execution of the joint tenancies arising through the fact that defendant had been agent of the deceased.

Appeal from Superior Court, Los Angeles County; Edward C. Purpus, Judge pro tem.

Action by Ben H. Brown, etc., and others, heirs of Thomas Coughlan and the administrator of his estate, against Angus W. MacDougall, to recover moneys and properties. From an adverse judgment, plaintiffs appeal.

Affirmed.

George W. McDill, of Los Angeles, for appellants.

S. S. Hahn, and W. O. Graf, both of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action by the heirs of Thomas Coughlan and the administrator of his estate to recover certain money and property which had formerly been owned by the deceased, but which at the time of his death stood in the name of Coughlan and the defendant as joint tenants, with the right of survivorship.

Early in 1934, Coughlan went to a hospital and later to a sanitarium where he died on October 25, 1934. He had been friendly with the defendant for about thirteen years and on March 17, 1934, at his request, $1,000 was moved from one of his savings accounts to a checking account and the defendant was authorized to sign checks thereon as Coughlan's attorney-in-fact.

This arrangement was carried through by the defendant who went to the bank and inquired how it could be done and took the necessary papers to Coughlan for his signature. At the same time Coughlan told the defendant to take out $50 a month for his trouble, which the defendant did. On March 26, 1934, two of Coughlan's savings accounts were changed into joint tenancy accounts in the names of Coughlan and the defendant, with the right of survivorship, and on May 21, 1934, Coughlan's checking account was likewise changed to such a joint tenancy account. On July 2, 1934, Coughlan's safe deposit box, containing the personal property in question, was changed to a similar joint tenancy. In connection with the creation of each of these joint tenancies, forms furnished by the banks were signed by Coughlan and by the defendant.

It also appears that in 1931, a lawyer named McCann drew a will for Coughlan, in which he named his sister, who lived in Ireland, and her heirs as beneficiaries. Coughlan had never seen these heirs, who are joined as plaintiffs in this action. In 1932, Coughlan received a letter stating that his sister in Ireland had died. Shortly thereafter, Coughlan told McCann that his sister had died, that he had nobody in Ireland in whom he took an interest, and that he was going to change his mind. Two weeks later he returned and asked for the will, telling McCann that he had changed his mind. He took the will away with him and the same was never found. After his sister's death, Coughlan wrote, or had written for him, several letters to his brother-in-law in Ireland or to other relatives there. In the first of these, after speaking of the death of his sister, he spoke of some mining claims which he said he hated to give up, and said: "It is not for myself but I'd like to make a good-sized stake and leave it to the children". He also said he had made a will a couple of years before in favor of his sister and the children, and then stated that he had gone to a lawyer, McCann, who had said he would write to them. In another letter, dated January 10, 1934, he asked his brother-in-law if he had heard from McCann. On October 28, 1934, the defendant wrote a letter to the brother-in-law in Ireland telling him of the death of Coughlan and saying that at times during his illness Coughlan had worried about having money to pay for everything, that he did have enough to carry him through, and that all of his wishes had been carried out the way he intended them to be. On October 9, 1935, McCann answered a letter from some solicitors in Ireland telling them that to the best of his knowledge and belief Coughlan left no estate, that he had created a joint account with this defendant of what money he had, and that the defendant had come into possession of the remainder by right of survivorship.

There was also evidence that during the year before he died Coughlan told two priests that he intended to leave all he had to relatives in Ireland. After the death of his sister Coughlan told another witness that there was nobody else in whom he was interested, that he was better taken care of then than at any time in his life, and that the defendant could have anything he had left. During the time Coughlan was in the hospital and sanitarium the defendant saw him about three times a week, wrote checks for his bills and wrote some letters for him. There is an entire absence of evidence as to what occurred in connection with the creation of the various joint tenancies and all that appears in the record is the instruments creating them.

This action followed. The complaint alleged that at the time of his death Coughlan possessed money and personal property to the amount of $13,821.23, that the defendant immediately after the death of Coughlan secured possession of all of his property for the use and benefit of, and as trustee for, his estate and his heirs, and that the defendant, upon securing such possession, converted all of said money and property to his own use. The answer, among other things, alleged that Coughlan at the time of his death was the owner in joint tenancy with the defendant, with the right of survivorship, of this property and that by reason of said joint tenancy the defendant had become the sole owner thereof. The court found in favor of the defendant and this appeal followed.

The appellants contend that because the respondent was the agent of the deceased there is a presumption of fraud and undue influence in connection with the execution of the joint tenancy in question; that the respondent failed to meet the burden of overcoming that presumption; and that, under these circumstances, either a resulting or a constructive trust arose in favor of the appellants under which it must be held that the respondent, in taking possession of the property after the death of

Coughlan, took the same as a trustee for the appellants.

[1] The most important question is whether the record discloses that the respondent sustained the burden resting upon him to overcome the presumption of fraud and undue influence which would ordinarily arise from the fact that he had been acting as the agent of the deceased. There is no proof of actual fraud in connection with the creation of the joint tenancies, and the most that can be said is that there is some evidence to the effect that the deceased, after the death of his sister, had at times expressed an intention of leaving his property to his sister's children. The appellants place considerable reliance on the fact that McCann, after the death of Coughlan, wrote a letter to the solicitors in Ireland in which he said that to the best of his knowledge and belief Coughlan had left no estate. It is argued that this must have been inspired by the respondent and that it shows a guilty intent to mislead the heirs in Ireland. Not only does it not appear that the respondent is responsible for the making of this statement, but in the same letter McCann told the solicitors that before his death Coughlan had created a joint account with the respondent of what property he had and that the remainder had gone to the respondent by right of survivorship.

[2] Conceding that the burden rested upon the respondent of overcoming the presumption of fraud and undue influence in connection with the execution of these joint tenancies, which presumption arises from the fact that the respondent had acted as agent for the deceased, we are of the opinion that the respondent met this burden and that a portion of the evidence, aside from the stipulation, is sufficient to sustain the court's findings. Moreover, the appellants in effect stipulated at the trial that there was no fraud or undue influence in this connection and it is unnecessary to further review the other evidence which sustains the judgment.

Early in the trial the attorney for the appellants stated: "No question raised on our part with reference to the joint tenancy being complete and in full effect as a joint tenancy". The court then stated: "Then, the stipulation in the record is, that both counsel stipulate that the joint tenancy was a complete joint tenancy and that all steps necessary to set forth and establish a joint tenancy have been done". The attorneys for both parties agreed and the court then said: "The stipulation then, is accepted by the court and therefore will be marked as evidence". Shortly thereafter it was stipulated "that the legal tenor and effect of those cards (referring to the joint tenancy cards) will determine the ownership and the evidence here". A little later the attorney for the appellants stated that he raised no question as to the mental competency of Coughlan and then when he was asked if he was raising any question of fraud or undue influence, he replied: "The fraud, such as it is begins at the point, according to our theory—where the defendant took the money—took the proceeds of these accounts and failed to turn over the residue to the legal heirs, or to the administrator of the estate. That has nothing to do with any testimony that Mr. Graf might be able to introduce at all, and there is no evidence of any sort up to that point". When the court then asked if it was stipulated that there was no fraud or undue influence prior to the death of Coughlan, the attorney for the appellants made an evasive answer.

[3, 4] The stipulation that these joint tenancies were complete, that they were in full effect, and that all steps necessary to set forth and establish them as joint tenancies had been done, necessarily conceded that there was no fraud or undue influence in connection with their creation. The case was apparently tried on the theory that while these joint tenancies were properly created, there was fraud of some sort on the part of the respondent, after the death of Coughlan, as a result of which the heirs had been deprived of the property. No evidence disclosing any such fraud appears in the record. It is now further argued in appellants' briefs that the respondent did not meet the burden resting upon him because of the presumption of fraud arising through the fact that he was the agent of the deceased. Aside from other considerations it would be unfair to decide the case on appeal on that ground after the respondent had been misled by the stipulations to which we have referred. Regardless of the rule relied upon, these stipulations and the other evidence sustain the court's findings and the judgment.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

44 Cal.App.2d 406

KATZ et al. v. KUPPIN.

Civ. 12900.

District Court of Appeal, Second District, Division 2, California.

April 23, 1941.

1. Automobiles 🔑181(1), 245(24)

In action for injuries to guests in defendant's automobile, evidence that defendant was driving in early morning hours on right side of dry paved highway free of traffic while moon was shining brightly at speed exceeding 70 miles per hour around right-hand curve when automobile ran off road into ditch was insufficient to take to jury question of defendant's "willful misconduct", to constitute which there must be intentional act or failure to act and circumstances showing express or implied knowledge that injury to guest will be probable result.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

2. Automobiles 🔑181(7)

The driving of automobile at speed exceeding 70 miles per hour along open country highway at 2 A.M. in clear weather under bright moonlit sky is insufficient to impute to driver knowledge that accident, resulting in injury to guest, will probably happen.

3. Automobiles 🔑242(1)

In action for injuries to guests in automobile driven by defendant, defendant's knowledge of probable injuries to plaintiffs cannot be implied from fact of right-hand curve in road, in absence of evidence that she was driving in erratic manner or knew that she was approaching dangerous curve, evidence as to nature or degree of curve, or testimony showing that defendant saw, knew of, or had her attention directed to, curve or knew that any specific peril lay ahead.

4. Automobiles 🔑244(20)

The fact that guest in another's automobile expresses dissatisfaction with manner of operation thereof by host does not ipso facto establish host's willful misconduct.

5. Automobiles 🔑242(1), 244(20)

In action for injuries to guests in automobile driven by defendant, plaintiffs' testimony that defendant became angry when requested by plaintiffs to decelerate speed did not justify inference that she acted with knowledge that such speed would probably lead to injuries to plaintiffs and herself under circumstances, the presumption being otherwise.

6. Automobiles 🔑244(20)

The driving of automobile at excessive speed on dry wide highway free of traffic during early hours of morning in bright moonlight does not establish driver's "willful misconduct", rendering her liable for resulting injuries to guests, though they voiced objections to rate of speed, in absence of proof of driver's positive intention to injure guests or wanton disregard for their safety.

7. Appeal and error 🔑927(3)

On appeal from judgment of nonsuit, District Court of Appeal must admit truth of plaintiffs' evidence.

8. Trial 🔑142

Where facts are clear and only one inference can be drawn therefrom, issue becomes one of law to be determined by trial judge, not jury.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Rose Katz and another against Betty Kuppin for personal injuries. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Roy H. Smith and P. V. Davis, both of Los Angeles, for appellants.

Parker & Stanbury and White McGee, Jr., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiffs appeal from a judgment of nonsuit in an action for damages for personal injuries sustained while riding as guests with defendant in her automobile.

About 2 o'clock a. m., on February 3, 1939, defendant drove her Terraplane coupe, accompanied by her two guests, the plaintiffs Rose Katz and Mrs. Sophronia Ray, upon a wide, paved boulevard some 5 miles east of Brawley. The weather was clear and dry and the moon was brightly shining. On their way to Los Angeles the parties had taken the wrong road at Brawley. While driving along this boulevard, at a speed in excess of 70 miles an hour, at a curve, the coupe ran off the road into a ditch and the guests were injured. Because of such speed, of the protests thereat voiced by plaintiffs and of the curve in the road, plaintiffs claim that the accident was the result of defendant's wilful misconduct.

We are to determine (1) whether the evidence introduced by plaintiffs and all just inferences show that the injuries suffered proximately resulted from wilful misconduct, and (2) whether the court erred in making its order of nonsuit at the close of plaintiffs' case.

Plaintiffs testified that, after leaving Brawley, Mrs. Katz requested defendant on several occasions to diminish her speed; that she complied but then gradually accelerated her speed and became angry at the admonitions. Mrs. Ray testified that on three occasions she had cautioned defendant against driving so rapidly.

[1-3] Defendant was driving in the early hours of the morning on a dry pavement, on the right-hand side of the highway free of traffic, and the moon was shining so that it was almost as bright as day. No maps were introduced in evidence and no description of the curve was given by any witness except that of Mrs. Katz who described it as a right-hand curve. Sophronia Ray testified: "I could see the curve way ahead." When asked if she had said anything to Miss Kuppin about a curve being there, she answered: "No, because I was talking to her about driving so fast and asked her to slow up." From the context of the testimony of Mrs. Katz, nothing would indicate that she meant anything other than that the curve was a turn to the right and not a right-angle turn.

The evidence affords no basis for comparing the speed of defendant with that of a motorist approaching a known danger. The evidence does not establish a case of wilful misconduct as defined in Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.2d 988, where it is held that two essentials must exist: (1) an intentional act or an intended failure to act, (2) under circumstances showing knowledge, express or implied, that injury to a guest will be a probable result. Driving at a speed in excess of 70 miles per hour, along an open country highway at 2 o'clock in the morning, in clear weather, under a bright, moonlit sky, is not of itself sufficient to impute to the driver the knowledge that an accident will probably happen. Neither can knowledge of probable injury be implied from the fact of the curve in the road. There is no evidence that defendant was driving in an erratic manner or that she knew that she was approaching a dangerous curve. Nothing was offered as to the nature or degree of that curve. No testimony appears in the record to show that defendant saw, knew of, or had her attention directed to the curve or that she knew that any specific peril lay ahead.

[4, 5] The fact that a guest expresses dissatisfaction with the manner of the operation of an automobile does not ipso facto establish wilful misconduct on the part of the driver. Plaintiffs' contention that defendant became angry on being requested to decelerate her speed is unimportant. It does not justify the inference that she acted with knowledge that under the circumstances it would probably lead to injury to her guest and herself. Rode v. Roberts, 11 Cal.App.2d 638, 54 P.2d 498. The presumption is otherwise, Id.

[6] Wilful misconduct is not to be inferred from the circumstances detailed in this case. Where a motorist had been requested to reduce his speed, raced with another car at a speed exceeding 50 miles per hour on a foggy night, pulled to the wrong side of the road at a speed of 73 miles an hour, intentionally disregarded the "slow" sign to pass his rival in the race, then swung back to the right-hand side only to collide with a third car crossing the highway, it was held that these facts, standing alone, did not constitute wilful misconduct. Under such circumstances, the record must further show that such acts were done under circumstances disclosing knowledge on the part of defendant that an injury to his guest would be a probable result. McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189. This and kindred authorities establish the law to be that, in the absence of proof of (1) a positive intention to injure his guests, or (2) his wanton disregard for their safety, the fact of his driving at an excessive speed on a dry, wide highway, free of traffic in the early hours of the morning, in the bright moonlight, even though objections were voiced to the rate of his travel, will not establish wilful misconduct. Newman v. Solt, 8 Cal.App.2d 50, 47 P.2d 289; Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948; Lennon v. Woodbury, 3 Cal.App.2d 595, 40 P.2d 292; Robertson v. Brown, 37 Cal.App.2d 189, 99 P.2d 288.

[7, 8] Admitting the truth of plaintiff's evidence, as we must (Marchetti v. Southern Pac. Co., 204 Cal. 679, 269 P. 529), they did not establish wilful misconduct on the part of defendant. The facts are clear and from them only one inference can be drawn. Hence, the issue became one of law to be determined by the trial judge.

The authorities cited by appellants are not applicable to the facts of this case. Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Browne v. Fernandez, 140 Cal.App. 689, 36 P.2d 122; Gieselman v. Uhlman, 7 Cal. App.2d 409, 45 P.2d 819. The Gieselman case is the nearest approach to any support of appellants' contention. There the defendant disregarded the rules of prudence which should obtain unless driving on a clear night and on a dry road. In that case, the mist was falling, the road was damp and the driver's vision was obscured by the fog on his windshield. By accelerating the speed of his car, he rendered it impossible of control within a safe distance although he was racing to cross a railroad track before the arrival of an approaching train, while other motorists were stopping, or were already waiting for the train to pass. The court merely established that it was apparent from the facts that reasonable men might believe that in accelerating his speed above 60 miles per hour, under the circumstances there related, the defendant should have known that injury to his guest was probable. Neither does the case of Marchi v. Virone, 42 Cal.App. 2d 124, 108 P.2d 469, strengthen the position of appellant. Virone was driving on a city street in Sacramento at 55 or 60 miles per hour; he swerved sharply from north to south, his car skidding as it proceeded. It was raining very hard and the pavement was slippery. Defendant had previously traveled over this same street on numerous occasions when it was slippery. According to his own testimony, he was doing 35 miles per hour when his car "slid" over the curb and struck a tree. He spurned suggestions of the safety of his guests in his zeal to arrive at his destination to meet other people on time. Giving to plaintiffs' evidence all of the value to which it would be legally entitled if the witnesses are believed, this is a proper case for the granting of a nonsuit. In re Estate of Flood, 217 Cal. 763, 21 P.2d 579.

Judgment affirmed.

I concur: McCOMB, J.

WOOD, Justice.

I concur in the judgment for the reason that the numerous decisions of reviewing courts of California have left no course open to us other than to affirm the judgment of the trial court.

44 Cal.App.2d 362

LEE v. DAWSON et al.

Civ. 11435.

District Court of Appeal, First District, Division 1, California.

April 22, 1941.

Hearing Denied June 19, 1941.

1. Appeal and error 🔑110, 870(6)

An order denying a motion for a new trial is a nonappealable order, but the order is reviewable on appeal from the judgment.

2. Appeal and error 🔑991

Whether stairway on which subtenant's guest fell was slippery, whether it was in a dangerous condition, whether it was properly lighted, whether, if in a dangerous condition, guest knew of that condition, whether guest exercised due care in descending stairway, whether, if owners, tenant, or either of them were negligent, such negligence was the proximate cause of accident, or whether, if guest was contributorily negligent, her contributory negligence was the proximate cause of the accident, were all "questions of fact" for the trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Appeal and error 🔑1011(1)

Where the trial court decided questions of fact adversely to plaintiff on conflicting evidence, the reviewing court could not disturb the judgment appealed from.

4. Trial 🔑375

Where trial judge visited premises and saw for himself the nature and type of stairway on which plaintiff fell, what he saw and observed was "evidence" in plaintiff's personal injury action.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

5. Landlord and tenant ⚷164(1)

The statutes providing that stairways in apartment houses constructed after enactment of statutes or stairways thereafter reconstructed should have handrails do not apply to buildings or stairways constructed before effective dates of statutes. St. 1917, p. 1497, § 46, as amended.

6. Appeal and error ⚷931(1)

Though trial judge who tried action for injuries sustained when plaintiff fell down a flight of stairs visited premises during daylight hours and accident happened after dark, the reviewing court was required to assume that the trial judge took that factor into consideration when he viewed the premises.

7. Appeal and error ⚷925(1)

Where affidavit in support of motion to set aside submission for further argument urged that affiant intended to argue case but that when counsel for opposite parties submitted the cause he was taken by surprise and mistakenly and inadvertently failed to ask permission to argue, the reviewing court could not assume that the trial court abused its discretion in refusing to set the submission aside to permit counsel to argue the case. Code Civ.Proc. § 473.

8. Trial ⚷66

In action for injuries sustained when plaintiff fell down stairs, the trial court did not abuse its discretion in denying motion to set aside submission for the taking of further testimony, where affidavit in support of motion was insufficient to inform court of nature of any evidence possessed by plaintiff which she desired to introduce, evidence, if produced, would at most have proved that defendants maintained building in a condition in violation of state law, and trial court found that proximate cause of injuries was plaintiff's contributory negligence. Code Civ.Proc. § 473.

9. Appeal and error ⚷970(4)
Trial ⚷66

A motion under statute to set aside submission for further argument and for the taking of further testimony is addressed to the sound discretion of the trial court, and his ruling will not be disturbed in absence of a clear showing of abuse of discretion. Code Civ.Proc. § 473.

10. New trial ⚷155

A denial of a motion for new trial by reason of expiration of 60-day period provided by statute was just as efficacious as denial by an affirmative act, as against contention that moving party had a statutory right to affirmative action by the trial court and that she was prejudiced by court's failure to act. Code Civ.Proc. § 660.

11. Trial ⚷397(5)

In action for injuries sustained when plaintiff fell down a flight of stairs, the trial court did not err in failing to find specifically on the doctrine of assumption of risk, a defense pleaded in defendants' answers, where the court did find that plaintiff was contributorily negligent, since the so-called doctrine of "assumption of risk" is merely one phase of the doctrine of "contributory negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Assumption of Risk" and "Contributory Negligence".

◆

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Action by Theresa Lee against Mary J. Dawson and others for personal injuries. From a judgment for defendants and from an order denying her motion for a new trial, plaintiff appeals.

Appeal from order dismissed and judgment affirmed.

John H. Crabbe and Laurel W. Streiff, both of San Francisco, for appellant.

R. L. Husted, of San Francisco, for respondent Minnie Coburn.

PETERS, Presiding Justice.

[1] Plaintiff brought this action to recover damages for personal injuries received when she fell down a flight of stairs in a residence owned by the defendant Minnie Coburn and her children, and leased on a month-to-month basis to defendant Mary J. Dawson. The appeal is from a judgment for defendants based on findings that they were free from negligence, and that plaintiff was guilty of contributory negligence. Plaintiff also appeals from the

order denying her motion for a new trial. That is a nonappealable order, and for that reason the appeal therefrom should be dismissed. The order is reviewable, however, on the appeal from the judgment. 20 Cal.Jur. p. 213, sec. 139.

It is fundamentally the contention of plaintiff that the evidence, as a matter of law, compels a judgment in her favor. Defendants introduced no evidence, but submitted the case on plaintiff's evidence. Plaintiff had examined the defendants under section 2055 of the Code of Civil Procedure, and defendants had, of course, cross-examined the witnesses called by plaintiff.

[2, 3] Although it may be conceded that on the question of the negligence of the defendants, particularly of Mrs. Dawson, and on the question of plaintiff's contributory negligence, the evidence is in conflict, and would support a judgment for plaintiff, it is also true that there is substantial evidence, and reasonable inferences from that evidence, to support the findings of the trial court. The questions as to whether the stairway was slippery, whether it was in a dangerous condition, whether it was properly lighted, whether, if in a dangerous condition, plaintiff knew of that condition, whether plaintiff exercised due care in descending the stairway, whether, if defendants or either of them were negligent, such negligence was the proximate cause of the accident, or whether, if plaintiff was guilty of contributory negligence, such contributory negligence was the proximate cause of the accident, were all questions of fact for the trial court. On conflicting evidence the trial court decided these questions of fact adversely to the plaintiff. This being so, under well-settled principles, this court cannot, and should not, disturb the judgment.

The building where the accident occurred was a three-story residence at the corner of Fell and Steiner streets in San Francisco. The lower story was a separate flat and had a separate entrance. The upper two stories were designed as a separate flat, consisting of nine rooms. The entrance to this flat was on Fell street. Mrs. Coburn, prior to December, 1934, had lived in the upper flat with her family. In December of 1934 she rented the entire upper flat, furnished, to defendant Dawson, who lived there with her daughter. Mrs. Dawson, in turn, subrented a room on the third floor with cooking facilities to a Mrs. Page. At various times other tenants rented other rooms from Mrs. Dawson. All the occupants and guests of the occupants of the upper flat used the Fell street stairway. On entering the main doorway there is a small level landing. From this landing the stairway, about 3½ feet wide, proceeds upwards between two high, smooth walls, to a second landing. Along the left-hand side of this stairway, from the entrance landing to the upper landing, is a handrail, 33 inches above the middle of the tread of the stairway. The upper landing is about 3½ feet square. At this upper landing the stairway makes a ninety degree turn to the left. There are three or four steps from this upper landing to the main upper hall. For these few steps the stairway is enclosed by solid walls extending to the floor above. There is no handrail, as such, along this stairway. Along the left-hand side as one ascends these few steps, starting from the floor line of the upper floor and proceeding upwards several feet, there is a guard railing and posts. The stairway is constructed of oak strips, and each step is of the normal height and width. According to plaintiff, the front part of the step immediately above the upper landing is rounded. The stairway has never been carpeted, was not waxed or polished, but was occasionally shellacked.

In the ceiling in the upper hallway an electric light operated from a switch was so located that it illuminated the upper three or four stairs, and also the lower longer flight. On the upper landing was a standing light operated by a pull cord.

[4] In addition to the testimony of the witnesses concerning the construction of the stairway, the trial judge visited the premises and saw for himself the nature and type of the stairway. What he then saw and observed is, of course, evidence in the case.

On the day in question, February 12, 1936, plaintiff visited her friend Mrs. Page. She had visited Mrs. Page on two prior occasions, both during the daytime. She arrived at about 4:30 p. m., had dinner with Mrs. Page, and decided to return to her home at about 6 p. m. She put on her wraps and was carrying a bag and a small package. Mrs. Page accompanied her down the stairway from her room to the main upper hallway, and lit the light in the upper hall. The plaintiff started to descend the upper three or four steps above the upper landing. Just as she reached the landing, or as she started to turn to go down the long flight of stairs, in some manner, she lost her balance. She tried to regain her balance and hopped down six or eight stairs, and then fell headlong down the balance of the long flight, receiving the serious injuries for which this action was brought.

Mrs. Page testified that, after turning on the light, she stood at the upper banister watching the plaintiff descend; that plaintiff was looking forward watching her step and going very slowly; that plaintiff lost her balance at the step just above the upper landing; that plaintiff tried to grab the handrail but could not reach it; that she hopped about half way down the long flight and then fell headlong. She further testified that she knew the steps were slippery, and had told the plaintiff they were dangerous.

The plaintiff testified that after reaching the upper hall, that, "I had to have the light to go from the house. Mrs. Page switched on the light, and as I went down, I was going down—I had to go very slow because I knew the stairs were slippery, so I went down—I don't know if there were three or four steps down—and I came to the edge, to the corner, so I stopped, I made a step and I made a turn, because I knew that to my right-hand of the stairway there is a banister, and I was going to hold that—get hold of the banister. Well, my foot—I made—as I stood there I started with my left foot down, and at this very moment I knew that it was a mistake and my foot skipped and I made a double step and I missed the landing." She further testified that she then tried to regain her balance, and started to hop, but could not regain her balance and fell headlong. The trial judge interpreted her testimony to mean that as she got to the step immediately above the upper landing she tried to step over the edge of the landing to the top step of the long flight of stairs; that in so doing she realized she had made a mistake, lost her balance and fell. Plaintiff testified there was sufficient light for her to see, but that the steps were very "glary" and that she knew the stairway was slippery.

There is substantial evidence to the effect that the standing light on the upper landing was lit at the time of the accident. Mrs. Dawson testified that it was her usual custom to turn that light on at about 4 p. m., and that she had no reason to believe that she had not done so that night. She further testified that when she heard of the accident a few minutes after it occurred she went down to see the injured woman; that the upper landing light was then lit; that she asked Mrs. Page, "Oh, Mrs. Page, were the lights on?" and that Mrs. Page replied, "Yes, Mrs. Dawson, the lights were on."

There was a direct conflict in the evidence as to whether the stairway was slippery and in a dangerous condition. Mrs. Page testified that the steps were slippery and that she had so informed the plaintiff. Plaintiff testified that the steps were slippery, and that she knew this fact as a result of her prior visits. On the other hand, the son of defendant Coburn testified that the stairway was not polished, and had only shellac as a covering. This was corroborated by other witnesses. The trial court found that the stairway "was not highly polished or waxed, or unduly slippery, and was constructed and maintained in such manner as to be reasonably safe and secure at all times". This finding is amply supported by the evidence.

[5] Plaintiff urges that since the stairway above the upper landing had no handrail, that there was a structural defect in violation of the State Housing Act. The evidence shows that the building was constructed in 1914 or 1915 before the passage of such act by the legislature. The State Tenement House Act of 1917 (Stats. of 1917, p. 1473) as well as the State Housing Act of 1923 (Stats. of 1923, p. 781) provided that stairways in apartment houses thereafter constructed, or stairways thereafter reconstructed should have handrails. The same provision was carried into the 1937 amendments (Stats. of 1937, p. 591). In Watwood v. Fosdick, 212 Cal. 84, 297 P. 881, it was expressly held that these statutes have no application to buildings or stairways constructed before the effective date of such statutes.

There was also a direct conflict as to whether previous accidents had occurred on the stairway. There was some evidence that defendant Dawson knew of previous accidents, but she denied such knowledge. There was no evidence at all that defendant Coburn had such knowledge.

In view of this state of the record it is obvious that the basic findings that defendants were free of negligence, and that plaintiff was guilty of contributory negligence find ample support in the record.

[6] At the close of plaintiff's case the defendants moved for a nonsuit. The motion was denied. Thereupon the defendants rested. The court then asked counsel for plaintiff: "That is the case then, Mr. Crabbe?" to which counsel replied, "Yes, Your Honor." The court then stated: "These cases are not easy, but I will order judgment for the defendant in this case. I went out and looked at that stairway and I don't think it is a model construction by any means. However, as I understand the testimony of the plaintiff, Mrs. Lee, when she reached the step above the landing, instead of stepping down on the landing, she turned on that step and attempted to go down, and slipped there. And she did not testify that she was confused, and might have thought she was on the landing. She said her foot missed the landing. And I can't conceive how a person in the exercise of ordinary care would attempt to turn that stairway in that fashion. So judgment will be for the defendant in this case." This was on March 30, 1939. After findings were prepared, but before they were signed in August of 1939, plaintiff filed a motion to set aside the submission for further argument and for the taking of further testimony. This motion was made under section 473 of the Code of Civil Procedure, and was supported by the affidavit of counsel for plaintiff. In the affidavit it is urged that the trial judge visited the premises on a bright and sunny afternoon, while the accident occurred at about 6 p. m. on a rainy dark day; that when seen by the judge the stairway was not in the same condition as it was on the day of the accident in that there was a mat on the upper landing and there was a silver stripe painted along the edge of the step above the landing. However, the record shows that before the judge visited the premises the fact that these changes had been made since the accident was developed in the evidence. Although the judge visited the premises during the daylight hours, and the accident happened after dark, we must assume the trial judge took this factor into consideration when he viewed the premises.

[7] The affidavit also urges that affiant intended to argue the case but that when counsel for defendants submitted the cause he was taken by surprise and mistakenly and inadvertently failed to ask permission to argue. This contention presumes that by argument on the facts counsel could call attention to facts which the motion assumes the trial judge did not consider. We cannot assume that the court abused its discretion in refusing to set the submission aside to permit counsel to argue the case. Bonestell v. Auto-Motive F. Corp., 69 Cal.App. 719, 729, 232 P. 734.

[8, 9] So far as the request to take additional evidence is concerned, the affidavit alleges that since the trial affiant has discovered that the Coburns purchased the property in 1921 (which appeared in the evidence at the trial); that in 1924 Coburn filed an application to remodel the premises, but that such application was withdrawn; that no permit was ever issued to alter the premises; that, nevertheless, the stairway was maintained in violation of the State Housing Act, supra. In the briefs it is recognized that, unless the stairway was reconstructed after the building was built in 1914, the State Housing Act has no application, but it is urged that plaintiff suspects that the stairway was reconstructed after the Coburns purchased the property. It is to be noted that the affidavit does not set forth that plaintiff has any evidence on this point. The affidavit is insufficient to inform the trial court of the nature of any evidence possessed by plaintiff that she desired to introduce. At most, it suggested that plaintiff's counsel desired to go on a "fishing expedition" to ascertain whether his suspicions were correct. Moreover, even if such evidence were produced, at most it would prove that defendants maintained the building in a condition in violation of state law. It would not affect the finding of the trial court, expressed at the conclusion of the trial, that the proximate cause of the injury was the contributory negligence of the plaintiff. A motion under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court, and will not be disturbed in the absence of a clear showing of abuse of such discretion. Moore v. Thompson, 138 Cal. 23, 70 P. 930; Dwyer v. Davis, 120 Cal.App. 435, 8 P.2d 168. No such abuse is shown in this case.

[10] It is next urged that it was prejudicial error to deny the motion for a new trial. That motion was predicated on substantially the same grounds urged on the motion to set aside the submission. The record shows that the motion for a new trial was argued and thereafter denied by reason of the expiration of the sixty-day period provided by section 660 of the Code

of Civil Procedure. Plaintiff seems to argue that she had a statutory right to affirmative action by the trial court, and that she was prejudiced by the failure of the trial judge to act. No authorities are, or can be, cited to support such an argument. A denial of a new trial by operation of law, under section 660 of the Code of Civil Procedure, supra, is just as efficacious as a denial by affirmative act.

[11] The last point urged is that the trial court committed error in failing to find on the question as to whether plaintiff assumed the risk, a defense pleaded in the answers of defendants. The court did find that plaintiff was guilty of contributory negligence. The so-called doctrine of assumption of risk is merely one phase of the doctrine of contributory negligence. No error was committed in failing to find specifically on the doctrine of assumption of risk.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

We concur: WARD, J.; GOODELL, J., pro tem.

44 Cal.App.2d 496

IRVIN v. PETITFILS.

Civ. 2649.

District Court of Appeal, Fourth District, California.

April 25, 1941.

1. Easements 🔑18(1), 26(3)

A right of way of necessity arises from necessity alone and continues only while the necessity exists.

2. Easements 🔑17(1)

A right of way appurtenant to property may pass by necessary implication by the deed to such property.

3. Easements 🔑12(1)

An easement which is a servitude on land may pass by grant though not attached to land. Civ.Code, § 802.

4. Easements 🔑1

Although an easement is ordinarily a right in fee, it may be a chattel interest less than a fee or even for a term of years. Civ. Code, § 806.

5. Easements 🔑25

An easement, like any other estate in land, may be a base or determinable fee, which may last forever, but which may end on the happening of a merely possible event.

6. Principal and agent 🔑177(3)

"Notice" to an agent, who negotiated the purchase of real estate, as to the terms of such purchase, was notice to the principal.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

7. Easements 🔑36(3)

In action to quiet title to a right of way over driveway across adjoining lot, which provided only means of ingress and egress to garages at rear of plaintiff's lot, evidence that common owner of both lots gave plaintiff right to use driveway until a right of way over adjoining lot expressly granted by deed was cleared of obstructions, and that plaintiff agreed to purchase lot only upon condition that such right of way at rear of lot should be granted, sustained finding that right to use driveway ceased when right of way which had been deeded was cleared and negatived plaintiff's claim to an implied grant of a "right of way of necessity" over the driveway.

See Words and Phrases, Permanent Edition, for all other definitions of "Right of Way of Necessity".

8. Easements 🔑8(2)

A prescriptive right to an easement must be based on open, notorious and adverse use, and hence cannot be acquired by use which is permissive, since such use would not be "adverse use".

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Use".

9. Easements 🔑8(2)

Where purchaser of lot was told by vendor that he might use a driveway over adjoining lot, also owned by vendor, until a right of way at rear of adjoining lot, which was expressly granted by deed, should be cleared of obstructions, purchaser could not claim a right of way by prescription over the driveway based on the use thereof, since such use was permissive rather than "adverse".

10. Appeal and error ⟹1056(1)

In action to quiet title to a right of way over driveway across adjoining lot, any error, committed in striking out testimony that common owner of both lots pointed out the driveway to plaintiff, when she purchased her lot, was harmless in view of fact that driveway was in plain sight and common owner of lots gave plaintiff the determinable right to use driveway.

11. Evidence ⟹151(1)

In action to quiet title to right of way over driveway across adjoining lot, evidence that common owner of both lots told purchaser of adjoining lot that plaintiff's right to use driveway would terminate when an 8-foot right of way at rear of adjoining lot, which was expressly granted by deed, was cleared of obstructions, was admissible for the limited purpose of explaining why purchaser of adjoining lot had not objected to use of the driveway by plaintiff.

12. Appeal and error ⟹1011(1)

The fact that trial court's findings were conflicting, where such conflict was only with respect to unimportant particulars, did not warrant reversal of judgment.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Alice A. Irvin against Veda M. Petitfils to quiet title to an easement of way 14 feet wide over defendant's property. From an interlocutory judgment adverse to plaintiff, she appeals.

Judgment affirmed.

Dailey S. Stafford, of Los Angeles, for appellant.

Barker & Keithly, of Los Angeles, for respondent.

MARKS, Justice.

Plaintiff brought this action to quiet her title to an easement of way fourteen feet wide over defendant's property. An interlocutory judgment was entered awarding plaintiff a right of way over the west eight feet of Veda M. Petitfils' property and decreeing that as soon as defendant cleared that eight feet of obstructions to travel, plaintiff's right to the use of the fourteen feet she claimed would end and defendant's title to it would be quieted. We will hereafter refer to Veda M. Petitfils as the defendant.

Prior to 1925, John W. and Elizabeth Woolard owned lots 19 and 20 of the Vermont and Melrose Avenue Tract in the city of Los Angeles. The lots face east and front on Vermont avenue. The south line of Clinton street forms the north line of lot 19. Lot 20 adjoins lot 19 on the south.

Several years before either party to this action had acquired any interest in either lot, Mr. and Mrs. Woolard erected two apartment houses, one on each lot. They also erected a continuous row of garages on the west portions of the two lots, with four of the garages opening on lot 20 and five of them opening on lot 19. An areaway twenty-seven feet wide was constructed of cement immediately in front of the garages. This was connected with Clinton street by a cement driveway. We will refer to this as the Woolard driveway.

This driveway and the areaway over lot 19 furnished the only means of ingress and egress to and from the garages on lot 20 to a public street. There was no other way provided for vehicles and plaintiff sought to establish her right to a way over the east fourteen feet of the areaway and the driveway on lot 19 which had been used by the occupants of both properties continuously and without objection until a short time before this action was brought.

In January, 1925, the Woolards sold lot 20 to plaintiff. Besides conveying the lot to her there was included in the grant a "perpetual right-of-way for driveway purposes over and upon the rear eight (8) feet of Lot Nineteen". This deed was recorded on February 7, 1925.

By a deed dated April 26, 1925, the Woolards conveyed lot 19 to defendant "Subject to * * * Conditions, restrictions, reservations, easements and rights of way of record". Thus the right of way granted to plaintiff was reserved from this grant to defendant.

The occupants of both properties used the Woolard driveway without objection until in June, 1937, when defendant wrote plaintiff a letter informing her that she proposed to remove the garages from the eight-foot right of way at the rear of lot 19, and that when it was cleared of obstructions she would require plaintiff and her tenants to use that driveway and to cease using the Woolard driveway. Defendant started the work of moving the garages on lot 19 and plaintiff instituted this action.

Plaintiff probably bases her right to recover upon the following theories: An implied grant of a way of necessity; the way over lot 19 was appurtenant to lot 20 and passed by grant to her; title to the easement by prescription. The trial court found against her on all issues.

Little need be said concerning a way of necessity as one could not be established under the facts of this case. Corea v. Higuera, 153 Cal. 451, 95 P. 882, 17 L.R.A., N.S., 1018; 9 Cal.Juris. 967, secs. 17, 18, 19.

[1] Further, as was said in Cassin v. Cole, 153 Cal. 677, 96 P. 277, 278: "A way of necessity arises from necessity alone, and continues only while the necessity exists. Unquestionably appellant had a way of necessity across his grantor's ranch until a road was dedicated to his use; but, when that was done, his right to a way of necessity ceased, and it matters not that the old road was more convenient for his purposes. When it ceased to be indispensable, the right ceased. Kripp v. Curtis, 71 Cal. [62] 65, 11 P. 879; Carey v. Rae, 58 Cal. [159] 163; Blum v. Weston, 102 Cal. [362] 369, 36 P. 778, 41 Am.St. Rep. 188."

[2] Plaintiff maintains: that as the Woolard driveway was the only means of ingress and egress provided for the occupants of lot 20 who used the garages on that lot; that as it was established and used by the Woolards and their tenants, and that as it was in existence and use at the time of her purchase and was pointed out to her by Woolard as the means of reaching the garages on her property, it was then a servitude on lot 19 for the benefit of lot 20 to which it was appurtenant and which right of way passed to her by necessary implication in the grant of that property. It is true that a right of way appurtenant to property may pass by necessary implication by the deed to that property. Corea v. Higuera, supra.

[3] An easement that is a servitude on land may pass by grant though it is not attached to land. (Sec. 802, Civ.Code.) However, "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Sec. 806, Civ.Code.

We may assume the soundness of every argument advanced by plaintiff under this phase of the case and still we cannot disturb the judgment.

[4] We regard the reasoning and authorities cited in Eastman v. Piper, 68 Cal. App. 554, 229 P. 1002, 1005, as determinative of this issue. There the owner of one tract of land granted to another an easement of way which was to exist until a certain street was opened along the grantee's property. In discussing this grant the court said: "While it is true that ordinarily an easement is a right in fee, it is not necessarily so. The interest of an easement may be less than a freehold; it may be a chattel interest. That is, it may be an estate in fee, or less than fee, or even for a term of years. Goldman v. Beach Front, etc., Co., 83 N.J.L. 97, 83 A. 777; 19 C.J. p. 862, tit. 'Easements,' par. 1.

[5] "Again, it is suggested that the right or privilege granted to Moffit, his heirs, or assigns cannot amount to an easement, for the reason that it is a right or privilege of indefinite duration; i. e., it is to continue until Alta Vista street shall be extended past the west half of Lot G—an uncertain event which may or may not happen, and if it does happen it may occur in either the near or the remote future. We fail to see how this aspect of the question is necessarily subversive of our conclusion that the instrument evidences an intention to create an easement. The argument is tantamount to a claim that the interest of an easement may not be a base, qualified, or determinable fee; i. e., an estate which may last forever, but which may end on the happening of a merely possible event. Des Moines City R. v. Des Moines, 183 Iowa 1261, 159 N.W. 450, 165 N.W. 398, L.R.A.1918D, 839; 21 C.J. p. 922, tit. 'Estates,' par. 18. It is well established that an easement, like any other estate in land, may be such base or determinable fee. Hall v. Turner, 110 N.C. 292, 14 S. E. 791."

In the instant case the interlocutory judgment gave plaintiff the use of the Woolard driveway until her driveway over the rear of lot 19 was cleared of obstructions. This had the effect of recognizing plaintiff's claim to the right to use the Woolard driveway, but, contrary to her contention, held that this easement was a determinable interest that terminated when plaintiff was given the use of her deeded right of way. Under this claim made by plaintiff we need only decide the question of the sufficiency of the evidence to support the findings that the right to use the Woolard driveway ended when the other way was cleared of obstructions so that it could be used.

[6] Plaintiff was represented in the negotiations which resulted in the purchase of lot 20, by a Mr. Sexton, who, as her agent, negotiated the terms of the purchase. Mrs. Woolard testified that Mr. Sexton was told that plaintiff could use the Woolard driveway until the eight foot driveway on the rear of lot 19 was cleared and opened for use. Of course, notice to the agent was notice to the principal.

Mazie A. Pomy testified to a conversation between plaintiff and Mr. Woolard relative to the use of the Woolard driveway. The witness testified that plaintiff said she would not buy the property unless she was given a right of way over the rear eight feet of lot 19; that Mr. Woolard agreed to convey this right of way to her and told her she could use the Woolard driveway until the eight foot right of way was cleared; that plaintiff "said that she would use it (the Woolard driveway) until such time as Petitfils would want to use the lot, and then Petitfils would have to move their garages around and give her eight feet in the back to get around to the back".

Escrow instructions signed by plaintiff contained the following: "You will see that the deed when executed also conveys a right-of-way for driveway purposes over and upon the rear 8 ft. of Lot 19 of Vermont & Melrose Ave. Tr." As we have seen, the deed from Mr. and Mrs. Woolard to plaintiff conveyed to her a right of way over the rear eight feet of lot 19. A deed of trust on the property signed by plaintiff included the following description: "A perpetual right of way for driveway purposes over and upon the rear Eight (8) feet of Lot Nineteen (19) of said Vermont and Melrose Avenue Tract."

[7] This evidence amply supports the conclusion drawn by the trial court that plaintiff's right to use the Woolard driveway would end when the eight feet which had been deeded for a right of way was cleared of obstructions. In fact a contrary finding would find little evidence to support it.

[8, 9] The evidence we have already outlined negatives plaintiff's claim to a prescriptive right to use the Woolard driveway as a prescriptive right cannot be predicated on a permissive use. Matthiessen v. Grand, 92 Cal.App. 504, 268 P. 675; Tarpey v. Veith, 22 Cal.App. 289, 134 P. 367. A prescriptive right must be based on open, notorious and adverse use. When the use is permissive it cannot be adverse. Janke v. McMahon, 21 Cal.App. 781, 133 P. 21; Pacific Gas & E. Co. v. Crockett L. & C. Co., 70 Cal.App. 283, 233 P. 370. It follows that plaintiff's claim of a prescriptive right to use the Woolard driveway must fail as it was permissive and not adverse.

[10] Plaintiff claims error in an order of the trial court striking out her testimony that Mr. Woolard pointed out the Woolard driveway to her. If this was error it was harmless. The driveway was in plain sight and was known to all parties. Plaintiff was given the determinable right to use it. Because Mr. Woolard pointed it out to her could not extend her right to use it beyond the agreed limitation on that right nor enlarge her estate in it.

[11] Plaintiff complains of a ruling of the trial court in admitting in evidence a conversation between defendant and Mr. Woolard to the effect that plaintiff's right to use the Woolard driveway would terminate when her eight foot right of way was cleared of obstructions. This evidence was admitted for the very limited purpose of explaining why defendant had not objected to the use of the Woolard driveway by plaintiff and her tenants prior to 1937. No harm followed from the admission of the evidence for that limited purpose. Pacific Gas & E. Co. v. Crockett L. & C. Co., supra.

[12] Plaintiff argues that the findings are conflicting. This may be true in unimportant particulars which furnish no sufficient ground for a reversal of the judgment. Other errors complained of are trivial and do not require separate consideration. They were not prejudicial to the rights of plaintiff.

A great preponderance of the evidence supports the findings which support the judgment. The judgment is just and gives plaintiff every right to the use of the Woolard driveway that she could legitimately claim.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

44 Cal.App.2d 442

SIMON v. MATTSON et al.

Civ. 12843.

District Court of Appeal, Second District, Division 1, California.

April 24, 1941.

Hearing Denied June 19, 1941.

1. Automobiles 🔑45

The motor vehicle department properly refused to issue certificates of junk for motor vehicles acquired by dealer where dealer was unable to show registered titles in himself and refused to pay statutory fees for transfers of registered titles and annual registration and license fees and penalties. Vehicle Code, § 164.5, St.1937, p. 165; §§ 160, 186, 377, St.1935, pp. 113, 118, 150; §§ 235, 379, St.1939, pp. 1395, 1944; St.1935, p. 1313, § 6.

2. Automobiles 🔑45

The refusal by motor vehicle department to issue certificates of junk for motor vehicles acquired by dealer, who could not show record titles in himself and who refused to pay fees for transfers of registered titles and annual registration and license fees and penalties, was not an unlawful attempt to force payment of fees. Vehicle Code, § 164.5, St.1937, p. 165; §§ 160, 186, 377, St.1935, pp. 113, 118, 150; §§ 235, 379, St.1939, pp. 1395, 1944; St.1935, p. 1313, § 6.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Mandamus proceeding by Larry Simon to compel J. Mattson and others, officers of the state department of motor vehicles, to issue certificates of junk for four motor vehicles which petitioner had acquired. From an adverse judgment, petitioner appeals.

Affirmed.

J. G. Moser, of Hollywood, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondents.

DESMOND, Justice pro tem.

The superior court of the county of Los Angeles, acting upon the petition of appellant, refused to grant a writ of mandate commanding the respondents, officers of the department of motor vehicles of the State of California, to issue certificates of junk for four motor vehicles which appellant had acquired; hence this appeal.

Section 235 of the Vehicle Code, as amended in 1939, St.1939, p. 1395, reads as follows: "Any person *desiring* to dismantle or wreck any vehicle registered hereunder shall immediately forward to the department the certificate of ownership, registration card and the *unexpired* license plate or plates issued for such vehicle. The department shall issue to such person a certificate of junk * * *." Previously no provision was made for issuance of a junk certificate, section 235 merely reading: "Any person dismantling or wrecking any vehicle registered hereunder shall immediately forward to the department the certificate of ownership, registration card and the license plate or plates *last* issued for such vehicle. * * *" St.1935, p. 126.

A careful reading of the two sections and consideration of the words which we have italicized will indicate that prior to 1939 any person was at liberty, without receiving permission from the motor vehicle department, to dismantle or wreck a car, merely being under the obligation to forward to the department the certificate of ownership, registration card and the license plate or plates last issued for such vehicle. The amended section in effect prohibits the junking of a vehicle without permission of the department issued in the form of a certificate of junk, and as will be noted, requires a surrender, not of the last license plates but of the unexpired license plates.

From the record, it appears that on April 19, 1940, certificates of junk were requested by appellant and refused by respondents on four automobiles: a Durant, a Studebaker, a Buick and a Ford. Of these, only one, the Durant car, carried unexpired 1940 license plates.

As to that automobile the records of the motor vehicle department showed that its legal and registered owner was not the appellant, but one W. C. Felton, and although appellant offered with his application a certificate of ownership (presumably showing Felton as the owner), a 1940 certificate of registration and 1940 license plates, respondents refused to issue the certificate of junk in the name of petitioner, because (to quote from the findings) "the registration and legal ownership of said vehicle had not been transferred to petitioner and because the fee required by statute for such transfer was not paid or tendered". The Vehicle Code (sec. 377, St.1935, p. 150) calls for payment of the sum of $1 for such transfer.

As to the Studebaker, appellant presented an affidavit of nonoperation during the period subsequent to December 31, 1939, presumably offered in lieu of unexpired 1940 license plates (sec. 164.5, Vehicle Code, St.1937, p. 165), a certificate of ownership and an application for a duplicate certificate of registration. The records showed one Adair Wingett as the registered owner of this automobile. The department refused to issue a duplicate certificate of registration to the petitioner because the statutory fee was not paid or tendered, and refused to issue a certificate of junk in the name of the petitioner, because the registration and legal ownership of said vehicle had not been transferred to petitioner, and because the fee required by statute for such transfer was not paid or tendered.

As to the Buick, appellant presented a certificate of ownership and an application for duplicate certificate of registration. The records did not show that petitioner was the owner of this car, one Vidal appearing as the registered owner, and Bank of America as legal owner. The certificate of ownership was endorsed by the bank, and presented with it was an affidavit of repossession made by that bank. The sum of $1.50 was tendered to the officers of the department, purportedly to represent the $1 fee for transfer of ownership to the name of petitioner, and the 50-cent fee for issuance of a duplicate registration certificate. The respondents refused to issue a certificate of junk in the name of petitioner, because the registration and legal ownership of the car had not been transferred to him, and because the fee required by statute for transfer of registration to the name of the legal owner upon repossession of the car had not been paid or tendered. The refusal to issue a certificate of junk in the name of the petitioner was also grounded upon the further reason that the 1940 registration fees and penalties, and the 1940 license fee and penalties, upon the Buick, had not been paid.

As to the Ford, the records of the department showed that one Castro was the registered owner of the car; that Southern Finance Service was the legal owner; and although petitioner delivered to the department a certificate of ownership and application for duplicate certificate of registration, and in connection with his application tendered the sum of $1 as a fee for the transfer of registration and legal ownership to the name of the petitioner, and the sum of 50 cents for the issuance of a duplicate registration certificate, the respondents refused to issue a certificate of junk in the name of the petitioner because the 1940 registration fees and penalties, and the 1940 license fee and penalties, upon the car, had not been paid.

[1] Analyzing the various situations presented by the foregoing review, it appears that a prime requisite for securing a certificate of junk is the presentation by the applicant of a certificate of ownership in himself. The department of motor vehicles will not accept, as sufficient compliance with the statute, a certificate of ownership issued to one having a prior interest in the car whether that one be a former registered owner or a former legal owner, or whether or not repossession has taken place. Appellant feels that since he is a dealer he should not be required to go through the process of securing by transfer or transfers a certificate of ownership in himself, his object being to wreck the car in question and not to use it on the highway, and points out that, prior to the enactment of the 1939 amendment of section 235, all that a dealer or any one else was required to do, having wrecked a car, was to forward to the department of motor vehicles the certificate of ownership, registration card, and the license plate or plates last issued for such vehicle. This view ignores the effect of the amendment. Any person now desiring to dismantle or wreck a vehicle must immediately forward to the department the certificate of ownership, registration card and the unexpired license plate or plates issued for the car. That being done, the department will issue a certificate of junk, but insists that the certificate of ownership and certificate of registration shall show that the recipient has a legal right to wreck the car, being the actual owner thereof. This interpretation of the language of the amended section seems logical since surrender of unexpired license plates is required as a condition for the issuance of a junk certificate. Such plates would have been issued at the beginning of the year in which the application is made, under section 160 Vehicle Code, St.1935, p. 113, only to the owner,

subject, of course, to transfer through the department to a new owner during the year while unexpired.

It may be noted here that, so far as pertinent, section 186 of the Vehicle Code, St. 1935, p. 118, reads as follows: "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall the delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card with respect thereto as provided herein * * *."

Respondents in their brief state that they will issue a certificate of junk free of charge to any person showing full title in himself to the vehicle involved and presenting the items specified in section 235, Vehicle Code. To show full title in himself, this appellant necessarily will be put to the expense of recording certain transfers or meeting other charges specified by the Vehicle Code, all of which we have set out in reference to each of the applications. All these charges, it appears, constitute liens against the particular vehicle to which respectively they attach. Section 379, Vehicle Code, St.1939, p. 1944, reads as follows:

> "(a) Every registration or transfer fee and any penalty added thereto, from the date the same become due, constitute a lien upon the vehicle for which due.
>
> "(b) The department shall collect such fee and any penalty by seizure of such vehicle from the person or persons in possession thereof, if any, and by the sale of such vehicle. * * *"

Section 6 of the Vehicle License Fee Act (Stats.1935, p. 1313) has a similar provision: "Every license fee and any penalty added thereto, from the date the same becomes due, constitute a lien upon the vehicle for which due." Seizure and sale is provided also for the enforcement of this lien.

Because the process of showing full title in himself will incidentally clear all these charges and lift the lien from each vehicle, appellant complains "that the department is attempting by its procedure, contrary to the law in such cases made and provided, to enforce the collection of a tax levied against the personal property of an owner from the purchaser of such property in a manner other than by the enforcement of its lien against such property".

[2] The respondents, however, deny that any coercion is being used. Their position, as stated by Mr. McLaughlin, deputy attorney general, at the hearing before the trial judge, we approve and quote at this point: "Upon the issuance of the certificate of junk, as referred to, the car is immediately torn down, the parts strewn from here to Halifax, possibly; the lien is effectually destroyed. Therefore before issuing the certificate of junk it is the duty of the department to see that that tax is paid, either by seizure of the truck or by voluntary payment by the person who owned the property at the time that the lien attached, or by some other person who is legally interested in that car. They object to our attempting to force them to pay this tax; we are not trying to force them to pay this tax; merely saying that this car shall not be destroyed by being junked, until the lien is satisfied. You have a right to come in and redeem the car by paying the tax. If you do not want to, that is all right; we may eventually resort to the authority given by the statute, to seize and sell the car in satisfaction of the tax, but here we are not bringing any action in any way, shape or form to collect this tax."

In other words, instead of enforcing payment of the charges due on account of these automobiles, the department at the present time merely declines to waive its right to rely upon the lien created by law in favor of the state. Such a course does not impress us as constituting compulsion.

We have not overlooked the various other points urged by appellant as grounds for reversal, but find none of them tenable. We believe the trial court properly refused to issue the writ of mandate.

Judgment affirmed.

We concur: DORAN, Acting P. J.; WHITE, J.

44 Cal.App.2d 469

WALKER v. LAUGHARN.

Civ. 2642.

District Court of Appeal, Fourth District, California.

April 24, 1941.

1. Fraudulent conveyances ⚷295(2)

Where the real intent of the parties and the facts of the transactions were peculiarly within knowledge of parties to alleged fraudulent conveyances, fraud could be proved by circumstantial evidence.

2. Bankruptcy ⚷303(5)

Evidence warranted the setting aside of assignments of certain accounts, and securities and conveyance of realty allegedly made by bankrupt in payment of wages due assignee and in repayment of loans to bankrupt, on ground that assignments and conveyance were made to hinder, delay and defraud creditors of bankrupt.

3. Trial ⚷45(1)

In action to quiet title wherein defendant sought to set aside assignments of certain accounts, offer of proof to the effect that for the sake of the record "I desire to make an offer to counsel and the trustee in bankruptcy that" assignee would accept a certain sum for the accounts was deficient in form and substance.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action to quiet title by Avril Walker against Hubert F. Laugharn, as trustee in bankruptcy of Dr. R. H. Gerber, a bankrupt, wherein defendant filed a cross-complaint. From a judgment for the defendant and cross-complainant, the plaintiff and cross-defendant appeals.

Affirmed.

Gerard Remington, of Los Angeles, for appellant.

Edward K. Zuckerman, Arthur Edmund Stein, and Joseph I. Siegel, all of Los Angeles, for respondent.

GRIFFIN, Justice.

This is an action to quiet title to certain real and personal property commenced by plaintiff and appellant Avril Walker against defendant and respondent Laugharn, as trustee in bankruptcy of Dr. R. H. Gerber, a bankrupt. Respondent answered and also filed a cross-complaint alleging that the purchase and assignment to appellant of the property involved was made to hinder, delay and defraud the creditors of the bankrupt, and was fraudulent and void, and prayed that the property be declared to be an asset of the bankrupt estate. The court rendered judgment in favor of defendant and cross-complainant, and plaintiff and cross-defendant has appealed.

The property in dispute was: (1) Assignment to appellant of various accounts of the face value of approximately $10,000 due to Dr. Gerber. This assignment was claimed to have been made in August, 1936, as security for past-due wages and rents due appellant. (2) One Texas & Pacific certificate claimed to have been purchased by appellant on June 22, 1936, for the price of $1,017. (3) Mexican bonds claimed to have been delivered to her in January, 1935, as the result of an agreement made with Dr. Gerber in 1931 to repay a loan of $400 made by her to him. (4) Real property consisting of a six-room house on Irolo street known, and hereinafter referred to, as Irolo street house.

The court found that on May 18, 1937, Dr. Gerber was adjudicated a bankrupt upon a voluntary petition; that the assets of his estate were only nominal or of no value at all, and that the liabilities were approximately $48,000; that for a long time prior to 1931, he was and now is indebted to various and sundry creditors in said sum; that Gerber was the actual owner and possessor of the properties above mentioned at the time that certain of the indebtedness above mentioned was incurred; that in contemplation of legal action being taken on said indebtedness and for the purpose of placing said real and personal property beyond the reach of attachment or execution or other legal process by his creditors, and in order to hinder, delay, and defraud his said creditors and to prevent the application of said assets and properties to the satisfaction of the claims of said creditors, the said Gerber and the appellant and each of them conspired together and with each other to wilfully defraud the creditors of said Gerber by concealing and transferring the assets and said properties, real and personal, of said Gerber; that pursuant to said conspiracies and in furtherance thereof, various and sundry sums of money, comprising all of the earnings of said Gerber, were so transferred and placed in the hands of the appellant over a period of several years and while said Gerber was indebted to certain creditors who are now creditors of his bankrupt estate, with the intention to defraud the creditors of Gerber; that there was no actual change in possession of said property and said properties remained in the actual possession and control of said Gerber; and that said purported transfers are invalid and fraudulent.

Appellant contends that there was no sufficient evidence to justify the court's judgment that the above-mentioned transactions were made to delay or defraud creditors of the bankrupt. Exception is also taken to the court's ruling on the admissibility of certain evidence. The following is a summary of certain facts and admissions as testified to by Gerber and appellant Walker. Prior to 1931 appellant, an unmarried woman was employed at a salary of $19 per week. In November, 1931, she went to work for the bankrupt, Dr. Gerber, as housekeeper and office assistant, and gave up her former position. She worked for Gerber for 14 months at a salary of $10 per month plus carfare and expenses. However, none of this money was actually paid to her during this 14 months' period. At about this same time she claims to have loaned Gerber $400 in cash, which she claims to have saved from her work, but which money she did not keep in any bank or safety deposit box but kept it home where she boarded. In return for this $400 loan it is claimed that Gerber promised to give her certain Mexican bonds when he obtained them. However, he didn't obtain them until several years later in 1935, when the bonds were claimed to have been given her. The bonds are part of the property in question.

The Irolo street property was acquired at about this same time in 1931 by the following transaction: The corporation in which Gerber, his son, and a Mr. Sunberg were interested and apparently owned, was the owner of lot one in Westwood Village. This lot was exchanged for Westwood lot two, which exchange was made on an even basis. As part of this same transaction, lot two was transferred to appellant, who borrowed $700 on it and gave the $700 to Gerber. Supposedly, Gerber then paid the $700 to Sunberg, or the corporation, as full payment for lot one. Hence, appellant then had the equity in lot two for nothing and had paid for lot one from the money borrowed on lot two. Lot two was shortly thereafter used to buy the Irolo street property and was used as a down payment thereon of $1,000. Title to the Irolo street property was taken in the name of appellant Avril Walker. The $700 mortgage on lot two was assumed and later paid off, supposedly by appellant, but out of the bank account discussed later herein.

Appellant claims at this point to have established the following considerations from these transactions: that since lot two was traded for $1000 and only $700 was owed on it, a $300 profit was made. Of this, Gerber made $175, which he allowed appellant to keep, since he supposedly owed her this amount, i. e., 14 months' wages at $10 per month, plus $35 expenses for carfare, etc. Appellant also was allowed to keep the other $125. Hence, the $300 equity supposedly belonged to appellant and not to Gerber, and formed the principal basis of her claim that she, and not Gerber, purchased the Irolo street property. That property was admittedly purchased at the suggestion of Gerber. The purchase was entirely engineered by him and he attended to the business end of it. He stated that he wanted the property as a home for himself and his daughter and for an office. The only amount that actually went into the purchase of the Irolo street property was the value of Westwood lot two, and escrow charges in a small amount. The doctor's testimony on this point obviously showed that he considered and still considers the house as belonging to him.

After the purchase of the home and since 1931, the method of the maintenance of bank accounts and the conducting of the business of Gerber is very illuminating. Gerber, at the time of trial, claimed to be still conducting a medical office. He was a "Natureopathic" physician. In 1931, immediately after the Irolo street house was purchased, Gerber had his own bank account and paid bills on this house from this account. Shortly thereafter, appellant opened a bank account under the name of Ametropathic Institute at the suggestion of Gerber. This account continued until 1933, when appellant, at Gerber's suggestion, changed the account to the name of A. Walker. All funds Gerber received from his practice or otherwise were deposited in this account. All of his bills were paid from this account and whenever he wanted money she gave him a check on the account. Practically all checks written on this account were written for Gerber. Appellant claimed she borrowed money from various sources in small sums from time to time and these sums were repaid from the bank account. Payments on the mortgage on the Irolo street property and taxes thereon were made directly from this account. Many of the checks were made out by Gerber and merely signed by appellant "A. Walker". Appellant no doubt knew of Gerber's indebtedness during at least a portion of the time she carried the bank account. She admittedly loaned Gerber all of the money he wanted from the account and allowed all moneys due her from him to accumulate. She never received any payments at all in cash for her wages or salary, but the same were merely deemed to have been paid because of the fact that she could draw on the bank account. Supposedly records were kept as to what Gerber owed her but the evidence indicates that these records were destroyed except the last account, which account was prepared just prior to bankruptcy, and which formed the basis for setting forth the amount of his indebtedness to her.

The Texas & Pacific certificate in question was purchased from this same bank account by a check in the handwriting of Gerber and purchased though an account he carried through Hutton & Company, brokers. This bond was bought at his suggestion. He admitted that he had previously dealt in these same bonds for himself and had made a profit. She knew nothing of the bond or its value when purchasing the same and merely followed his suggestion. The certificate of this stock was kept in a safety deposit box by appellant but it was admitted that the daughter of Gerber had access to the box. The Mexican bonds which Gerber supposedly gave appellant were kept in this same box. The assignment of the accounts receivable which were supposed to be held as security for money due appellant from the bankrupt, completes the transfers involved in this action, and is significant mostly in that it constituted a complete concealment and transfer by Gerber of all of his assets to appellant so as to conceal the same from his creditors. Just how appellant could accumulate these holdings on $10 per month plus $35 expenses and carfare and still repay the sums claimed to have been borrowed and yet be a creditor of the bankrupt in the sum of $2,500, is not only astonishing to say the least, but is a great source of solace and a real inspiration to those desiring to accumulate a modest quantum of worldly goods without regard to creditors.

[1, 2] The inconsistencies in the testimony of appellant and the bankrupt as well as the inherent improbability of their testimony and the glaring intentions of fraud seem too apparent to require argument. From the very nature of the action, direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties. The inference of fraud drawn by the trial court from the irregularities of the instant transactions is reasonable. Adams v. Bell, 5 Cal.2d 697, 56 P.2d 208; Cioli v. Kenourgios, 59 Cal.App. 690, 697, 211 P. 838; Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350.

[3] We have carefully examined the claimed errors of the trial court in striking portions of certain answers given by appellant; in sustaining objections to certain other questions; and in sustaining an objection to certain testimony in reference to the actual value of the assigned accounts. The offer of proof in that regard was in this form: "Mr. Remington: Well, for the sake of the record, Your Honor, at this time I desire to make an offer to counsel and the trustee in bankruptcy that Miss Walker will accept $500 for the accounts." It becomes immediately apparent that the offer of proof was deficient, not only as to form but as to substance, and the record in respect to the claimed errors justifies the conclusion that appellant's claim in this respect is unfounded and without merit.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

44 Cal.App.2d 551

RICHARDS et al. v. PACIFIC SOUTHWEST DISCOUNT CORPORATION.

Civ. 2639.

District Court of Appeal, Fourth District of California.

April 28, 1941.

1. Action ⚿6

Trial court's finding that plaintiffs were not entitled to recover on their main cause of action for breach of contract necessarily precluded a finding on count for declaratory relief.

2. Corporations ⚿155(4)

In absence of an agreement to the contrary, the owner and holder of the legal title to stock in a corporation is entitled to its earnings.

3. Corporations ⚿155(4)

Under an executory contract for the sale of stock in a corporation, the buyer is not entitled to the dividends thereon until the legal title actually passes, in absence of an agreement to the contrary.

4. Evidence ⚿65

In entering into an executory written contract for the purchase and sale of all stock of radio broadcasting company, it would be presumed that the contracting parties dealt with each other with knowledge of the law relative to the sale of radio broadcasting stations. Communications Act of 1934, § 310, 47 U.S.C.A. § 310.

5. Corporations ⚿155(4)

A written contract for purchase of all stock of radio broadcasting company, providing that consummation of the contract was dependent on approval of the Federal Communications Commission of transfer of ownership of broadcasting station, and that the transaction should be escrowed until date when Commission gave approval of transfer, was an "executory contract", and title to the stock remained in the seller who was entitled to dividends pending the escrow, and buyer was not entitled to any part of the earnings of the stock prior to the date contract was entered into notwithstanding that contract provided that earnings of corporation between date of contract and closing of escrow belonged to the seller, since such fact created no implication that the earnings of the stock prior to the date of the contract belonged to the buyer. Communications Act of 1934, § 310, 47 U.S.C.A. § 310.

See Words and Phrases, Permanent Edition, for all other definitions of "Executory Contract".

6. Corporations ⚿152

Where there is no proof that power of board of directors of a corporation is limited, and in absence of a showing of fraud or bad faith, the disposition of the surplus funds of the corporation by way of dividends rests in the sound discretion of the board of directors.

7. Corporations ⚿152

So long as the board of directors of a corporation acts honestly, its power over the disposition of surplus funds of corporation by way of dividends is absolute, and the burden of proving bad faith is on those contending otherwise.

8. Corporations ⚿121(5)

In action by buyer against seller for breach of executory written contract for purchase of all stock of radio broadcasting company, evidence justified trial judge in drawing inference that directors of corporation acted in good faith and in the ordinary course of business in reducing the rate of depreciation and in declaring dividends prior to effective date of the contract.

9. Corporations ⚿119

Where no rate of depreciation of company's property was mentioned in executory written contract for the sale of all stock of radio broadcasting company, and contract was silent on the business and accounting practices to be used in the fixation of earnings and surplus available to stockholders for dividends prior to consummation of contract, and contract expressly provided that seller might make such changes in the financial conditions and essential operating properties of the company as might occur in the ordinary course of business, the contract did not incorporate the rate of depreciation in effect on the date of the contract, and did not preclude reduction in rate of depreciation for purposes of declaring dividends.

10. Corporations ⚿116

The fact that buyer under executory written contract for the purchase of all stock of radio broadcasting company, after consummation of the contract, discarded much of the equipment and replaced it with new equipment did not indicate that equipment discarded had not a value as set forth in seller's financial statement prior to the time that the parties entered into the contract.

11. Corporations ⚷121(5)

In action by buyer against seller for breach of executory written contract for the sale of all stock of radio broadcasting company, evidence justified trial court in drawing conclusion that seller substantially performed its contract, and delivered properties and equipment, including contracts and other matters, in accordance with terms of financial statement.

12. Appeal and error ⚷1008(3)

The construction of unambiguous executory written contract for the purchase and sale of all stock of radio broadcasting company, was peculiarly within the province of the trial court in action for breach of the contract.

13. Contracts ⚷147(1)

The sole purpose of every rule of interpretation, such as a rule of interpretation for a contract, is to ascertain the intention of the parties. Civ.Code, § 1636.

14. Appeal and error ⚷1008(3)

Where the terms of a contract are clear and certain, its meaning and effect and the relation of the parties to it thereby become a "question of law" to be decided by the trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

15. Appeal and error ⚷1008(3)

The initial power to construe a contract and determine its true meaning is in the trial judge, and if the District Court of Appeal is satisfied that the construction which the trial judge placed on the contract is neither arbitrary nor unreasonable, but is a fair interpretation of the language used, that construction will be accepted on appeal.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by George A. Richards and another against the Pacific Southwest Discount Corporation for breach of contract and for declaratory relief. From a judgment in favor of the defendant, the plaintiffs appeal.

Judgment affirmed.

Flint & Mackay, Wesley L. Nutten, Jr., and Maurice G. Covington, all of Los Angeles, for appellants.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for respondent.

CONWAY, Justice pro tem.

This is an appeal by plaintiffs and appellants from a judgment in favor of the defendant Pacific Southwest Discount Corporation, respondent herein.

[1] The complaint alleged breach of contract and prayed for judgment in the sum of $5,057.59, with interest. Plaintiffs also set up a cause of action for declaratory relief which the court denied for the obvious reason that its findings to the effect that plaintiffs were not entitled to recover on the main cause of action for breach of contract necessarily precluded a finding on the count for declaratory relief. We shall set forth substantially the covenants and conditions of the contract essential to a proper determination of the questions involved herein.

On July 23, 1936, George A. Richards, as purchaser, and the Beverly Hills Broadcasting Corporation, as seller, entered into a written contract for the purchase and sale of all the capital stock of said corporation for the sum of $125,000. Respondent Pacific Southwest Discount Corporation owned all of the capital stock of the appellant corporation and on August 5, 1936, ratified and confirmed in writing the contract of purchase and sale and agreed to be bound by all of the terms, covenants and conditions thereof and, for the purposes of this appeal, we may consider the appellant George A. Richards as the buyer and respondent as the seller under the contract, each subject to the obligations and entitled to the benefits therein provided. The parties agreed to file an application with the Federal Communications Commission for the transfer of the ownership and control of the broadcasting station to the buyer, and agreed that "the consummation of this contract" is dependent upon such approval of the commission, which was given on June 8, 1937. The transaction was escrowed. It was agreed that there would be no cash withdrawals from the corporation except dividends, other than in the ordinary course of business of the corporation, and that no changes should occur in the financial conditions or essential operating properties of the corporation between the date of the contract and the date of closing the escrow, the latter date being admittedly June 8, 1937, except such changes as might occur in the ordinary course of business. It was expressly agreed that the earnings of the broadcasting station between the date of the signing of the contract and the date of the closing of the escrow belonged to the seller, and the respondent agreed to deliver to the buyer "assets and liabilities reflecting net worth not less than shown in the balance sheet, exhibit A, as of June 30, 1936". Further, it was agreed that no changes should be made in the capital structure of the corporation. The foregoing statement substantially sets forth the pertinent parts of the contract requisite to a proper determination of the legal points involved. In the consideration of this appeal it should be noted that no question of fraud, bad faith or kindred matters are involved, and the sole questions presented concern the legal construction of the contract.

Ten thousand dollars was deposited in the escrow upon the date of the signing of the contract and the balance of the purchase price, $115,000, was paid and respondent claims it delivered to appellant the stock and assets of the corporation of a value corresponding to the net worth of the amount of the sum paid as set forth in the balance sheet of the corporation as of June 30, 1936. The trial court found that the respondent has fully performed its contract and satisfied the requirements thereunder.

It is stipulated that the earnings of the Beverly Hills Broadcasting Company from July 1, 1936, to July 23, 1936, both dates inclusive, amounted to $1,270.82, and that this sum was retained by the seller, respondent herein, and distributed as dividends to its stockholders. The ownership of these earnings is the first question before us for decision, and that issue necessarily depends upon a judicial construction of the contract, especially where counsel for both parties contend that the contract is clear and unambiguous on its face, although each argues to opposite conclusions. The instrument itself is silent on the ownership of the earnings during this period. Appellant takes the position that the contract resulted in the present sale of the assets and properties of the corporation and, under such a construction, the earnings for this 23-day period belong to the buyer as earnings. He claims that section 15 of the contract, which provides that earnings of the corporation between the date of the contract, July 23, 1936, and the admitted date of the closing of the escrow, June 8, 1937, are the property of the seller to be distributed as dividends by the seller to its stockholders, shown by inference that it was the intention of the parties that the earnings between July 1st and July 23rd should belong to the appellant. In this connection he construes the contract to provide for a present sale of the assets subject only to the approval of the Federal Communications Commission.

[2-4] Respondent urges that paragraph 15 of the contract is inconsistent with such a theory and that a proper construction of the contract compels the conclusion that the stock and all its earnings remain in the seller until the Federal Communications Commission approves the transaction and the escrow is closed. In other words, the approval of the Federal Communications Commission was a condition precedent to the actual consummation of the contract. It is, of course, clear that in the absence of an agreement to the contrary, the owner and holder of the legal title to the stock of a corporation is entitled to its earnings. Under an executory contract for the sale of stock of a corporation the buyer is not entitled to the dividends thereon until the legal title actually passes, in the absence of an agreement to the contrary. Gilfallan v. Gilfallan, 168 Cal. 23, 141 P. 623, Ann. Cas.1915D, 784. It must be presumed that the contracting parties dealt with each other with knowledge of the law relative to the sale of radio broadcasting stations. The Communications Act of 1934, Title 47, § 310, U.S.C.A., provides that no license or any rights granted therein shall be transferred, assigned, or in any manner disposed of until the Federal Communications Commission shall first decide the transfer is in the public interest, and until said commission shall give its consent in writing to the change. This express provision in the contract for the subsequent approval of the Federal Communications Commission strongly indicates the executory nature of the transaction. The contract provides for the filing of an application for the ownership and control of the broadcasting station with the Federal Communications Commission, and obligates both contracting parties to execute and file all

necessary documents in accordance with the contemplated transfer if and when made. It further provides that in the event no action was taken by the commission prior to July 1, 1937, either party may declare the contract ended and the parties returned to status quo. Subdivision (e) of the contract particularly states that the "consummation" of the contract depends upon the approval of the commission and in the event of disapproval by the commission that no further obligations exist upon either party, and the contract is clear to the effect that in the event of non-approval by the commission that all rights and obligations under the written instrument were terminated without damage to anyone.

[5] We are in accord with the construction placed upon the contract by the trial judge that the contract is executory in character, that the title to the stock remained in the seller who was entitled to dividends declared pending the escrow, and that the buyer was not entitled to any part of the earnings of the stock from July 1 to July 23, 1936. The fact that the contract provides that the earnings of the corporation between the date of the contract and the closing of the escrow belong to the seller creates no implication that the earnings of the stock prior to that time belong to the purchaser.

The second point urged for reversal of the judgment involves the legal right of the corporation to reduce the percentage of depreciation on its assets in determining its earnings from July 1, 1936, to June 8, 1937, the date of the closing of the escrow. It is, of course, fundamental that certain reservations for depreciation must be established before the true earnings of any corporation may be ascertained. From July 1, 1932, until and including the date of the contract, the percentage of depreciation used by the corporation was as follows: 16⅔ per cent on broadcasting building; 10 per cent on furniture and equipment; and 15 per cent on all other assets. This rate continued until August 1, 1936, when the percentage of depreciation was reduced by the directors of the broadcasting corporation as follows: 6⅔ per cent on broadcasting building and equipment; 4 per cent on furniture and fixtures; and 6 per cent on all other assets. It is admitted that the change in the percentage rate of depreciation above outlined increased the earnings of the corporation from July 1, 1936, to June 7, 1937, in the sum of $3,791.05, which amount was distributed by the seller to its stockholders as dividends.

Appellants claim that subsection (c) of paragraph 15 of the contract which provides "that there will have been no changes in the financial conditions or essential operating properties of the corporation as reflected by the balance sheet as of June 30, 1930" prohibits the seller from reducing the percentage rate of depreciation of the properties and that respondent breached the contract in this respect. Appellant does not question respondent's right to the earnings of the broadcasting station from the date of the signing of the contract up to and including June 7, 1937, but challenges respondent's right to increase these earnings by a reduction in the rate of depreciation of its properties. No charge of fraud or deceit is made against the directors of the corporation in this respect and the sole issue is whether there was sufficient evidence presented at the trial from which the court could reasonably draw the inference that respondent was entitled, under the circumstances presented, and in the ordinary course of business, to reduce the rate of depreciation, for, in such case, it is apparent that there would have been no breach of contract.

Respondent maintains that appellants had no concern with the rate of depreciation charged by the board of directors of the seller corporation prior to the transfer of the stock and before appellants became the legal owners thereof. Respondent argues that under the terms of the contract it was only required to deliver corporate stock representing a radio broadcasting station possessing assets and essential operating properties of not less than the value of those assets set forth in the balance sheet as of June 30, 1936, and when the corporation actually delivered the capital stock and assets equivalent to those contained in the balance sheet, it fully performed its contract. The evidence shows without contradiction that after appellant obtained control of the properties he continued to use the same rate of depreciation set by respondent on August 1, 1936, and in fact appellants' federal income tax returns for 1937 show that he used a lower rate than that established by respondent, of which he here complains. We feel this was a convincing circumstance which the court undoubtedly considered in showing the good faith of the directors of the respondent corporation in making the reduction.

[6-9] Where there is no proof that the power of the board of directors of a corporation is limited or restrained, and in the absence of a showing of fraud or bad faith, the disposition of the surplus funds of the corporation rests in the sound discretion of the board of directors of the corporation. So long as they act honestly, their power over the disposition of such funds by way of dividends is absolute and the burden of proving bad faith was upon the appellants herein. Mulcahy v. Hibernia Sav. & Loan Society, 144 Cal. 219, 77 P. 910. From a review of the transcript, we are satisfied that there was substantial evidence before the trial judge from which he was justified in drawing the inference that the directors of the corporation acted in good faith and in the ordinary course of business in reducing the rate of depreciation and in the declaration of the dividends complained of. The testimony of the witness Moore, a certified accountant, established that the general practice in the depreciation of assets required the directors to make a periodical survey of the amount that has been charged off over a period of years, and to compare the depreciated value to the expected remaining life of the asset, and to either increase or decrease the rate to be used from that time on; and to amortize the unamortized portion of the estate over the remaining life. This yardstick was evidently accepted and adopted by the appellants' new board of directors who continued in effect the rate of depreciation theretofore set by the directors of the respondent corporation. We are unable to agree with appellants' contention that the contract incorporates the rate of depreciation in effect on the date of the contract. No rate of depreciation was mentioned in any respect in the contract and it was silent upon the business and accounting practices to be used in the fixation of earnings and surplus available for dividends. The contract expressly provides that respondent may make such changes in the financial conditions and essential operating properties of the corporation as may occur in the ordinary course of business.

Appellant in his attack on the rate of depreciation fixed by the respondent corporation takes each item separately, consisting of the broadcasting building, equipment, antenna and towers, furniture and Neon signs, and compares that rate with the rate which he believes should have been fixed by the directors.

[10] Considerable evidence was introduced by each party supporting their respective theories as to the actual rate of depreciation which should have been charged off by the board of directors on August 8, 1936, but it would needlessly prolong this opinion to review it here. For instance, appellants have misconstrued the facts with reference to the depreciation of the building when they argue that by use of 15 per cent per annum depreciation, the value of the building on September 30, 1937, would be practically zero. They are unwarranted in this conclusion for the reason that in this particular case the ground lease specifically recites that the building and improvements situated upon the property remained personal property and were owned by the lessee and are not a part of the lessor's estate. Also, appellants have endeavored to show that as much of the broadcasting equipment was junked, the larger rate of depreciation should have been used. There is conflicting evidence on this point and a review of the same shows that the broadcasting equipment was sufficient to earn a very substantial profit and that the changes made by appellant were prompted by a desire to fashion the new studio to his own tastes. Undoubtedly, in the ordinary course of the operation of a broadcasting station, more and new streamlined equipment is produced and it is undoubtedly the natural desire of every station to keep abreast of the times by a revamping of the rapidly changing equipment. This, however, does not indicate that the equipment discarded had not a value as set forth in the financial statement as of June 30, 1936.

[11, 12] A review of the evidence introduced by both sides convinces us that the most that can be said of the action of the board of directors in depreciating the properties complained of is either supported or condemned in accordance with the divergent viewpoints of different public accountants as to what constitutes good accounting practices. Appellant has not charged nor proven, and the court has not found that any fraud or deceit or bad faith of any character has existed, and we are satisfied that the court was justified in drawing the conclusion that respondent had substantially performed its contract and

had delivered properties and equipment, including contracts and other matters, in accordance with the terms of the financial statement as of June 30, 1936. The construction of this contract, which contained no ambiguities, was peculiarly within the province of the trial court. Western Industries Co. v. Mason Malt Whiskey Distilling Co., 56 Cal.App. 355, 205 P. 466.

[13-15] The sole purpose of every rule of interpretation is to ascertain the intention of the parties. Civ.Code § 1636; McPherson v. Great Western Milling Co., 44 Cal.App. 491, 186 P. 803. Where the terms of a contract are clear and certain, its meaning and effect and the relation of the parties to it thereby become a question of law to be decided by the trial court. Mickel v. Althouse, 38 Cal.App. 321, 176 P. 51. The initial power to construe a contract and determine its true meaning is in the trial judge. If we are satisfied that the construction which he has placed upon it is neither arbitrary nor unreasonable but is a fair interpretation of the language used, it will be accepted upon appeal. George Herz & Co. v. Solt, 23 Cal.App.2d 178, at pages 181, 182, 72 P.2d 251. In accordance with this settled law, we are of the opinion that the construction of the trial court placed upon this contract was reasonable and that the judgment should be affirmed.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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44 Cal.App.2d 596

In re O'NEILL'S ESTATE.

COUNTY FIRST NAT. BANK v. O'NEILL.

Civ. 11632.

District Court of Appeal, First District, Division 1, California.

April 30, 1941.

1. Executors and administrators 🔑314(12)

The Superior Court's orders, approving administratrix' second supplemental and final account, and adjudging that assignee of interest in estate was not entitled to share therein, were not appealable, but are reviewable on appeal from subsequent decree of final distribution based on fact findings, conclusions of law, and decree rendered on hearing of second supplemental account.

2. Executors and administrators 🔑314(12)

Where bank, appealing from Superior Court's decree, settling administratrix' third supplemental and final account, ordering final distribution of deceased's estate, and adjudging bank not entitled to share therein as assignee of its debtor's interest, on basis of fact findings, conclusions of law, and decree rendered on previous hearing of administratrix' second supplemental account, did not bring up record of evidence on either hearing by bill of exceptions or otherwise, District Court of Appeal must presume that evidence introduced at previous hearing was sufficient to support distribution decree and that Superior Court disregarded incompetent evidence.

3. Executors and administrators 🔑314(11)

An administratrix' procedure in procuring decree, settling her third supplemental and final account, finally distributing deceased's estate, and adjudging bank not entitled to share therein as assignee of its debtor's interest, on basis of fact findings, conclusions of law, and decree rendered on hearing of second supplemental account, approved by decree not distributing estate, was not improper or prejudicial to bank, particularly in view of nearly two years' lapse of time between hearings and orders and necessity of passing on supplemental accounts.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

In the matter of the estate of Frank O'Neill, deceased. From a decree of settlement of the third supplemental and final account of Mary B. O'Neill, administratrix of the estate, and decree of final distribution adjudging that the County First National Bank was not entitled to share in the estate as assignee of the interest of John J. O'Neill, the bank appeals.

Affirmed.

Harry J. Bias and William A. Deans, both of Santa Cruz, for appellant.

James J. Harrington and Byron Coleman, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal by the County First National Bank, assignee of the interest of John J. O'Neill in the estate of Frank O'Neill of which he was formerly administrator. The appeal, taken on the judgment roll, is from the Decree of Settlement of Third Supplemental and Final Account and Decree of Final Distribution wherein it was held that appellant was not entitled to share in the estate.

The basis of the decision denying appellant any rights by virtue of its assignment was that the assignor, who became indebted to the bank while acting as administrator of decedent's estate, had, before his removal, appropriated to his personal use property of the value of $79,848.41, a sum in excess of his share of the estate.

Appellant filed objections to the Second Supplemental and Final Account and Petition for Final Distribution of the respondent administratrix (successor of its assignor) wherein it urged its claim as assignee. After hearing, the court on May 25, 1937, made findings of fact and conclusions of law to the effect that appellant was not entitled to share in the estate and that the administratrix was entitled to have the account settled and the petition for distribution granted. A decree was entered approving the account and adjudging that appellant was not entitled by virtue of the assignment to share in the estate. The decree did not distribute the estate although the findings of fact and conclusions of law had ordered the petition for final distribution granted.

A Third Supplemental and Final Account was subsequently filed, accompanied by a report stating that the estate was in a condition to be closed and that distribution should be made. However, no separate instrument entitled "Petition for Distribution" was filed. A time was fixed for hearing the account and an order made setting the same time for a hearing upon the previous petition for distribution. Appellant filed objections averring that "this last petition" was not properly before the court for the reason that the issue had been previously determined. On the date of the hearing a minute order was made to the effect that the account was approved and that the petition for distribution and the objections thereto "are taken under advisement". The decree rendered some time thereafter recites that it was stipulated at the hearing that the findings of fact, conclusions of law and decree theretofore rendered on the hearing of the Second Supplemental Account should be considered the findings, conclusions and decree to the objections filed by plaintiff to the Third Supplemental Account. The effect of this last decree dated April 13, 1939, is a judgment that appellant has no interest in the estate. Both decrees, the 1937 and the 1939, were adverse to appellant's objection to distribution. The appeal herein is from the 1939 order but the record does not include evidence of the proceedings of either occasion.

Appellant does not contend that the court would be without authority to render a decree of distribution based on the findings of 1937, nor that such decree would be favorable to it, nor does it contend that the decree based on such findings was separately appealable. On the contrary, it contends that such decree would be reviewable on appeal from the decree of distribution which should have been entered on the findings of 1937 *without further hearing*. The contention of appellant is that the 1939 decree was in excess of the court's jurisdiction and therefore void. The record discloses that evidence was taken on the 1939 proceeding relative to supplementary accounts, etc., but there is no record that such evidence related to appellant's objection to distribution. Conceding that a new hearing should not have been held so far as appellant is concerned, in the absence of proof that further evidence was taken over its objections, from a factual standpoint appellant was not aggrieved. Accordingly it is only the procedure adopted that could have prejudiced appellant, the contention being that respondent deprived it "of an effective appeal by the strategy of holding two hearings on one petition".

[1] The orders of 1937, based upon a hearing in 1936 of the Second Supplemental Account were not appealable but are reviewable on appeal from the 1939 decree of final distribution. Estate of Wilson, 199 Cal. 199, 248 P. 666; Estate of Grussing, 15 Cal.App.2d 11, 59 P.2d 152. Assuming that evidence on the merits of appellant's objections was actually taken at the 1939 hearing, appellant could contend, and perhaps successfully, that in determining the sufficiency or insufficiency of the evidence this court should be limited to the previous hearing. Appellant states that the proceedings of 1939 were not

written up, but the record indicates that no additional evidence was taken on its claim.

[2] Both decrees are adverse to the objector. Appellant has not by bill of exceptions or otherwise brought up a record of evidence on either hearing. In the absence of a record, it must be presumed that the evidence introduced at the first hearing was sufficient to support the decree of distribution entered, and that the court disregarded incompetent evidence. Estate of O'Hare, 178 Cal. 114, 172 P. 385; De Acosta v. De Acosta, 218 Cal. 176, 22 P. 2d 1; Lieber v. Rigby, 34 Cal.App.2d 582, 94 P.2d 49; Watt v. Copeland, 92 Cal.App. 161, 267 P. 928.

[3] Under the circumstances of this proceeding, particularly the lapse of time between hearings and orders, and the necessity of passing upon supplemental accounts, it may not be said that the procedure was improper or that appellant has been prejudiced except through its own failure to present a proper record on this appeal.

The decree appealed from is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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44 Cal.App.2d 544

MOSESIAN v. PARKER et al.

Civ. 2587.

District Court of Appeal, Fourth District, California.

April 28, 1941.

1. Mandamus 🔑187(9)

Where evidence in hearing before State Director of Agriculture on application for issuance of produce dealer's and broker's licenses fully supported director's finding of applicant's financial irresponsibility and bad faith and did not support trial court's finding, based on same evidence, in mandamus proceeding to compel issuance of licenses, that applicant satisfied director of her responsibility and good faith, District Court of Appeal is not bound to uphold trial court's judgment directing issuance of peremptory writ. St.1933, p. 274, as amended.

2. Mandamus 🔑168(2)

To furnish basis for issuance of writ of mandamus, petitioner must show that respondents owe some duty to do what petition asks that they be required to do.

3. Mandamus 🔑71, 72

A writ of mandate may not issue to compel an officer or board to act in any particular way, except in performance of ministerial duties, nor to control exercise of discretion, unless abused.

4. Mandamus 🔑168(4)

In proceeding for writ of mandate, requiring State Director of Agriculture to issue produce dealer's and broker's licenses to petitioner after denial of such licenses to her husband because of violations of statute by corporate licensee, in which he owned controlling interest, evidence *held* insufficient to support trial court's finding that petitioner was not financially irresponsible nor guilty of bad faith in seeking to carry on such business. St.1933, p. 274, as amended; St. 1939, pp. 2328, 2332, §§ 1263, 1269.

5. Husband and wife 🔑259

In wife's proceeding for writ of mandate, requiring State Director of Agriculture to issue produce dealer's and broker's licenses to her after director's denial of her husband's application for similar licenses because of violations of statute by corporate licensee in which he owned controlling interest, whether such business and earnings therefrom would become community property depends largely on facts. St.1933, p. 274, as amended; St.1939, p. 2332, § 1269.

6. Husband and wife 🔑259

Businesses, such as those of produce dealer and broker, and profits therefrom, constituting property acquired after owner's marriage, are "community property". Civ. Code, §§ 162–164.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

7. Husband and wife 🔑265

The respective interests of husband and wife in community property are existing and equal, subject to husband's dominent right to manage and control such property. Civ. Code, §§ 161a, 172, 172a.

8. Husband and wife ⚷265

The husband of woman granted licenses to engage in produce dealer and broker businesses, not constituting her separate property, would have not only equal and existing interest therein, but complete management and control thereof, subject only to statutory restrictions on disposition thereof. Civ. Code, §§ 161a, 172, 172a; Code Civ.Proc. §§ 1811–1821.

9. Husband and wife ⚷249

Generally, money borrowed on personal security by husband or wife is "community property".

10. Factors ⚷2

A wife, having no funds or property of her own before borrowing money on her notes and life insurance policy, nor any assets over and above her liabilities, was without financial responsibility sufficient to entitle her to licenses to engage in business of produce dealer and broker. St.1933, p. 274, as amended; St.1939, p. 2328, § 1263.

11. Factors ⚷2

Where husband had control and management of funds and property, obtained by wife applying for produce dealer's and broker's licenses after State Director of Agriculture denied similar licenses to husband because of his previous failure to pay producers for their products, wife was not entitled to such licenses as purpose of statutory provisions respecting them was primarily to protect producers and make sure that they should be paid for their products by dealers and brokers. St.1933, p. 274, as amended; St.1939, pp. 2328, 2332, §§ 1263, 1269.

12. Mandamus ⚷87

The State Director of Agriculture cannot be compelled by mandamus to issue produce dealer's and broker's licenses to financially irresponsible wife, whose husband has just been denied similar licenses because of his violations of statute by failing to pay producers for their agricultural commodities. St.1933, p. 274, as amended; St.1939, pp. 2328, 2332, §§ 1263, 1269.

Appeal from Superior Court, Fresno, County; Ernest Klette, Judge.

Proceeding by Marion Mosesian against W. B. Parker, as State Director of Agriculture, and others, for a writ of mandate requiring respondent Parker to issue produce dealer's and broker's licenses to petitioner. From a judgment directing issuance of a peremptory writ, respondents appeal.

Reversed.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for appellants.

L. Kenneth Say, of Fresno, for respondent.

GRIFFIN, Justice.

This is an appeal from a judgment directing that a peremptory writ of mandate issue requiring respondent and appellant W. B. Parker, as Director of Agriculture of the state of California, to issue to the petitioner and respondent herein licenses to act as a produce dealer and broker under the provisions of chapter 6, § 1261 et seq., division VI of the Agricultural Code, St. 1933, p. 274, as amended.

The matter was presented to the trial court upon written stipulation and a transcript of proceedings had before the Director of Agriculture. On January 31, 1940, following a hearing before the Director of Agriculture, the licenses of the Moco Fruit Company, Inc., as a produce dealer and broker under chapter 6 of division VI of the Agricultural Code were suspended for violations of certain provisions of that chapter, in that such corporation failed and refused to pay producer creditors being about 40 in all, for farm products in an amount exceeding $37,000. Mr. S. P. Mosesian was at that time the president and operating manager of, and owner of the controlling interest in the Moco Fruit Company, Inc., and at all times completely dominated its affairs, and the company was in fact his alter ego. Thereafter, he made applications for similar licenses as an individual, which applications, after hearing regularly had, were denied by the Director of Agriculture on July 16, 1940. Mosesian had been declared a bankrupt.

Thereafter, the petitioner herein, Marion Mosesian, his wife, filed applications on August 8, 1940, for similar licenses in her individual right, doing business under the firm name and style of Sun-Beam Fruit Company. No certificate to do business under this name was ever filed. A hearing was regularly had on these applications and the Director of Agriculture denied the same on August 22, 1940. This petition for writ of mandate to compel the Director of Agriculture to issue such licenses to her followed.

The evidence is not to any extent contradictory, and aside from the general propositions that the evidence is insufficient to sustain certain findings and that the findings do not support the judgment, the other essential question sought to be determined upon this appeal is whether the Director of Agriculture may be compelled to issue licenses to a wife to engage in business as a produce dealer and broker where such licenses have been denied the husband for violation of the law above referred to. The evidence considered by the Director of Agriculture in denying the applications and by the trial court in considering the petition for a writ of mandate and in ordering that the permits issue, may be thus summarized: It is clear and undisputed that at all the times here involved petitioner was married and living with her husband. The record is wholly devoid of any showing that respondent had any *separate* property. It is admitted that she was not a "sole trader" and had made no attempt to operate as such. Her husband had gone through bankruptcy and had no money or property. According to petitioner, she borrowed $2,500 from a firm in New York to whom she intended to ship fruit. She obtained $1,000 from her sister-in-law on a note. She also borrowed from her brother on a note and also on a life insurance policy. These funds were deposited in a bank in the name of Sun-Beam Fruit Company, a fictitious name, where they were specifically made subject to withdrawal either by the wife *or by her husband*, and the written authorization in evidence provides that they and each of them "are hereby authorized to endorse for deposit or for encashment any checks and other items payable to the business organization as above named".

Respondent freely admits the previous violations of the provisions of the Agricultural Code on the part of her husband. Up until the time of the hearing on petitioner's applications for these licenses, what business was being conducted in the name of Sun-Beam Fruit Company was being conducted in the offices formerly occupied by S. P. Mosesian's Moco Fruit Company, with the same bookkeeper formerly employed by the latter company.

S. P. Mosesian claimed that he had no connection with the Sun-Beam Fruit Company; that his wife had never been active with him in the fruit business; that she had worked as office assistant for the Powers family, who were in the fruit business; that he had no arrangement with his wife other than to ship one crop of grapes; that he could not draw checks without his wife's authorization; that he did not have any money invested in his wife's business; and that he had no share in the profits thereof; that he was packing a crop for one Massakian and it was being shipped to one Sakajian; and that the Sun-Beam Fruit Company was to obtain 27½ cents per box for packing the crop.

Marion Mosesian testified that she had nothing to do with her husband's fruit business in the past; that she had made the application in question because she had to make a living; that she had been forced to borrow money; that she had no understanding with her husband relative to which he would actually run the business; that she had no understanding or arrangement with her husband at all; that she did not intend to hire her husband to go out and buy fruit; that she might hire her husband as a plain foreman; that her husband would not dominate her business nor her business policies; that her funds on hand were funds which she had borrowed; and that she had a tentative deal to ship fruit to a New York receiver.

An affidavit of the district supervisor of the bureau was presented and considered by the Director of Agriculture. It alleges, upon information and belief, that the applications are not made by said applicant Marion Mosesian in good faith for the purpose of carrying on the business or businesses stated in the several applications; that applicant does not possess the financial or other responsibility required by law for carrying on the business or businesses stated in the several applications; that if the licenses as applied for were procured by applicant, said applicant would be intentionally guilty of fraud or deception in that the sole purpose of the applications now on file to secure licenses for the actual benefit of the said S. P. Mosesian, husband of applicant; that the true and actual applicant, for all intents and purposes, is said S. P. Mosesian, and that therefore the license applications should be denied for the reasons set forth in the departmental order denying the license of S. P. Mosesian, as well as for the reasons set forth herein.

[1] Petitioner concedes that all that is required of the Director of Agriculture is that he "must exercise his power under this section of the Agricultural Code in a reasonable manner", but she contends, how-

ever, that "if he does not, then he is subject to a writ of mandamus by the Superior Court", and in this connection she claims "that there is not one scintilla of evidence contained in the whole matter that would even tend to cast any reflection whatsoever on the charactor, good faith, or responsibility of ... the petitioner and respondent herein", and that in view of the finding of the trial court upon the evidence submitted, this court must, under the decision of Drummey v. State Board of Funeral Directors, etc., 13 Cal.2d 75, 87 P.2d 848, uphold the trial court's judgment. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992, is also cited in support of this contention.

In the Drummey case, supra, it was said that the findings of the board in such a case, where formal hearings are held, should and do come before the courts with a strong presumption in their favor. It was also said, in ordering the board to reinstate the license after previous refusal of the board so to do and where the court *made no findings of fact* and the cause was tried on the record before the board, that if there was any substantial evidence found in the record to support the trial court's judgment that judgment must be affirmed. The case now under consideration can be differentiated from that case. In the instant case, findings were prepared by the court, based upon the same evidence taken before the Director of Agriculture. The evidence fully supported the finding of the Director of Agriculture and lacked substantial evidence to support the material finding of the trial court that the petitioner did satisfy the Director of Agriculture of her responsibility and good faith, and that her husband did not have control of and access to the funds obtained by her.

The Webster case (wherein the trial court upheld the order of the board), merely holds that where the evidence before the trial court in support of the order of suspension was of a substantial nature, an appellate court will not substitute its own conclusions for those reached by the trial court.

[2, 3] It is the general rule applicable to the issuance of a writ of mandamus to furnish any basis for the relief sought, that the petitioner show that respondents are under some duty to do what the petition asks that they be required to do. San Diego Cotton Club, Inc., v. State Board of Equalization, 139 Cal.App. 655, 34 P.2d 749. A writ of mandate may not issue to compel an officer or board to act in any particular way except in the performance of ministerial duties, and never to control the exercise of discretion unless it has been abused. Doble Steam Motors Corp. v. Daugherty, 195 Cal. 158, 232 P. 140; Morales v. Ingels, 30 Cal.App.2d 182, 85 P.2d 907.

[4] We will therefore discuss the sufficiency of the evidence to support the court's finding and determination that it was untrue, as found by the department, "that from said hearing it appeared to respondents (appellants) that petitioner had no responsibility and did not in good faith seek to carry on the business stated in petitioner's applications; that it appeared from said hearing, and is a fact, that petitioner has no funds nor assets of her own with which to engage in such business, and that said S. P. Mosesian has full control of and access to all funds obtained by petitioner". We believe this finding of the trial court is lacking in substantial evidentiary support, without discussing the other contention of appellant that the department was fully and reasonably justified in denying petitioner's applications under the express authority of section 1269 of the Agricultural Code, St. 1939, p. 2332, i. e., "previous violation by the applicant or by any person connected with him or it of any of the provisions of this chapter shall be good and sufficient ground for denial of a license".

The court's finding and petitioner's statement that the petitioner's husband did not have control over the funds in the bank is contrary to the admitted facts and written authorization hereinabove mentioned.

Section 1263 of the Agricultural Code, St.1939, p. 2328, provides that "such applicant shall further satisfy the director of his or its character, responsibility and good faith in seeking to carry on the business stated in the application".

[5, 6] The evidence is undisputed that at all of the times involved herein petitioner was married to S. P. Mosesian and that they lived together and were living together as husband and wife; she borrowed the money from friends and relatives and on her life insurance policy to commence and carry on these proposed businesses, and Mr. Mosesian testified that they had been living on part of this borrowed money. These borrowed funds were deposited in the bank as described. It was stipulated that peti-

tioner did not make her applications for the licenses to conduct such businesses or occupations as a sole trader under sections 1811–1821 of the Code of Civil Procedure. Whether the business of produce dealer and broker, in which petitioner seeks to engage, and the earnings therefrom would or would not become community property, depends largely upon the facts. Gray v. Perlis, 76 Cal.App. 511, 245 P. 221. Ordinarily, such businesses and the profits accruing therefrom, are and would be property acquired after marriage, and under sections 162–164 of the Civil Code would be community property.

[7, 8] In accordance with the provisions of sections 161a, 172 and 172a of the Civil Code, the respective interests of the husband and wife in community property are existing and equal, subject to the very dominant right of the husband to manage and control such property. The fact thus appears that if such licenses were issued to the petitioner herein to engage in the businesses mentioned, and such property were not her separate property (the record affirmatively shows it was not), her husband would not only have an equal and existing interest therein, but would have the complete management and control thereof, subject only to the particular restrictions on the disposition thereof set forth in sections 172 and 172a of the Civil Code.

[9] It is a general rule that money borrowed on personal security by a husband or wife is community property. Moulton v. Moulton, 182 Cal. 185, 187 P. 421; Estate of Ellis, 203 Cal. 414, 264 P. 743; 3 Cal. Jur.Supp. p. 535, sec. 47.

[10] It is clear from the evidence that petitioner had absolutely no financial responsibility. She had no funds or property of her own prior to the time she consummated the loans above mentioned. Her husband admittedly had none. Petitioner became liable on her notes to repay all of the sums she had borrowed and became liable to repay all that she had borrowed on her insurance policy. She had no assets over and above her liabilities. Therefore, petitioner showed no financial responsibility sufficient to allow her to engage in the business of purchasing the produce of the farmers with any assurance to them that she could pay for their products sold to her. The showing here made would not satisfy the clear intent of the statute with respect to petitioner's financial responsibility, and may result in the same disaster that confronted the creditors of her bankrupt husband.

The court's finding to the effect that petitioner did satisfy the director of her character, responsibility and good faith, and that her husband did not have control of and access to the funds obtained by her husband receives no sufficient support in the evidence and cannot be sustained.

[11] The purpose of the provisions of the Agricultural Code above mentioned was primarily for the protection of the producers or growers of agricultural commodities, and to be sure that such producers shall be paid for their products by the dealer and broker. The statute is particularly concerned with the financial standing and management, and where such control and management of the funds and property are in the hands of the husband as here indicated, it would be an absurdity to grant such a license to the wife when the same had been denied the husband because of his previous failure to make such payment to producers.

[12] To compel the director by mandamus to issue a license to a wife whose husband has just been denied one because of his violations under the circumstances existing here cannot be justified.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

44 Cal.App.2d 511

PAULSON v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 6509.

District Court of Appeal, Third District, California.

April 28, 1941.

Rehearing Denied May 27, 1941.

Hearing Denied June 26, 1941.

1. Insurance ⚿435

Where employer employed 25 or 30 men in logging enterprise when compensation policy was issued, but policy enumerated only truckmen and drivers, chauffeurs and helpers, and others employed in employer's trucking and garage businesses, and did not mention logging enterprise, and policy declared that employer was conducting no other business operations not disclosed, evidence supported Industrial Accident Commission's conclusion that parties did not mutually intend to include in policy logging enterprise in which workman was engaged at time of injury.

2. Insurance ⚿435

Where compensation policy covering employer's trucking and garage businesses stated that premiums were based on remuneration earned by all employees engaged in business operations described, and that if any operations as defined were undertaken, though not specifically rated, employer agreed to pay premium in accordance with insurer's rules, though hauling of lumber or other manufactured products of timber might be incident to a logging business, it did not follow that employer's logging enterprise was merely incident to the business of hauling and thus within coverage of policy.

3. Insurance ⚿146(1, 3)

Insurance policies, like other contracts, should be interpreted to give effect to the mutual intention of the respective parties, and uncertain or ambiguous language contained therein should be construed most strongly against the party who prepares the contract.

Petition to review an award of the Industrial Accident Commission.

Petition by Julius Paulson, employer, to annul an award of the Industrial Accident Commission against him and to reverse an order relieving the Pacific Indemnity Company, insurance carrier, from liability on account of personal injuries received by a workman in petitioner's employ.

Award affirmed.

Shipper & Benard, of San Francisco, for petitioner.

E. A. Corten, Eldon B. Spofford, and Keith & Creede, all of San Francisco, for respondents.

THOMPSON, Justice.

The petitioner seeks to annul an award of the Industrial Accident Commission against him, and to reverse the order relieving the Pacific Indemnity Company from liability on account of personal injuries received by a workman in his employ. The workman, George Walsh, was employed by the petitioner in a logging enterprise in Siskiyou county when a dead limb fell from a tree and struck him on the head. The Commission determined that the petitioner's separate trucking and garage businesses at Kelseyville, Lake county, were all that were covered by the policy. This proceeding merely involves a construction of the policy to determine whether the workmen engaged in the logging enterprise were also insured thereby.

Julius Paulson conducted a hauling and trucking business and also a garage at Kelseyville, in connection with which he operated twenty-eight trucks and possessed other equipment incident thereto. For twenty years he had been engaged in separate logging enterprises in Siskiyou county and elsewhere. His wife testified that, at the time of the accident, they employed twenty-five or thirty workmen in the logging enterprise at Hilt. It does not satisfactorily appear that the petitioner's logging enterprises were previously covered by the policies insuring his trucking and garage businesses. Prior to June, 1939, the trucking and garage enterprises were insured by the Employers' Liability Assurance Corporation, Ltd., through its agent, Mrs. Grace I. Morgan, who resides at Napa. That company instructed her to cancel the petitioner's policy on account of frequent automobile accidents. She proposed to transfer the policy to the Pacific Indemnity Company, at San Francisco. Its inspector, Harry B. Barnes, was sent to Kelseyville in the spring of 1939, to investigate the businesses. Mr. Paulson was then absent. The agent interviewed the chief mechanic and Mrs. Paulson who informed him regarding the trucking, hauling and garage businesses and showed him the equipment. He was told they were engaged in trucking and hauling fruit, cement, oil, merchandise and various products, including some lumber and lumber products from Hilt and Scotia which were delivered to the fruit-packing establishments. Mr. Barnes definitely stated he was not told they were engaged in a logging or timber enterprise, although Mrs. Paulson did say they were hauling from Hilt some manufactured lumber and lumber products. The agent subsequently talked with Mr. Paulson who made substantially the same statement to him, but failed to tell him he was engaged in a logging enterprise. There is a conflict of evidence in regard to the essential details of that conference. Mr. Paulson testified that he did inform Barnes he was engaged in a logging business at Hilt.

The Pacific Indemnity Company issued the policy June 26, 1939, for the period of one year. It contained the following stipulations:

"Classification of Operations

"Truckmen–N.O.C.—including Drivers, Chauffeurs, and their Helpers; stablemen, blacksmiths and repairmen.

* * * * * *

"Outside Salesmen, collectors and messengers (wherever engaged) who do not deliver merchandise.

"Drivers and Drivers' Helpers (if not included in 1) wherever engaged.

"Chauffeurs and Chauffeurs' Helpers (if not included in 1) wherever engaged."

The policy also included the following clauses:

"This Employer is conducting no other business operations at this or any other location not herein disclosed—except as herein stated: No Exceptions."

"The premium is based upon the entire remuneration earned, during the Policy Period, by all employees of this Employer engaged in the business operations described in said Declarations together with all operations necessary, incident or appurtenant thereto, or connected therewith whether conducted at such work places or elsewhere in connection therewith or in relation thereto; * * * If any operations as above defined are undertaken by this Employer but are not described or rated in said Declarations, this Employer agrees to pay the premium thereon, at the time of the final adjustment of the premium in accordance with Condition C hereof, at the rates, and in compliance with the rules of the Manual of Rates in use by the Company upon the date of issue of this Policy."

The minimum quarterly premium was fixed at $94. The estimated average premium was specified as $100. Two bills for premiums, which were previously presented to the insured for $115.39 and $123.40, respectively contained no mention of charges for workmen engaged in logging. They contained only charges for trucking employees and garage workmen. The payroll lists furnished by the insured contained no mention of workmen engaged in the logging enterprise. It appears from the evidence that a much higher rate of insurance was charged for workmen employed in logging. That pursuit is recognized as unusually hazardous. Mrs. Paulson testified that they had twenty-five or thirty men employed in the logging business. It appears that if those workmen had been included in the policy the premium would have necessarily been increased at least four-fold.

George Walsh, who was employed by the insured at Hilt in the capacity of a woodsman in the logging enterprise, was injured September 21, 1939, as a result of being struck on the head by a dead limb falling from the top of a tree. A claim was filed against the employer and the Pacific Indemnity Company. By stipulation between the petitioner and the insurer, the company advanced to the workman compensation payments to be adjusted after the Commission had determined the liability of the respective parties. March 8, 1940, an award was made against the Pacific Indemnity Company. Julius Paulson was then relieved from liability. A rehearing was subsequently granted. May 3, 1940, an award of $14.94 per week was made in favor of George Walsh against Julius Paulson only. The Pacific Indemnity Company was relieved from all liability on the ground that the logging business was not covered by the insurance policy. A petition for rehearing from that order was denied. This petition for certiorari was then filed in this court. The amount of award is not questioned. The sole problem to be determined is whether the policy covers the logging enterprise in which the workman was engaged at the time of his injury.

The petitioner relies chiefly on the clause in the policy previously quoted to the effect that if any operations "as above defined" are thereafter undertaken by the insured "which are not described or rated in said declarations" the premiums shall be finally adjusted accordingly.

[1] We are of the opinion we are bound by the findings and judgment of the Industrial Accident Commission in this proceeding. Assuming that the language of the policy leaves an uncertainty as to whether the petitioner's separate logging business was insured, there is ample evidence to support the conclusion of the Commission that it was not the mutual intention of the respective parties to include that enterprise in the compensation insurance policy. The very language of the policy and the amount of premiums to be paid appear to refute that theory. The petitioner had been engaged in logging enterprises for twenty years. He should be charged with knowledge that it is an unusually hazardous business and that the premiums for insuring the workmen engaged therein would be proportionately higher than those required to cover a trucking or garage business. The policy does not mention a logging enterprise in its classification of workmen insured. The omission to include workmen engaged in logging, under the circumstances of this case, seems significant. The petitioner had twenty-five or thirty men so employed at the time the policy was issued. The policy specifically enumerates truckmen and their drivers, chauffeurs and helpers; salesmen, collectors and messengers; stablemen, blacksmiths and repairmen. The policy then declares that "This employer is conducting no other business operations at this or any other location not herein disclosed". The representatives of the insurance company testified they had no knowledge of the fact that the insured was conducting a logging enterprise, although they did know he was hauling manufactured lumber and lumber products from Hilt and other timber camps. There is a clear distinction between conducting a logging enterprise and merely hauling the manufactured products of a lumbering mill or camp.

[2] A construction of the clause in the policy relied upon by the petitioner does not require this court to determine as a matter of law that the policy covers any other enterprises in which the insured may engage. It appears to cover only such other operations as are similar to the ones enumerated in the classifications specifically stated. That paragraph first states that the premiums are based on the remuneration earned by "all employees * * * engaged in the business operations described", and that "if any operations as above defined are undertaken", although they are not specifically rated, the employer agrees to pay the premium therefor in accordance with the rules of the company at the time of final adjustment of the claim.

We assume that the hauling of lumber or other manufactured products of timber may be incident to a logging business. But it does not follow that a logging enterprise is merely incident to the business of hauling. The evidence abundantly shows that the logging business is a much more hazardous occupation, and that it is entirely different and distinct from a trucking or hauling business.

In the case of National Auto. Ins. Co. v. Industrial Acc. Comm., 220 Cal. 642, 32 P. 2d 356, 359, an award against the insurance company was reversed on the statement that the policy which insured against injuries sustained by "truckmen and chauffeurs" did not cover the operating of a "power shovel." The court there said: "We are asked to extend the terms of the policy to an employee who was not mentioned in the policy and who was engaged in an entirely different and distinct line of employment from those specified therein. That this cannot be done we think is clear from the authorities above cited, as well as from the following: Western Indemnity Co. v. Industrial Acc. Comm., 43 Cal.App. 487, 185 P. 306; Kugler v. Industrial Acc. Comm., 63 Cal.App. 308, 218 P. 472; Ocean A. & G Corp., Ltd., v. Industrial Acc. Comm., 104 Cal.App. 34, 285 P. 707."

[3] It is true that insurance policies are subject to the same rules of construction which apply to other contracts; that they should be interpreted to give effect to the mutual intention of the respective parties, and that uncertain or ambiguous language contained therein should be construed most strongly against the party who prepares the contract. Maxfield Wilton, etc., v. Industrial Acc. Comm., 19 Cal.App.2d 606, 65 P.2d 1354. But in the present proceeding the record satisfactorily shows that there was no mutual understanding that the employees of the petitioner who were engaged in a separate logging business were intended to be included in the specification of classes of workmen covered by the policy.

Certainly there is ample evidence to support the contrary finding of the Commission in that regard.

The award is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

44 Cal.App.2d 599

ROSE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 13109.

District Court of Appeal, Second District, Division 1, California.

April 30, 1941.

Prohibition ⚷29

A petition for a writ of prohibition by petitioner, who had been found guilty of contempt, was denied where court could not determine whether petitioner was entitled to any remedy because of absence of copies of complaint and answer, of full showing of proceedings before the trial court and notary, and of full copy of the affidavit in re contempt.

Petition for a writ of prohibition by Arthur Brigham Rose against the Superior Court of the State of California in and for the county of Los Angeles and others.

Petition denied.

Arthur B. Rose in pro per.

No appearance for respondent.

WHITE, Justice.

I vote to deny the petition, primarily on the reasoning and holding in C. S. Smith Metropolitan Market v. Superior Court, Cal.Sup., 105 P.2d 587. In the instant case it appears from the petition before us that after an order to show cause in re contempt had been issued, petitioner appeared in response thereto and offered to present his defense, which right, he claims, was denied him, and that he was thereupon found guilty of contempt. He bases his defense, according to the claims of his petition, upon the irrelevancy and immateriality of the questions propounded to his client and which petitioner advised his client not to answer. Under the cited case, it appears to me that his remedy was by way of certiorari or habeas corpus. In my opinion, these remedies remain available to petitioner should the court proceed to pronounce judgment.

Furthermore, in any petition for certiorari, habeas corpus or prohibition presented under the facts of this case, we should be furnished with a copy of the pleadings in the litigation in question, together with a copy of the deposition containing the disputed questions and answers, as well as a copy of the affidavit upon which the order to show cause in re contempt was issued. In determining the materiality, competency or relevancy of the questions upon which the order to show cause in re contempt was predicated, we must of necessity have before us the foregoing documents. In the instant petition we are not furnished with them.

YORK, Presiding Justice.

The petition is denied for the reason that it does not even purport to give all of the proceedings had in the respondent court, but only such portions of the pleadings, affidavits and proceedings as the petitioner wants to direct our attention to. Only the conclusion of petitioner is given us as to what the controversy is about, parts of evidence are set out only, but the conduct of petitioner at the taking of the deposition, as set out in the part of the proceeding before the notary, shows conclusively that petitioner did not confine his objections to the legal objections provided by law.

In the absence of copies of the complaint and answer and a full showing of the proceedings before the trial court and the notary, especially a full copy of the affidavit in re contempt; and as exhibit "A" is not complete in that the transcript referred to therein is not made available to this court, we are without authority to grant the petition.

Under the facts alleged in the petition, it is impossible for any court to decide whether or not the petitioner is, or might hereafter be, entitled to any remedy, without the court being first fully informed of the proceedings had in the trial court.

I concur: DORAN, J.

44 Cal.App.2d 503

CAREY et al. v. CITY OF OAKLAND.

Civ. 11416.

District Court of Appeal, First District,
Division 1, California.

April 28, 1941.

Rehearing Denied May 28, 1941.

Hearing Denied June 26, 1941.

1. Witnesses 🔑269(1)

Where direct examination of plaintiffs' witnesses was limited to certain points, the trial court properly restricted the cross-examination to those same points.

2. Automobiles 🔑181(2)

That definition of "guest" in guest statute does not employ words "without pay" therefor, but employs words "without giving compensation" therefor, indicates an intention not to limit definition to persons paying for their transportation in cash or its equivalent, but to include within its scope persons who give such recompense for the ride as may be regarded as "compensation" therefor, that is, a return which may make it worth the other's while to furnish the ride. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation" and "Guest".

3. Automobiles 🔑181(1)

A "guest" within guest statute defining a guest as a person who accepts a ride in any vehicle without giving compensation therefor is one who is invited either directly or by implication to enjoy the hospitality of the driver, accepts that hospitality, and takes a ride for his own pleasure or on his own business without any return to or conferring any benefit on driver other than the mere pleasure of his company, but where a special tangible benefit to driver or his principal is the motivating influence for furnishing the transportation, "compensation" may be said to have been given. Vehicle Code, § 403, St.1935, p. 154.

4. Trial 🔑159

A motion for nonsuit presents a pure "question of law" and may be granted only when disregarding all conflicting evidence and accepting plaintiff's evidence at its full value, indulging in plaintiff's favor every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff if such a verdict were given.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

5. Trial 🔑142, 165

Where evidence is fairly susceptible of two constructions or several inferences may reasonably be drawn therefrom, any one of which will support a verdict, the trial court in ruling on a motion for nonsuit must take the view most favorable to plaintiff and submit the issues to the jury.

6. Automobiles 🔑245(24, 30)

In action against city for injuries sustained by plaintiff who was accompanying an injured friend in city ambulance and was thrown from her seat when ambulance came to a sudden stop, evidence was sufficient to submit to jury questions whether plaintiff was a guest in the ambulance within guest statute and whether police officer in charge of ambulance exceeded his authority in permitting plaintiff to ride therein. Vehicle Code, § 403, St.1935, p. 154.

7. Automobiles 🔑245(24)

In action against city for injuries sustained by plaintiff while accompanying an injured friend in city ambulance, evidence was sufficient to submit to jury question whether ambulance was negligently operated when it came to such a sudden stop that plaintiff was thrown from her seat.

8. Automobiles 🔑175(5)

Though city ambulances when responding to emergency calls may be lawfully operated at a high rate of speed and under some circumstances may disregard traffic stop signs at intersections, the failure to sound the siren on approaching intersections may be deemed an act of "negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Gwynn Carey and Marie Carey, his wife, against the City of Oakland to recover damages for injuries sustained by Marie Carey while riding in a city ambulance. From a judgment for defendant, entered on an order granting defendant's motion for a nonsuit, plaintiffs appeal.

Reversed.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

C. M. Walter and Elson L. Jones, both of Oakland, for appellants.

Hagar, Crosby & Crosby and F. Bert Fernhoff, City Atty., all of Oakland, for respondent.

KNIGHT, Justice.

The plaintiffs, Gwynn and Marie Carey, husband and wife, brought this action against the City of Oakland to recover damages on account of personal injuries sustained by Mrs. Carey while riding in a city ambulance. At the time she received the injuries she was accompanying and assisting in caring for a friend, Miss Jeanne Gordon, who was being conveyed in the ambulance to the emergency hospital in an unconscious condition after having been injured in an automobile accident. The trial proceeded before a jury, and the trial court granted defendant's motion for a nonsuit. From the judgment entered thereon plaintiffs appeal. In granting the nonsuit the trial court held that at best Mrs. Carey was a guest, and that the officer in charge of the ambulance exceeded his authority in permitting her to ride therein. It is upon those grounds, and the additional ground that the evidence is legally insufficient to establish negligence, that the city seeks to sustain the trial court's ruling.

The accident in which Miss Gordon was injured occurred shortly before eight o'clock in the evening in front of the Carey home. She was taken into the Carey home in an unconscious condition, and a city ambulance was summoned to convey her to the hospital. The ambulance arrived in charge of two police officers. Viggo Sorensen was the driver, and M. J. Kennedy was in command. Miss Gordon was still unconscious when placed in the ambulance, and Mrs. Carey asked Officer Kennedy if she could go along. According to her testimony he replied, "Yes, lady, you may go, you may help", and he assisted her into the ambulance. Gene H. Wartell, a neighbor, was present at the time, and overheard the conversation between Mrs. Carey and the officer, and he testified that after Miss Gordon had been placed in the ambulance he heard Mrs. Carey say to the officer, "Shall I go?" to which the officer replied, "Get in, she is unconscious, you may be able to help her". The witness stated that while he would not say those were the exact words, he heard the officer say "get in", and saw him take hold of Mrs. Carey's arm and help her in the ambulance. Mrs. Carey further testified that after the officer helped her in he told her to sit at Miss Gordon's head; that he put some smelling salts up to Miss Gordon's nostrils, but she did not recover consciousness; that he then turned to her, Mrs. Carey, and handing her the smelling salts told her to keep them up to Miss Gordon's nose; that she did as instructed, and Miss Gordon soon regained consciousness. Shortly thereafter the accident happened in which Mrs. Carey was injured. In this connection she testified that the ambulance was being driven along East 18th street at a speed of 50 to 55 miles an hour, without sounding the siren; that as it entered the intersection of 14th avenue the driver did not slow down, stop at the boulevard stop sign, or sound the siren; that in order to avoid colliding with an automobile approaching on 14th avenue he brought the ambulance to a sudden stop, with a "terrific screech of brakes" and a "terrible jolt"—"just like hitting into a wall"; that she was thrown from her seat, wedged into a narrow place in the ambulance, striking her head and knocking her unconscious. Mrs. Carey testified positively that the siren of the ambulance was not sounded along East 18th street either before crossing the 12th avenue intersection or when it reached and entered the 14th avenue intersection. Miss Gordon testified also that she did not hear any siren sounded at any time after she regained consciousness. Mrs. Carey was the mother of two small children, one being an infant which she was nursing; and the worst injury she received was a severe bruise on the breast, which caused a malignant growth, necessitating the removal of the breast.

[1] Plaintiffs called the police officers as witnesses, but their direct examination was limited to certain points; consequently the trial court properly restricted the cross-examination to those same points. In this regard the record shows that Officer Kennedy was not interrogated as to the conversation with Mrs. Carey, but only regarding his authority to permit persons to accompany injured friends or relatives in the ambulance; hence the testimony given by Mrs. Carey and Mr. Wartell as to the conversation which took place between Mrs. Carey and Officer Kennedy stood uncontradicted. The testimony of Officer Sorensen was confined chiefly to a description of the ambulance, the intersec-

tion and the amount of traffic therein, and the operation of the ambulance from the time it reached and crossed into the 14th avenue intersection. In this latter respect his testimony conflicted with that given by Mrs. Carey principally in that he stated that he stopped at the boulevard stop sign before crossing into the intersection, and then started up again before he was forced to stop suddenly to avoid colliding with the other automobile.

The pertinent evidence relating to the authority exercised by Officer Kennedy in taking Mrs. Carey along in the ambulance consisted of a written rule of the department and the testimony given by him as to the operation of the rule. The rule was as follows: "A patrol wagon ambulance or special motor vehicle driver shall not permit persons other than authorized members of the department to ride on the seat with him or in his vehicle except such persons as are required to be conveyed in the performance of police duty *or under the orders of the Chief of Police*" (italics ours); and in explaining the operation of the rule Officer Kennedy testified that the understanding with the chief of police was that the officer in charge of an ambulance was to use his own discretion in allowing relatives, for example, a parent, sister, or wife, to accompany an injured or sick person in the ambulance; that in case the officer was in doubt about granting such permission he should call up his commanding officer; that he had been on ambulance detail continuously for three or four years, during which time and also since the accident happened he had granted such permission several times a month; that on very few occasions had he found it necessary to call up his commanding officer.

The so-called guest law of this state (section 403, Vehicle Code, St.1935, p. 154) reads as follows: "No person who as a guest accepts a ride in any vehicle upon a highway *without giving compensation for such ride*, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver." (Italics ours.) In the case of McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909, the court in reviewing the origin, purpose and the construction placed upon the operation of said law clearly points out, first, that such statutes, depriving a person carried without reward of the right to recover damages for injuries caused by failure to exercise ordinary care, are in derogation of the common law, and therefore must not only be construed strictly against the change but its operation should not be extended beyond the correction of the evils and the attainment of the permissible social objects which were the inducing reasons for its enactment; secondly, that although courts of various jurisdictions have undertaken to define the word "guest" as used in such statutes, those definitions are of little practical assistance here inasmuch as the legislature itself has furnished the definition, namely, a person who accepts a ride without giving compensation therefor; third, that in construing and applying the statute a court may consider the prior state of the law, the purposes of the enactment effecting the change in the law, and the nature of the matter to be remedied. An earlier case giving careful analysis to said law is Crawford v. Foster, 110 Cal.App. 81, 293 P. 841, 843, where, in speaking of the purposes of the law, it was said: "The purpose and object that the Legislature had in mind sometimes throws light upon the meaning of the language used. The situation that this section was apparently designed to prevent is well known. As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation." As supporting the view thus expressed attention may be called to an article in 26 California Law Review, at page 252, where in commenting on the decision in McGann v. Hoffman, supra, it was said that the purpose of the legislature in limiting liability for carrying guests was to protect a host from guests who accept his hospitality, and then upon being injured while riding with him, retaliate by suing him for damages, and to avoid collusive suits between members of the same family or friends, where the driver admits negligence in order to force his insurer to bear the loss resulting from the accident.

[2,3] Moreover, as pointed out in Crawford v. Foster, supra, the fact that the definition in the statute, St.1929, p. 1580, § 141¾, does not say "without paying" therefor, but employs the words "without giving compensation" therefor, indicates an intention not to limit the definition to persons paying for their transportation in cash or its equivalent, but to include within its scope persons who give such recompense for the ride as may be regarded as compensation therefor, that is, a return which may make it worth the other's while to furnish the ride; and as said in McCann v. Hoffman, supra, an examination of the numerous cases wherein the guest law has been under review demonstrates that the nature of the compensation as contemplated by the law is as variable as the particular facts involved. In short it may be said that the general rule deducible from the two principal cases above cited, and those cited and discussed therein, is to the effect that a person shall be classified as a guest within the meaning of the law who is invited either directly or by implication to enjoy the hospitality of the driver of the car; who accepts such hospitality and who takes a ride for his own pleasure or on his own business, without any return to or conferring any benefit upon the driver of the car other than the mere pleasure of his company (Crawford v. Foster, supra), but that where a special tangible benefit to the driver or his principal is the motivating influence for furnishing the transportation, compensation may be said to have been given. McCann v. Hoffman, supra.

Some of the California cases which may be cited as illustrative of the application of the principle that a person is not a guest within the meaning of said law who accepts a ride with the understanding that he is to perform some service beneficial to the driver or his principal, are Lerma v. Flores, 16 Cal.App.2d 128, 60 P.2d 546, wherein the plaintiff accepted a ride for the purpose of assisting and guiding the driver along the highway, and advising him, at the latter's request, as to the condition of the roads over which the driver was about to travel; Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, 38 P.2d 160, wherein the plaintiff accompanied the driver to assist in marketing the latter's produce; and Yates v. J. H. Krumlinde & Co., 22 Cal.App.2d 387, 71 P.2d 298, in which the plaintiff claimed that he was taken along by the driver for the purpose of helping him unload the truck on which he rode.

[4,5] The general rule governing nonsuits is that a motion therefor presents a pure question of law, and may be granted only when disregarding all conflicting evidence and accepting plaintiff's evidence at its full value, herein indulging in plaintiff's favor every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in plaintiff's favor, if such a verdict were given. Furthermore, if the evidence is fairly susceptible of two constructions, or several inferences may reasonably be drawn therefrom, any one of which will support a verdict, the court in ruling on the motion for nonsuit must take the view most favorable to the plaintiff, and submit the issues to the determination of the jury.

[6] In view of the construction placed upon the operation and scope of the guest law, as set forth in the cases above cited, and keeping in mind the rules controlling in granting nonsuits, it is our conclusion that the state of the evidence was such that if a verdict had been returned herein in favor of plaintiffs it would not have been wanting legally in substantial evidentiary support; and therefore that plaintiffs were entitled to have the cause submitted to the determination of the jury.

As to the first of the two issues upon which the trial court based its ruling in granting the nonsuit, it is our opinion that the uncontradicted testimony relating thereto, if true, was fairly susceptible of the inference that the motivating influence which induced the officer in charge of the ambulance to allow Mrs. Carey to go along, and which prompted her to make the request, was that she could and would render a beneficial service in assisting him in caring for the unconscious Miss Gordon on the way to the hospital. In order to sustain the trial court's view, it would be necessary to hold, as a matter of law, that the evidence was susceptible of but one construction, namely, that Mrs. Carey sought and was granted permission to ride in the ambulance solely for her own pleasure and convenience. In the light of the testimony given by her and Mr. Wartell, we are not prepared so to hold.

With regard to the second issue mentioned by the trial court, the evidence, as it stood at the time the nonsuit was granted, was legally sufficient, in our opinion, to support a finding that it was within the discretionary authority of the officer under the circumstances to allow Mrs. Carey to accompany her injured friend to the hospital.

[7, 8] Nor are we able to agree with the city's final contention that the evidence establishes as a matter of law that the ambulance was not negligently operated; for although such vehicles, while responding to emergency calls, may be lawfully operated at a high rate of speed and under some circumstances may disregard traffic stop signs at intersections, the failure to sound the siren on the approach to intersections may be deemed an act of negligence. Mastro v. City of San Diego, 17 Cal.App.2d 331, 62 P.2d 407; Raynor v. City of Arcata, 11 Cal.2d 113, 77 P.2d 1054; Lossman v. City of Stockton, 6 Cal.App.2d 324, 44 P.2d 397; Stone v. San Francisco, 27 Cal.App.2d 34, 80 P.2d 175.

The judgment is reversed.

We concur: PETERS, P. J.; WARD, J.

44 Cal.App.2d 404

FALLON v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11670.

District Court of Appeal, First District, Division 2, California.

April 23, 1941.

1. Municipal corporations 🔑668

Any right of abutting owners to use area beneath surface of street is subordinate to paramount right of public to make any reasonable use of such area.

2. Constitutional law 🔑278(1)
Eminent domain 🔑2(6)

An ordinance reducing sidewalk widths on Market street in San Francisco does not "take private property without just compensation" or without "due process of law" as applied to an abutting property owner who would be required to have his basement under the sidewalk set back to conform to new curb. Const.Cal. art. 1, § 14; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Take Private Property Without Just Compensation" and "Due Process of Law".

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by F. A. Fallon to enjoin the City and County of San Francisco and others from reducing sidewalk widths on Market Street in San Francisco pursuant to an ordinance adopted by the Board of Supervisors. Judgment for defendants, and plaintiff appeals.

Affirmed.

Hyman & Hyman, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff brought this action seeking an injunction. Defendants demurred to the amended complaint and their demurrer was sustained without leave to amend. Judgment was thereupon entered in favor of defendants and from said judgment, plaintiff appeals.

This controversy arose out of the determination of the board of supervisors of the city and county of San Francisco to reduce the width of the sidewalk along certain portions of Market street. Plaintiff alleged in his complaint that he is a property owner on Market street whose property extends to the center line of the street; that the basement of plaintiff's hotel building extends under the sidewalk area; that "the City and County of San Francisco has an easement over and upon said property, the said easement being for a public use and for a street and sidewalk"; that in 1937, the board of supervisors adopted an ordinance reducing the width of the sidewalk; that plaintiff was advised that the curb would be moved back and that plaintiff would have to arrange to have his basement set back to conform to the new curb; that said ordinance is illegal and void and a nullity; and that defendants threaten to proceed with the work unless enjoined. The remaining allegations are not material for the purpose of this discussion.

[1, 2] Plaintiff contends that the ordinance "reducing sidewalk widths on Market Street is void and unconstitutional", citing Article I, section 14 of the State Constitution and the Fourteenth Amendment of the Federal Constitution prohibiting the taking of private property without just compensation and without due process of law. We find no merit in this contention and we are of the opinion that said contention is based upon a misconception of the relative rights of plaintiff and the public with respect to the area in question. The nature of the public easement in streets and of the paramount right of the public to use such streets, including the space above and beneath the surface, for all reasonable uses, is discussed at length in Hayes v. Handley, 182 Cal. 273, at page 281 to 284, 187 P. 952. We believe that the principles enunciated in that decision are controlling here. It appears therefrom that any right of abutting owners to use the area beneath the surface of the streets is subordinate to the paramount right of the public to make any reasonable use of such area. There could therefore be no taking of property of the abutting owners resulting from the reducing of the width of the sidewalk as provided in said ordinance.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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44 Cal.App.2d 484

PEOPLE v. HANNON et al.

Cr. 3443.

District Court of Appeal, Second District, Division 1, California.

April 25, 1941.

1. Criminal law 🔑1144(13)

On appeal from judgments on verdicts of guilty, the District Court of Appeal was required to state the facts in the light most favorable to the prosecution.

2. Criminal law 🔑1159(6)

An appellate tribunal cannot disturb the findings of the triers of fact unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence, circumstantial or otherwise, to support conclusion reached in the lower court.

3. Criminal law 🔑1134(3), 1159(2)

Where appeal is taken from judgment on verdict of guilty, the appellate jurisdiction of the District Court of Appeal extends only to "questions of law", and, where the evidence militating against defendant considered by itself without regard to conflict is sufficient to support the verdict, the question ceases to be one of law and becomes a "question of fact" on which decision of the jury and trial court is conclusive.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

4. Rape 🔑51(4)

In prosecution of negroes for rape of white woman, evidence that husband of prosecutrix was bruised and battered, that prosecutrix was menaced with a knife by assailant who threatened to cut her husband's throat if she opened her mouth, and that physical facts at scene of crime indicated a struggle, was sufficient to show reluctance and resistance on part of prosecutrix.

5. Rape 🔑51(1)

In prosecution of negroes for rape of white woman, medical testimony of county jail physician would sustain conclusion that one of negroes was physically able to accomplish act of intercourse notwithstanding his contrary testimony.

6. Rape 🔑51(1)

In prosecution of negroes for rape of white woman, evidence sustained convictions.

7. Criminal law 🔑814(17)

In prosecution of negroes for rape of white woman, where evidence warranted conclusion that prosecutrix resisted, and her identification of defendants was positive, instructions on circumstantial evidence were properly refused.

8. Criminal law ⚷792(3)

In prosecution of negroes for rape of white woman, instruction correctly expounding the law on aiding and abetting, followed by additional instruction, in response to jury's request, defining "aider or abettor" and explaining aiding and abetting by hypothetical example, was sufficient. Pen. Code, § 31.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Hannon and another were convicted on two counts of rape, and they appeal.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county, appellants and one Thaddeus F. Fuller were accused of three counts of rape, one count of robbery, and one count of kidnaping for the purpose of robbery. Following not guilty pleas by all defendants to all counts and a jury trial, the two appellants herein were found guilty on two counts of rape and not guilty of the crimes of robbery and kidnaping, while during the progress of the trial the third count of rape was dismissed as to all defendants. Defendant Fuller was acquitted on all counts. From the two judgments of conviction and from an order denying their motion for a new trial, appellants prosecute this appeal.

[1] Stating the facts in the light most favorable to the prosecution, as we are required to do following a guilty verdict, the record discloses that on the night of July 20, 1940, Maurice H. Stevens, Jr., and his wife entered a cafe in southeast Los Angeles conducted and in the main patronized by persons of the colored race. During their stay in the cafe Mr. and Mrs. Stevens each consumed three bottles of beer. They were the only white persons present during the evening, and they spent the time talking to each other and also in conversation with other patrons, as well as operating the nickel-in-the-slot phonograph machine.

About 12:15 o'clock Sunday morning, Mr. and Mrs. Stevens left the cafe, walked to the curb and entered their automobile. As they started to drive away they discovered that they had a flat tire and were without tools with which to change tires. Mr. Stevens alighted from the car, and about that time appellant Hannon, who had followed Mr. and Mrs. Stevens out of the cafe, inquired if he could be of assistance. Mr. Stevens explained they had no tools, and appellant Hannon told him if he would drive around the corner to Hannon's car, the latter had the necessary equipment and would help change the tire. According to the testimony of Mr. and Mrs. Stevens, at that time they believed they were alone in the car. Appellant Hannon stepped onto the running board next to Mrs. Stevens and directed them to "just drive around the corner here". As they approached the corner of Wilmington and Imperial boulevard according to the testimony of Mr. Stevens, "somebody popped up from the back seat —I don't know where they came from— and held a sharp—or held this instrument to my back and told me to keep on driving". Mr. Stevens was unable to state whether the instrument was a knife, a gun, or just a piece of steel. In obedience to the voice directing him to "just keep on driving, white boy", Stevens continued to drive until they had passed Grape street on 115th, when he stopped his car and the voice said, "O. K." The evidence indicates there were no houses on 115th street east of Grape at or near the place where the car was stopped.

As soon as the car stopped, appellant Hannon stepped off the running board, opened the front door of the car next to Mrs. Stevens, grabbed her around the neck and dragged her backwards out of the car and into an adjoining vacant lot. Mr. Stevens also alighted from the car and "rushed across the vacant lot". After he had gone 50 or 75 feet into the lot he saw four or five colored men near his wife and one of them had her down on the ground. As he approached this group, one of the men, testified to as being about appellant Anderson's build, hit Stevens over the eye and knocked him down. Each time he attempted to rise he was struck in the eyes, nose or mouth until he lost consciousness. He observed one of the colored men having sexual intercourse with his wife. There is evidence in the record that after appellant Hannon dragged Mrs. Stevens across the stubble in the vacant lot, holding her by the throat, he tripped her and attacked her. When she became aware of Hannon's intentions, she screamed. At this point one of the group held a long knife close to her throat and threatened to "cut your husband's throat from ear to ear" if she opened her mouth again. Mrs. Stevens positively identified both these appellants as two of the three negroes who raped her before she lost consciousness. The physical facts also indicated a struggle. Records of the United States Weather Bureau introduced in evidence showed that the moon was practically full that night; that there was no fog and the atmosphere was clear. Mrs. Stevens claimed she could plainly see the faces of her assailants.

It was not until about two or two-thirty o'clock that Mrs. Stevens regained consciousness, at which time she saw her husband lying on the ground a short distance away. She went to his aid, finally revived him, and they walked to a nearby house, from which they were taken to the police station, where they made complaint of what had happened. Testimony of the receiving hospital doctor indicated that when she arrived at the hospital Mrs. Stevens was very nervous, and the doctor discovered evidence that she had recently had intercourse. Subsequently the officers found the spare tire of Mr. Stevens' car in the shed at appellant Hannon's home. Investigation of Mr. Stevens' car indicated that the right rear tire was flat and that there were three clean cuts entirely through the sidewall of the tire, as though it had been cut with some sharp instrument.

Appellant Hannon admitted being present while Mrs. Stevens was in the vacant lot, but denied that he had intercourse with her. On another occasion he admitted he was "in the gang that took the white man and woman into the vacant lot at 115th and Grape". While in the presence of appellant Anderson the appellant Hannon stated to the officers that "Anderson was one of the boys over there with Mrs. Stevens in the vacant lot". In the face of this accusatory statement Anderson stood mute. During his cross-examination as a witness in his own behalf at the trial, Hannon admitted that at the time of his arrest he knew that he was being taken into custody because of "a little ruckus at 116th and Wilmington Saturday night."

Appellant Anderson testified at the trial that on the evening in question he was with Fred and Claude Stewart a little after ten o'clock at the cafe in question; that he left the cafe after about ten minutes' stay therein and went to a pool hall across the street, where he remained about an hour, when he went home. He further testified that while he met appellant Hannon on 103rd street about 9:30 on the evening in question, he was not again with him that night, except to see him in the cafe. Appellant Anderson denied that he ever talked to Mr. Stevens or that he had seen Mrs. Stevens at all on the night of the alleged assault. He steadfastly denied that he had sexual intercourse with Mrs. Stevens or that he held a knife over her. He claimed that the first intimation he had of any trouble in which Mr. and Mrs. Stevens figured was after his arrest on July 22. He denied the accusatory statement heretofore narrated as having been made by appellant Hannon, and claimed that when he denied complicity in the alleged assault after his arrest, the police officer struck him.

Appellant Hannon, testifying in his own behalf at the trial, stated that he saw Fred and Claude Stewart at the cafe in question at ten o'clock, but did not remember definitely seeing his co-defendant there. He admitted seeing Mr. and Mrs. Stevens at the cafe, where he remained for about two hours. He testified that he talked with Mr. Stevens for about an hour and that the latter had purchased two bottles of beer for him. He further testified that when he left the cafe he saw Mrs. Stevens sitting in a parked automobile with a colored man whom he did not know. He absolutely denied having any conversation with Mr. Stevens relative to fixing the tire on the latter's automobile, and further denied that he rode on the running board of the Stevens car, and also denied having intercourse with Mrs. Stevens or aiding or abetting in the consummation of such an assault by others. There was also introduced at the trial evidence of the previous good reputation of the appellants.

[2, 3] Upon the foregoing state of the record, we are asked to declare that the verdict is contrary to law and to the evidence, in that the story told by Mr. and Mrs. Stevens is inherently improbable, and that it is also inherently improbable that men bearing the previous good reputation of appellants would commit the atrocity

here in question. It is axiomatic that an appellate tribunal cannot disturb the findings of the triers of fact unless it be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court. People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Gidney, 10 Cal.2d 138, 143, 144, 73 P.2d 1186. No such showing is made in the instant case. True, there is an irreconcilable conflict between the testimony of Mr. and Mrs. Stevens and that given by the appellants. Our appellate jurisdiction, however, extends only to questions of law, and where the evidence which militates against a defendant, considered by itself without regard to conflicts in the evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive.

[4] Appellants' contention that there is a lack of sufficient evidence to show reluctance and resistance on the part of Mrs. Stevens is without merit. The battered and bruised condition of Mr. Stevens, as well as the nervous state in which Mrs. Stevens was found, coupled with the evidence that she was menaced with a knife in the hands of one of her assailants, who threatened to "cut her husband's throat from ear to ear" if she opened her mouth, as well as the physical facts at the scene of the crime, which indicated a struggle, amply support a conclusion that no small degree of force and violence was used in committing the offenses in the case at bar, and certainly belie the testimony of appellant Hannon that Mrs. Stevens walked freely and unassisted into the vacant lot with a colored man. In the face of all the evidence in the record before us, it would certainly tax one's credulity to indulge in the assumption that the acts of sexual intercourse were accomplished by and with the consent of Mrs. Stevens.

[5] It is true that appellant Hannon testified that it would have been impossible for him to have accomplished an act of intercourse because of his physical disabilities, but the jury was entitled to disbelieve him in view of the medical testimony of the county jail physician who made a physical examination of him.

[6] From the statement of facts already given, enough appears to show that appellants and certain other colored men, either expressly or tacitly, entered into an agreement to disable the Stevens car by cutting the right rear tire with some sharp instrument; that appellant Hannon was to offer to help change the tire if the car were driven around the corner and away from the lights of the cafe; that other participants were secreted in the back of the automobile; that subsequently Mrs. Stevens was raped by these appellants, both of whom she positively identified, and that other men present aided and abetted in the commission of the crimes by preventing Mr. Stevens from coming to the assistance and rescue of his wife.

[7] It is next contended by appellants that the court erred in refusing to give two instructions on circumstantial evidence. The instructions in question were properly refused on the ground given therefor by the trial court—that the evidence in this case is basically direct and positive, and not circumstantial.

[8] Appellants' further contention, that the only instruction the court gave the jury on the question of aiding and abetting was defective and insufficient, cannot be sustained. First of all, the instruction in question was a correct exposition of the law and is supported by section 31 of the Penal Code. However, the record discloses that during the deliberations of the jury, it returned into court, at which time, in response to the jury's request, the court, in the presence of appellants and their counsel, instructed the jury at considerable length on the subject of what constituted aiding and abetting in the commission of a crime. Not only did the trial court give to the jury the legal definition of what constituted one an aider or abettor, but the learned trial judge painstakingly and patiently explained what constituted aiding and abetting by giving to the jury concrete hypothetical examples of the manner in which one who, though not actually perpetrating the offense, would become guilty thereof and might be prosecuted as a principal therein, by aiding or abetting in its commission.

The judgments and the order denying appellants' motion for a new trial are and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

44 Cal.App.2d 332

CHRISTIANSEN v. HOLLINGS.

Civ. 11406.

District Court of Appeal, First District, Division 1, California.

April 21, 1941.

Rehearing Denied May 21, 1941.

Hearing Denied June 19, 1941.

1. Automobiles ⚷245(17, 83)

In action for death of decedent whose stomach had hit steering wheel as result of collision between automobile which he was driving and partially opened door of defendant's automobile which defendant had parked parallel to curb before opening door preparatory to alighting therefrom, whether defendant was negligent in opening door under circumstances and whether decedent was guilty of contributory negligence in driving too close to parked automobiles were questions for jury.

2. Automobiles ⚷246(27)

In action arising out of collision on city street occurring when moving automobile struck partially opened door of automobile parked parallel to curb, court properly instructed that provision of Vehicle Code requiring vehicles to be driven as close as practicable to right-hand curb or edge of roadway was in force on day of accident. Vehicle Code, § 525, St.1935, p. 181, as amended by St.1937, p. 619.

3. Automobiles ⚷246(58)

In action arising out of collision on city street between moving automobile and partially opened door of parked automobile, there was no error in court's failure to instruct on provisions of Vehicle Code that requirement that vehicles should be driven as close as practicable to right-hand curb did not apply to overtaking vehicles or to vehicles making a left turn, since such provisions were inapplicable. Vehicle Code, § 525, St.1935, p. 181, as amended by St.1937, p. 619.

4. Automobiles ⚷11

The provision of Vehicle Code requiring vehicles to be driven as close as practicable to right-hand curb or edge of roadway applies to any person driving on right-hand side of street, and was passed for benefit of person so traveling as well as for benefit of others rightfully on that side of street. Vehicle Code, § 525, St.1935, p. 181, as amend- by St.1937, p. 619.

5. Death ⚷65

In action for wrongful death of 65-year old man, a mortality table containing life expectancy periods applicable to heirs of decedent and to a man of 65 years was admissible, notwithstanding that decedent was not in good health but had a bad heart and a diseased kidney condition.

6. Trial ⚷86

An objection that evidence is incompetent, irrelevant and immaterial is sufficient only if the evidence is absolutely inadmissible for any purpose, and where evidence is objectionable only on special grounds, they must be specified or objection is waived.

7. Death ⚷104(6)

In wrongful death action where mortality table was admitted into evidence, it was proper to give an instruction as to life expectancy according to table of person of decedent's age.

8. Death ⚷104(6)

In wrongful death action where instruction was given for plaintiff based on mortality table admitted into evidence, defendant was entitled to a qualifying instruction that in estimating probable length of a particular man's life as compared with average length of life disclosed by mortality tables, the individual's state of health, occupation, habits and surroundings as disclosed by evidence must be considered.

9. Appeal and error ⚷216(2)

In wrongful death action in which instruction was given as to life expectancy of person of decedent's age according to mortality table admitted into evidence, failure to give qualifying instruction authorizing consideration of decedent's health, occupation, habits and surroundings was not reversible error, where defendant did not request such an instruction and did not challenge amount of verdict.

10. Appeal and error ⚷928(1)

In determining on appeal in wrongful death action whether trial court's failure to give qualifying instruction after having given instruction based on mortality tables was prejudicial to defendant, reviewing court was required to assume that jury was composed of reasonably intelligent persons who must have known that tables are not conclusive as to life expectancy of any particular person.

11. Death 🔑104(2)

In action for wrongful death of decedent who received attention of a physician and of a Christian Science practitioner after injury, court properly instructed that injured person must use ordinary and reasonable diligence in caring for his injuries, that he may rely upon such treatment as a reasonably prudent person might have chosen and that jury could consider decedent's conduct in light of his belief in Christian Science doctrines.

12. Appeal and error 🔑1033(5)

In wrongful death action, defendant could not complain of alleged conflict between instruction given at request of plaintiff relating to duty to use diligence in caring for injuries and instruction given at defendant's request relating to same matter, where possible error in instructions was in defendant's instruction as interpreted by him in that it was too favorable to the defendant.

13. Death 🔑104(2)

In action for wrongful death of decedent who had been treated by Christian Science practitioner, court properly instructed that decedent's belief in Christian Science doctrines could be considered by jury in determining whether decedent acted with reasonable diligence in caring for his injuries.

14. Damages 🔑62(2)

An injured person must use reasonable diligence in caring for his injuries, and what constitutes reasonable diligence depends upon facts and circumstances of particular case.

15. Damages 🔑62(2), 214

An injured person is not necessarily required to seek medical care of a particular type, but self care may be reasonable under the circumstances and the jury should be so instructed where that factor is relevant.

16. Trial 🔑296(8)

In wrongful death action, the alleged omission of necessary elements from a formula instruction was not prejudicial where jury was fully instructed in detail on particular elements claimed to have been omitted.

17. Evidence 🔑550(2)

In wrongful death action, there was no error in question propounded to physician based in part on diagnosis of attending physician who testified concerning his personal examination and diagnosis and on conclusions appearing in other testimony.

18. Evidence 🔑550(1)

The opinion of an expert cannot be predicated on the opinion of another expert, but an expert may express an opinion based upon facts testified to by an expert, or upon tests made by other experts.

19. Appeal and error 🔑206(2)

When a hypothetical question improperly commingles with statement of facts opinion evidence of others, reviewing court will not consider objection unless trial court's attention was called to objectionable parts of question.

20. Evidence 🔑553(1, 2)

A hypothetical question need not necessarily include a statement of all the evidence in the case, but question may be properly framed upon any reasonable theory of questioning party.

21. Appeal and error 🔑971(1)

In determining whether hypothetical question failed to include all relevant facts, reviewing court is justified in placing considerable reliance upon trial court's determination in passing on sufficiency of facts narrated in question.

22. Appeal and error 🔑232(2)

Where after defendant's objection to hypothetical question on ground that all relevant facts were not included, every relevant fact suggested by him was thereafter included in question, defendant could not claim on appeal that other facts not included should have been.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Ada Lea Christiansen, as administratrix of the estate of her husband, against Harry Hollings, to recover for the wrongful death of her husband allegedly resulting from an automobile collision. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Arthur Joel, of San Francisco (James Martin MacInnis of San Francisco, of counsel) for respondent.

PETERS, Presiding Justice.

Plaintiff, as administratrix of the estate of her husband, brought this action to recover damages for his wrongful death. She sues on her behalf, and on behalf of the three sons of decedent. From a judgment for plaintiff for $8,000 damages, entered upon a jury verdict, defendant prosecutes this appeal.

Defendant contends that the evidence, as a matter of law, demonstrates that he was free from negligence, and that the decedent was guilty of contributory negligence; that the court erred in giving certain instructions; and that the court erred in admitting certain evidence over defendant's objections.

The facts are as follows: Just before 8 a.m. on the morning of February 8, 1938, defendant parked his Plymouth sedan on the east side of Third street north of Twenty-second street in San Francisco. Third street at this spot is a busy, paved street, with sidewalks on either side, and streetcar tracks in the middle. The automobile was parked parallel to the curb facing north. There are several driveways cut into the curb in that block, and defendant had parked so that the right wheels of his car were over the curb and up on the sidewalk.

Plaintiff's husband was employed as a switchman and engine fireman on the Belt Line Railway. On the morning in question he was driving his Chevrolet sedan north on Third street. He had with him his daughter-in-law, Anita Christiansen, and a friend. It was his custom to ride the girls to work each morning. Anita Christiansen testified as plaintiff's only witness to the facts of the accident, the other girl not having seen what occurred. According to her testimony, they were proceeding north on Third street in the outside traffic lane close to the right curb at between fifteen to seventeen miles per hour, when, as the front of the Chevrolet reached the rear fender of defendant's parked car, the defendant opened the door of his car preparatory to alighting therefrom. The Chevrolet driven by the decedent struck the partially opened door and caused the Chevrolet to be "jolted back and forth". The force of the impact threw the witness against the windshield, and caused the decedent to be thrown forward so that his stomach hit the steering wheel. According to the witness, the decedent made an exclamation and rubbed his stomach. He drove on several hundred feet and brought his car to a stop. It is a reasonable inference from the witness' testimony that the decedent was then in a daze. She testified that immediately after the accident he drove along until she told him to stop; that she had to tell him to stop three or four times; that he finally stopped some five feet from the curb; that he got out of the car and started to walk back towards defendant's car in the middle of the street against traffic; that she led him over to the sidewalk; that she had to ask him three or four times to take defendant's license number; that defendant refused to give his name. She further testified that they then got back into the Chevrolet and started to drive away; that the fender that had hit the door was rubbing against the tire; that they drove on about a block or two and stopped; that during this ride the decedent was rubbing his stomach; that when they stopped the decedent ran over to a vacant lot and got a board and placed it under the fender and "stumbled off to the curb"; that the two girls lifted the fender off the tire; that the decedent then drove the girls to work.

The evidence of the other witnesses, so far as necessary to be recounted, is that the decedent then drove to his place of work and changed into his work clothes. He was observed to stagger as he came down the stairs, and was unable to work, being in a dazed condition. Three fellow employees took him home, carried him into the house, undressed him and put him to bed. That evening Dr. Piero Albi, one of the physicians for the decedent's employer, examined the decedent. He found that the decedent had high blood pressure, and was suffering from a degenerative disease of the heart. He found no objective sign of abdominal injury. He prescribed rest and digitalis. It was agreed that the wife should report daily to the doctor by telephone giving him, particularly, the pulse beat of the injured man. The plaintiff testified that she followed the doctor's orders as to administering digitalis and telephoning every day until February 14, 1938. On that day she informed Dr. Albi that his services were no longer desired and that they were going to have a Christian Science practitioner treat the injured man. The practitioner treated decedent until his death, which occurred on February 19, 1938. The coroner's autopsy gave as the causes of death (1) acute peritonitis; (2) acute appendicitis; (3) aortic stenosis; (4) chronic parenchymatous nephritis; and (5) arteriosclerosis.

Doctor Adolphus Berger, who had not treated decedent, was called as an expert witness. In response to a hypothetical question he testified that, in his opinion, peritonitis as a result of an acute appendicitis attack was the cause of decedent's death; that the blow received by the deceased in the accident aggravated or lighted up a dormant pre-existing chronic appendix; that death was caused by traumatic peritonitis.

[1] From this evidence, it is clear that, whether defendant was guilty of negligence in opening the door of his car in the stream of traffic in the fashion he did, or whether the decedent was guilty of contributory negligence in driving too close to the parked cars, were questions of fact for the jury. Defendant testified that he looked in the rear view mirror of his car and observed traffic in back of him for a distance of some two hundred feet. Apparently the jury disbelieved this testimony, and for good reason. If the defendant had looked in his rear view mirror as he opened the door of his car, and, if the mirror was properly adjusted, he must, inevitably, have seen decedent's approaching automobile. Defendant admittedly did not look out the window of his car before opening the door, a precaution that the jury might well have found was reasonable under the circumstances, particularly in view of the traffic conditions on Third street. Whether the injury was proximately caused by the negligence of the defendant, or whether the decedent's negligence, if any, contributed to the accident, were clearly jury questions that cannot, and should not, be disturbed on this appeal.

[2, 3] Defendant urges prejudicial error in the giving of certain instructions. He objects to the court having instructed the jury that, "* * * Section 525 of the Vehicle Code, St.1935, p. 181, as the same was in force and effect on the 8th day of February, 1938, reads in part as follows:

"'Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway.'"

Defendant contends that, as given, the instruction is a mandatory requirement that a vehicle be driven as close as practicable to the right-hand curb. He also objects to the failure of the court to instruct on the following portions of section 525 which follow the portion of the section above-quoted: "except as follows:

"(a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"(b) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn."

It is quite clear that subsection "b" above-quoted has no application to the facts here involved. Nor is subsection "a" applicable. The defendant's car was parked so that the decedent's car was not "passing another vehicle proceeding in the same direction".

[4] There can be but little doubt that the portion of section 525 of the Vehicle Code that was read to the jury is applicable to the facts here involved. The section, except when facts exist to bring it within the exceptions, applies to any person driving on the right-hand side of the street, and was passed for the benefit of the person so traveling as well as for the benefit of others rightfully on that side of the street. It requires the driver of a vehicle to drive as close to the right-hand curb as is practicable except under circumstances not involved here. Appellant relies on Polk v. Weinstein, 12 Cal.App.2d 360, 55 P.2d 588, as establishing error in the giving of the instruction. In that case it was contended that the plaintiff was guilty of contributory negligence, as a matter of law, for the reason that when hit he was driving on his own side of the street twenty-five feet from the right-hand curb. The defendant was driving on the wrong side of the street in the opposite direction to that in which plaintiff was traveling. The court held that the section has no application to vehicles traveling in opposite directions. The same result was announced in Arundel v. Turk, 6 Cal.App.2d 162, 44 P.2d 383. In Skulte v. Ahern, 22 Cal.App.2d 460, 71 P.2d 340, it was held that the reasoning of the two cases above-cited only applies when the vehicles are proceeding in opposite directions. It was further held that where an automobile being driven on the right-hand side of a street hits a pedestrian, the section should be read to the jury. Negligence of the automobile driver was found to exist because he did not follow the mandate of the section. In the instant case, one of the major contentions of the defendant was that the decedent was guilty

of contributory negligence in traveling too close to the parked car. The law required the decedent to drive "as close as practicable" to the right-hand curb, and the plaintiff was clearly entitled to an instruction so informing the jury. Of course, the statute did not establish, as a matter of law, that the decedent was not guilty of contributory negligence. Whether it was "practicable" for the decedent to drive as close to the parked car as he did was a question of fact, and the jury was so instructed. For example, at the request of defendant, the jury was instructed "that it was the duty of decedent, Henry Christiansen, in passing to the left of vehicles parked on Third Street at the time and place in question to exercise ordinary care to pass at a safe distance to the left thereof". Several other instructions were given on the same general subject. It is clear that the jury was fully and properly instructed on the issue under consideration.

[5] It is next urged that error was committed in admitting into evidence, over appellant's objection, a mortality table, and in giving an instruction based thereon. The court admitted into evidence a mortality table containing the life expectancy periods applicable to the heirs of the decedent, and, applicable to a man of 65 years, the age of decedent at the time of his death. An instruction was given to the effect that, "according to the American Tables of Mortality a person of the age of 65 years has an expectancy of life for an additional 11.10 years * * *". It is contended that it was error to admit the evidence, and to so instruct the jury, because the evidence showed that the decedent was not in average good health, but had a bad heart and a diseased kidney condition. While it is true that the evidence shows that the deceased was suffering from these ailments, the evidence proffered by plaintiff is susceptible of the reasonable interpretation that, had it not been for the blow received by the decedent, he would not have died when he did. The evidence also shows that up until the day of the accident the deceased was working at his place of employment without difficulty.

It will be noted that appellant objects first to the admissibility of the tables into evidence, and, secondly, to the instruction. There can be no doubt of the admissibility of the table into evidence. No cases are cited by appellant that hold that such evidence is inadmissible. On the other hand, in Groat v. Walkup Drayage, etc., Co., 14 Cal.App.2d 350, 359, 58 P.2d 200, it was expressly held that, even though the evidence shows that the person injured was not in average good health, such tables are admissible even against the specific objection that the evidence shows that the injured person was not in average or ordinary health. See, also, Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575. In 116 A.L.R. 416, there is an exhaustive annotation on the subject. At page 417 the rule is stated that: "According to the weight of authority, lack of normal health in a person whose life expectancy is sought to be determined does not render such tables inadmissible in evidence, it being frequently pointed out in these cases that such ill-health or disease goes only to the weight of the evidence and not to its admissibility." The statement is supported by cases from many states.

[6] In the present case, when the table was offered containing not only the average life expectancy of a man of the age of 65, but also the life expectancy of the heirs of the deceased, the appellant made the following objection: "I am not certain whether this objection is good, I make the objection that it is incompetent, irrelevant and immaterial; I wish to make a record at this time." The rule is elementary that such a general objection is sufficient only if the evidence is absolutely inadmissible for any purpose, and that where the evidence is objectionable only on special grounds, such grounds must be specified—otherwise it is waived. Brumley v. Flint, 87 Cal. 471, 25 P. 683; Toomes v. Nunes, 24 Cal.App.2d 395, 75 P.2d 94. But reliance need not be had upon this technical rule. Under the Groat case the evidence was admissible even in the face of a specific objection. Appellant's objections go to the weight, not to the admissibility of the evidence.

[7-9] The evidence having been admitted properly, the plaintiff was entitled to an instruction based thereon. It is true that the appellant was entitled to a qualifying instruction to the effect that in estimating the probable length of a particular man's life, as compared with the average length of life as disclosed by the mortality tables, the individual's state of health, occupation, habits and surroundings, as disclosed by the evidence, must be taken into account. Groat v. Walkup Drayage, etc., Co., supra; Scott v. Sheedy, supra. Under the circum-

stances of this case, however, the failure to give such a qualifying instruction did not constitute reversible error. The appellant made no request for any such instruction, and does not challenge the amount of the verdict. For these reasons he cannot now complain of the failure of the court to give the qualifying instruction. In Murphy v. National Ice Cream Co., 114 Cal.App. 482, 300 P. 91, the mortality tables showed that the life expectancy of a person of plaintiff's age was 18.9 years. The trial court instructed the jury that the jury should first find if the claimed injuries were permanent and then stated that (page 486 of 114 Cal. App., page 92 of 300 P.), "in this connection I instruct you that if you do find her injuries to be permanent the life expectancy of the plaintiff Ellen E. Murphy is eighteen years". Note that this was a positive, unequivocal instruction which, in effect, took the determination of this question of fact from the jury. Nevertheless, the court held that this was not reversible error. In so holding, the court, at page 487 of 114 Cal.App., at page 93 of 300 P., stated the proper rule as follows: "The term 'life expectancy' as used in the instruction here given was sufficiently accurate to express that which the tables of mortality showed (Belmer v. Boyne City Tanning Co., 160 Mich. 669, 125 N.W. 726), and consequently the jury was informed in effect that, if Mrs. Murphy was permanently injured, her life expectancy as shown by said tables was eighteen years; but of course, in the form the instruction was given, it cannot be approved, because it was still a question of fact for the jury to determine whether on account of those injuries she was removed from the general classification established by said tables. However, it does not follow for several reasons that a reversal is warranted on that ground, for in the first place it is held generally that in the absence of a request for more specific instructions it is not reversible error for the court to instruct the jury that life tables might be considered as evidence of the life expectancy of a person, without instructing further that it should take into account in this respect all the evidence relating to the health and physical condition of such person. [Citing many cases] And in the present case, no such request was made, nor was any instruction whatever proposed by defendants upon the subject.

"Furthermore, it is a matter of common knowledge that the length of the life of a person cannot be definitely known (People v. Burns, 138 Cal. 159, 69 P. 16, 70 P. 1087, 60 L.R.A. 270), and of course is not subject to mathematical computation. Presumably the jury was composed of intelligent persons (Ward Land, etc., Co. v. Mapes, 147 Cal. 747, 82 P. 426), and must have realized that this was true. Consequently it is not unreasonable to assume that they understood the instruction to mean, as the court doubtless intended, that, if it believed that Mrs. Murphy was permanently injured, it was to take the eighteen-year period set forth in said tables as a basis in estimating her life expectancy. And in any event, since defendants were found liable for the accident, plaintiffs were admittedly entitled to damages for the personal injuries suffered by Mrs. Murphy; and the instruction in question concerns only that element thereof based upon her life expectancy. Therefore, since as stated it is impossible to determine such life expectancy with any degree of certainty, and defendants make no point that the amount of the award is so disproportionate to the injuries inflicted as to demand a reversal upon that ground, we are not prepared to hold that the error complained of calls for a new trial. Lahti v. McMenamin, 204 Cal. 415, 268 P. 644; Kirk v. Santa Barbara Ice Co., 157 Cal. 591, 108 P. 509."

In Newman v. Campbell, 23 Cal.App.2d 639, 641, 73 P.2d 1265, 1266, the same thought is expressed in the following language: "The mortality table was admissible and, although not conclusive, was evidence of the probable duration of her life. Under the evidence she was entitled to an instruction based upon her theory of the case. Groat v. Walkup Drayage, etc., Co., 14 Cal. App.2d 350, 58 P.2d 200; Morrow v. Mendleson, 15 Cal.App.2d 15, 58 P.2d 1302. If the appellant desired an instruction explaining in more detail the weight to be given the elements fixing her life expectancy, as was the case in Groat v. Walkup Drayage, etc., Co., supra, such an instruction should have been offered. This was not done, and in the circumstances appellant has no ground for complaint. Murphy v. National Ice Cream Co., 114 Cal. App. 482, 300 P. 91."

[10] The conclusions reached in these cases are determinative of the point under discussion. The only case that is cited that can be interpreted as supporting the contention that the failure to give the qualifying instruction is error is Morrow v. Mendleson, 15 Cal.App.2d 15, 58 P.2d 1302. In that

case it was held that it was error to instruct the jury upon the mortality tables without qualification where the person involved was admittedly not in normal or average health at the time of the injury. Apparently, the court was of the opinion that error was committed unless the qualifying instruction was given. An examination of the case, however, discloses that the court did not hold that the giving of the instruction was prejudicial and therefore reversible error. The court first held that certain instructions dealing with the question as to who has the right-of-way at an intersection were prejudicially erroneous, and then held that the mortality table instruction (the wording of which does not appear in the opinion) was improper, and, in effect, ordered the trial court not to give such instruction on the new trial. At most, all that this case held was that the giving of an unqualified instruction based on the mortality tables is error. If that case were applicable here it would not necessitate a reversal unless it were also held that the giving of the instruction was prejudicial. As already pointed out, the appellant does not attack the verdict as excessive. In fact, any such contention would be without merit. The deceased was earning over $2,300 annually at the time of his death. A person of average health of the decedent's age at the time of his death has a life expectancy of 11.10 years. The wife of decedent, who had a life expectancy of twenty-two years, and a fifteen-year-old son, who had a life expectancy of forty-five years, were entirely dependent on the decedent for support. The jury fixed the recovery at $8,000—about the amount the decedent would have earned in three and one-half years. We must assume, as was pointed out in the Murphy v. National Ice Cream Co. case, supra, that the jury was composed of reasonably intelligent persons. They must have known that life expectancy tables are based on average normal health, and are not conclusive as to the life expectancy of any particular person. That the jury must have considered the particular health of the decedent is conclusively demonstrated by the size of the verdict. We, therefore, hold that even if error was committed in the giving of the unqualified instruction, it was not prejudicial to defendant.

[11] The defendant next complains of an instruction dealing with the duty of the decedent to use reasonable diligence in the care of his injury, and also dealing with the legal effect of his belief in the doctrines of the Christian Science Church. At the request of plaintiff the court instructed the jury that: "The Court instructs you that a person injured through the negligence of another has the duty to use ordinary and reasonable diligence in caring for his injuries and reasonable means to prevent aggravation of them and to effect a recovery. Such person is not required, however, to rely on a particular kind of treatment but such treatment as a reasonably prudent person might under all the circumstances have chosen.

"In determining whether Christiansen did act as a reasonably prudent person might have acted under the circumstances, you are entitled to consider, with all the other evidence, his conduct in the light of any conscientious belief in methods of treatment held by him, such as his belief in the doctrines of the Christian Science Church or healing by prayer and the extent to which he acted in accordance with such belief." At the request of defendant the court instructed the jury that, "I instruct you that it is the law that, if the injuries, if any, sustained by Henry Christiansen, the decedent, were such as to render, in the exercise of ordinary care on his part, medical, or surgical, treatment by a physician, or surgeon, reasonably necessary, or expedient, then the decedent was under the duty to use ordinary care to secure such medical, or surgical, aid, and he was also required to exercise ordinary care in the selection of a physician, or surgeon, of ordinary skill and experience, and while, in determining whether the decedent exercised such ordinary care, you may consider the fact that the decedent was a member of the Christian Science Church, or an attendant at such church, that fact, or the religious beliefs, or practices, of the decedent did not relieve him from the duty of exercising ordinary care, in the light of all the circumstances of this case, in securing medical, or surgical, attention." Another instruction was given at the request of defendant reading as follows: "Belief in any particular system of healing by faith or prayer, does not in and of itself, relieve an injured person from the duty of exercising ordinary care to bring about recovery from injuries suffered."

Other instructions were given dealing with the duty of an injured person to use ordinary and reasonable diligence in the caring for his injuries.

[12, 13] It seems to be the contention of defendant that the first two instructions are in conflict, in that it is contended the first told the jury that the injured person was not required to rely on a particular kind of treatment, while the second told the jury, to use defendant's own language, "that decedent was under a duty to exercise ordinary care to secure medical assistance". It is also apparently urged that it was error to tell the jury it could consider the decedent's belief in the doctrines of the Christian Science Church in ascertaining whether he exercised due diligence in caring for his injuries. These contentions are without merit. If there is any error in the two instructions it is in the one offered by defendant, if that instruction should be interpreted as contended by him. As so interpreted, it was entirely too favorable to the defense. The proper rule was embodied in the first instruction above-quoted. Defendant concedes that the jury should have been instructed that the fact that the decedent was a believer in Christian Science could be taken into consideration in determining whether the decedent acted with reasonable care. He argues that the last sentence of the first paragraph of the first instruction above-quoted which reads: "Such person is not required, however, to rely on a particular kind of treatment but such treatment as a reasonably prudent person might under all the circumstances have chosen" in effect told the jury that the deceased was under no duty to seek medical care. Defendant seems to believe that the true rule is that a belief in Christian Science may permit the injured man to delay in securing medical treatment, apparently until relief has been sought and not obtained through Christian Science, but that such belief will not justify him in not securing medical care at all. Of course, in the present case, the decedent did seek medical care. He first called in a doctor, and, after the doctor had failed to give relief, called in a Christian Science practitioner.

[14, 15] The correct rule is that an injured person must use reasonable diligence in caring for his injuries. What is reasonable diligence depends upon all the facts and circumstances of each case. There is no hard and fast rule that the injured person must seek medical care of a particular type. Self care may be reasonable under the circumstances, and the jury should be so instructed where that factor is relevant. McKinney v. Red Top Cab Co., 113 Cal. App. 637, 299 P. 113; see, also, Larson v. Blue & White Cab Co., 24 Cal.App.2d 576, 75 P.2d 612. Similarly, if the injured party is a believer in Christian Science, the jury should be instructed, as it was instructed in this case, that such belief is a factor to be considered with all the other evidence in determining whether the injured person used reasonable diligence in caring for his injuries. If the injuries are such that a reasonably prudent man would seek medical care, such care must be secured. But where the injuries are not of such a nature, as in the present case, the jury may properly consider the religious beliefs of the injured person in ascertaining whether he exercised reasonable care. Certainly, the courts should not disregard the beliefs held by a large number of reasonable and intelligent people in passing on the efficacy of the curative means adopted by the injured person. Lange v. Hoyt, 114 Conn. 590, 159 A. 575, 82 A.L.R. 486; see, also, cases collected in 82 A.L.R. 491; 15 Am.Jur. 436, § 37. The charge given, in our opinion, was proper and correct.

[16] Defendant also urges prejudicial error in the giving of plaintiff's instruction number 25, which, he contends, is a formula instruction that omits certain necessary elements. No useful purpose would be served by setting forth this instruction in this opinion. When the challenged instruction is read in its entirety it is clear that it was a proper instruction. Moreover, the jury was fully and fairly instructed in detail on the particular elements claimed to have been omitted. Defendant could not possibly have been prejudiced even if the instruction were defective. Mahoney v. Murray, 140 Cal.App. 206, 35 P.2d 612; Flood v. Miura, 120 Cal.App. 467, 8 P.2d 552.

[17, 18] The only other contention of defendant is that his objection to the hypothetical question propounded to Dr. Berger should have been sustained because, it is claimed, the question was based, in part, on the conclusions of others. It is also urged that the question was "valueless because no proper foundation was laid and it was built upon the assumption of numerous facts not in evidence". The first part of this contention is based on the theory that the hypothetical question was based, in part, on the diagnosis of Dr. Albi, the attending physician, and on conclusions appearing in the testimony of others. It is urged that

it is error for a hypothetical question to include the assumption of the correctness of opinions reached by someone else. The case of Mt. Royal Cab Co. v. Dolan, 168 Md. 633, 179 A. 54, 98 A.L.R. 1106, and 20 Am.Jur. 665, § 791, are cited as supporting this rule. It is, of course, the rule, as announced in the above case and text, that the opinion of an expert cannot be predicated on the opinion of another expert. But it is equally true that an expert may express an opinion based upon facts testified to by an expert, or upon tests made by other experts. In the present case, Dr. Albi was permitted to testify concerning his personal examination and diagnosis. The hypothetical question properly included the facts so disclosed. This is equally true of the facts testified to by the other witnesses. Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S.W.2d 638.

[19] Moreover, it is a well-settled rule that even when a hypothetical question improperly co-mingles with the statement of the facts opinion evidence of others, a reviewing court will not consider the objection unless at the trial the appellant called the attention of the trial court to the objectionable parts of the question. Borkheim v. Borkheim, 65 Cal.App. 218, 223 P. 429; Travelers Ins. Co. v. Drake, 9 Cir., 89 F.2d 47. The record shows no objection to the question based on the contention now urged.

[20-22] Defendant also makes the familiar contention that the hypothetical question did not include all the relevant facts. Obviously, a hypothetical question need not necessarily include a statement of all of the evidence in the case—a question may be properly framed upon any reasonable theory of the questioning party. Coyne v. Pacific Mut. Life Ins. Co., 8 Cal.App.2d 104, 47 P.2d 1079. Moreover, the appellate court is justified in placing considerable reliance upon the determination of the trial judge in passing on the sufficiency of the facts narrated in the question. Weaver v. Shell Company, 34 Cal.App.2d 713, 94 P.2d 364; Graves v. Union Oil Co., 36 Cal.App. 766, 173 P. 618. In addition, the record here shows that, after the question was asked of Dr. Berger, defendant objected on the ground that all facts were not included. Every relevant fact suggested by him was thereafter, with consent of plaintiff's counsel, included in the question. Defendant is in no position now to claim that other facts not included should have been included. Coyne v. Pacific Mut. Life Ins. Co., supra.

It was urged on the oral argument, and somewhat imperfectly in the briefs, that the hypothetical question, which was intended to ascertain the opinion of the expert as to the cause of death, assumed the very fact in issue. This is incorrect. A fair reading of the question discloses that it was based on the relevant facts, and did not assume the fact in issue.

A reading of the record demonstrates that defendant was accorded a full and fair trial. The jury was fully and fairly instructed. No substantial or prejudicial error was committed.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

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44 Cal.App.2d 577

MARIN COUNTY v. MESSNER.

Civ. 11177.

District Court of Appeal, First District, Division 1, California.

April 30, 1941.

Hearing Denied June 26, 1941.

1. Counties 🔑73

The section of the Political Code requiring county board of supervisors to provide offices and materials for surveyor and also "all necessary expenses and transportation on work performed in the field" is broad enough to cover all traveling expenses to and from work in field for every county surveyor in state, notwithstanding sections relating to some counties make no express provision for such expenses. Pol.Code, § 4044.

See Words and Phrases, Permanent Edition, for all other definitions of "All Necessary Expenses and Transportation On Work Performed In The Field".

2. Counties 🔑73

That Legislature, when fixing compensation of county officers in obedience to constitutional mandate, in some instances superadded provisions for traveling expenses did not indicate that, in acts wherein Legislature merely fixed compensation of surveyors in some counties, it intended to discriminate against surveyors and assistants in other counties in matter of traveling expenses. Const. art. 11, § 5.

3. Officers 🔑97

Fees and compensation of public officers, being of statutory origin, may be collected and retained only when they are specifically provided by law.

4. Officers 🔑94

Laws granting fees and compensation to public officers should be strictly construed in favor of government, and where ambiguity arises and the enactment admits of two interpretations, the rule of strict construction in favor of government must be applied.

5. Counties 🔑73

The section of Political Code requiring county board to provide office and materials and all necessary expenses and transportation on work performed in field for surveyors is as much a part of the County Government Act as sections therein dealing with the several classified counties. Pol.Code, § 4044.

6. Counties 🔑73

The section of the Political Code directing board of supervisors to provide for surveyor "all necessary expenses and transportation on work performed in the fields", makes all such transportation expenses, those of surveyor's assistants as well as those of himself, a county charge. Pol.Code, § 4044.

7. Statutes 🔑225

The section of the Political Code prescribing powers and duties of boards of supervisors and directing board to provide for surveyor all necessary expenses and transportation on work performed in field, and section making traveling and other personal expenses of district attorney and sheriff county charges which are found among the general sections of the County Government Act are "in pari materia." Pol.Code, §§ 4044, 4307.

See Words and Phrases, Permanent Edition, for all other definitions of "In Pari Materia".

8. Counties 🔑73

The 1927 and 1929 amendments to the County Government Act, allowing surveyor in Marin county "his actual traveling and other necessary expenses incurred by him while engaged in work for the county," do not supersede or repeal by implication the section of the Political Code directing board of supervisors to provide for "all expenses and transportation on work performed in the field" by the county surveyor. Pol.Code, §§ 4044, 4252, subd. 12.

9. Counties 🔑114

The 1927 and 1929 amendments to the County Government Act applying to Marin county and providing that surveyor shall receive his "other necessary expenses incurred by him while engaged in work for the county" do not under the "expressio unius" rule mean only the surveyor's own expenses, but permit surveyor to contract with third persons for transportation of members of his surveying parties to and from their work. Pol.Code, § 4252, subd. 12.

See Words and Phrases, Permanent Edition, for all other definitions of "Expressio Unius Est Exclusio Alterius" and "Other Necessary Expenses Incurred by Him While Engaged in Work for the County".

10. Counties 🔑122(2)

Under provision of County Government Act applying to Marin county and providing that surveyor shall receive his other necessary expenses incurred by him while engaged in work for county, which permits surveyor to contract with third persons to transport surveying parties to and from work, and under Political Code section prohibiting officers from having interest in contracts made by them but containing exception relating to traveling expenses, surveyor of Marin county could collect transportation charges of surveying parties when personally furnished by him under agreement with county board of supervisors. Pol.Code, §§ 920, 4252, subd. 12.

11. Counties 🔑122(2)

Under the section of the Political Code prohibiting public officials from being interested in contracts made by them and providing that when traveling expenses are allowed to officer, he may contract with appropriate authorities for allowance or mileage for use of vehicles owned, rented or used by him, expression "traveling expenses" includes not only officer's personal traveling expenses, but also allowances for transportation of county employees which come within provision of the County Government Act applying to Marin county allowing surveyor traveling and other necessary expenses incurre in work for county. Pol.Code, §§ 920, 4252, subd. 12.

See Words and Phrases, Permanent Edition, for all other definitions of "Traveling Expenses".

12. Counties 🔑73

The provision of the County Government Act applying to Marin county, as it read before 1933 amendment, warranted, as county charge, transportation expenses of assistants of county surveyor. Pol.Code, § 4252, subd. 12.

13. Counties 🔑122(2)

Agreement whereby Marin county surveyor, in official capacity, agreed to transport men working under his supervision in automobiles owned by him and whereby county board of supervisors made allowance for use of automobiles owned or rented and used by him in lieu of usual transportation charges was valid. Pol.Code, §§ 920, 4044, 4252, subd. 12.

14. Counties 🔑122(2)

Claim by county surveyor for rental by surveyor to county of his equipment under arrangement with county board of supervisors whereby he was to receive rental for equipment was prohibited by section of Political Code prohibiting interest by public officials in contracts made by them. Pol. Code, § 920.

15. Contracts 🔑123(1)

Statute prohibiting interest of public officials in contracts made by them is an express legislative declaration of the common-law rule upon the subject. Pol.Code, § 920.

16. Contracts 🔑123(1)

Any direct or indirect interest in subject matter by public officer is sufficient to taint contract with illegality if interest is such as to affect judgment and conduct of officer either in making contract or in its performance. Pol.Code, § 920.

17. Counties 🔑206(1)

Where county board of supervisors acted without jurisdiction and allowed claims of county surveyor for rental for equipment furnished under arrangement with board of supervisors, which claims were invalid on face and expressly prohibited by law, approval of board added nothing to validity of claims and they were subject to attack under section of Political Code providing for suit by county against persons receiving money unlawfully paid. Pol.Code, §§ 920, 4005b.

18. Counties 🔑75(4)
Estoppel 🔑62(3)

Action by county under section of Political Code to recover from former county surveyor money paid under invalid agreement respecting rental of surveyor's equipment was not an action on an implied equitable contract for money had and received, and doctrine of "equitable estoppel" did not preclude county from recovering. Pol.Code, §§ 920, 4005b.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

19. Limitation of actions 🔑34(3)

Action instituted by district attorney in county's name under section of Political Code to recover from former county surveyor moneys paid under invalid agreement was not an action upon an implied contract for money had and received to which two-year statute of limitations applied, nor one to recover money from an involuntary trustee wherein the four-year statute applied, but was an action based upon liability created by statute, and three-year statute of limitations was controlling. Pol.Code, § 4005b; Code Civ.Proc. § 338, subd. 1.

20. Counties 🔑75(4)

In action instituted by district attorney in county's name under section of Political Code to recover from former county surveyor money paid under invalid agreement, matter of awarding 20 per cent. damages for use of money mentioned in section rested in sound discretion of trial court, and there was no mandatory duty imposed on court to impose such damages, even though it was district attorney's imperative duty under the section to institute the action. Pol.Code, § 4005b.

21. Counties 🔑75(4)

In action by county under section of Political Code to recover money paid former county surveyor under invalid agreement with county board of supervisors for rental of surveyor's equipment, court did not abuse discretion in denying county an additional judgment of 20 per cent. damages. Pol.Code, § 4005b.

WARD, J., dissenting.

Appeal from Superior Court, Marin County; Donald Geary, Judge.

Action by the County of Marin against Rodney E. Messner to recover certain sums of money paid by the county to defendant while he occupied the position of county surveyor and alleged to have been paid without authority of law. From the judgment, both parties appeal.

Judgment modified, and, as modified, affirmed.

Prior opinion, 108 P.2d 74.

Hearing denied; EDMONDS, J., dissenting.

A. E. Bagshaw, Dist. Atty., and Harold Jos. Haley, Deputy Dist. Atty., both of San Rafael, for plaintiff, appellant and respondent.

Martinelli & Gardiner, of San Rafael, for respondent and appellant.

GOODELL, Justice pro tem.

Section 4005b of the Political Code provides in part that whenever the board of supervisors shall, without authority of law, order any money paid as salary, fees or for any other purposes, and such money shall have been actually paid, it is the duty of the district attorney to institute suit in the name of the county against such person or persons to recover the money so paid and twenty per cent damages for the use thereof. Acting in pursuance of the foregoing provisions the district attorney of Marin county instituted the present suit in the name of that county to recover certain sums of money paid by the county to defendant while he occupied the position of county surveyor, alleging that such payments were authorized by the board of supervisors and paid by the county treasurer without authority of law. The total sum originally sued for was $28,183, but by an amended complaint was reduced to $24,219.70. The trial court found in favor of the county on the issue of the illegality of the payments, but held that the three-year statute of limitations applied, and that therefore the county was entitled to recover only the moneys paid within the three years next preceding the filing of the complaint, which amounted to $4,122.50. Judgment was entered for that amount, without any allowance being made for damages. Each party has appealed, the defendant contending in support of his appeal that the payments were not illegal, or, if so, that because of the circumstances hereinafter stated the county is estopped from suing for the recovery thereof; and in any event, that the two-year statute of limitations applies. The county contends in support of its appeal that the four-year statute of limitations governs, and that as a matter of law the county was entitled to twenty per cent damages on the amount recovered.

It appears from the evidence, which consists for the most part of written stipulations, that between February 3, 1927, and September 6, 1932, defendant presented to the board of supervisors and upon approval of said board the county treasurer paid some 507 separate claims, aggregating the amount here sought to be recovered. The claims so presented, approved and paid included two separate subject matters; first, mileage for the use of defendant's automobiles in transporting surveying parties—transit men, chain men, rod men, and field men, who were county employees working under defendant's direction—to and from the location of county construction and repair work and operations; secondly, for rental of surveying and engineering equipment owned by defendant and used by said surveying parties in and upon county work. The claims for transportation were at the rate of fifteen cents a mile for each mile traveled until about September 4, 1929, and thereafter at the rate of ten cents a mile. The claims for rental of surveying and engineering equipment were at the rate of $2.50 per day for each unit of equipment so used. It further appears, and the trial court in effect so found, that the claims were presented, approved and paid pursuant to an arrangement made between the board of supervisors and defendant at the board's request, at a regular meeting of said board held in December, 1926. The arrangement was brought about in this manner: Defendant was elected surveyor at the August, 1926, primary election. At a special election held on September 26, 1925, the county had voted a bond issue of $1,250,000 for road construction, which was subject to the engineering control of the county surveyor. At its regular session in December the board called defendant before it and in open meeting informed him of a working agreement then existing between the board and the surveyor whereby the surveyor transported the men working under his supervision in automobiles owned by him, and furnished surveyor's equipment for their use at an allowance from the county of fifteen cents a mile for the use of the automobiles, and $2.50 a day of actual use for each complete unit of engineering equipment. Defendant at first objected to a continuation of the arrangement, stating that he had no such transportation facilities or surveying equipment as would be required to take care of the work contemplated under the bond issue. The board then informed him that it did not want the county to spend the money for the purchase of the automobiles and equipment for the reason that the county would no longer have use for the same after completion of the road work under the bond issue, and that defendant would be in a better position to dispose of the automobiles and equipment than the county. Thereupon defendant agreed to proceed in accordance with the board's wishes, and in connection therewith it was further understood and agreed that the moneys thus to be paid to defendant would not provide any profit to defendant, but would compensate him only for the actual, necessary and proper expenses of transportation and performing said engineering work. In consummation of the agreement a motion was unanimously approved that such arrangement be continued with defendant for the duration of his occupancy of the office, but subsequently and at the same meeting the motion was withdrawn on the advice of the county clerk that such motion was unnecessary because the arrangement was merely a continuation of the system then in force. In September, 1929, the rental for the use of the automobiles was reduced from fifteen to ten cents a mile, but otherwise the arrangement so entered into remained unchanged, and in accordance therewith monthly claims were presented, allowed and paid for such mileage and rentals up to September, 1932.

At the trial it was stipulated that each charge made by defendant and each item of every claim allowed and paid involved actual and necessary transportation or use of the surveying equipment in performing the necessary duties of the office of county surveyor by defendant and said survey parties, in the sense that such transportation and use of engineering equipment were necessary, and that either the county or the defendant was bound to incur the expense therefor, either in the amount charged or some other amount; that the action of the board in allowing the claims was final and binding as to the amounts "if the board of supervisors had jurisdiction to allow anything on these items".

Section 920 of the Political Code as enacted in 1921 reads as follows: "Members of the legislature, state, county, city, and township officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members; *provided, that when traveling expenses are allowed by law to any such officer, he may contract with the appropriate authorities for an allowance or mileage rate for the use of vehicles owned or rented and used by him in the performance of duty, in lieu of the usual transportation charges.*" (Emphasis ours.) It will be observed that the single exception noted by the section granting the right to contract is restricted to the matter of an allowance for the use of the vehicles; and it is the county's contention that neither under said exception nor any other statutory enactment did defendant have the right to contract with the county for the use of his automobiles except for his own personal transportation; and that there is no statutory justification whatever for that portion of the agreement relating to the rental of the engineering equipment; that therefore the entire agreement was made in violation of express statutory enactment, and the principle of public policy that officers shall not have a personal pecuniary interest in public transactions. In behalf of defendant it is contended that if the payments were authorized by statute they are legal, regardless of the question of the existence of any previous valid agreement between him and the board.

The Mileage Claims.

The sole question on this phase of the appeal is whether the transportation of men employed by the county to assist the surveyor is a county charge allowable to him. If it is, then under the proviso in section 920 it was perfectly legal for the surveyor to collect, as he did, on a mileage basis "for the use of vehicles owned or rented and used by him in the performance of duty, in lieu of the usual transportation charges". That this transportation expense was necessarily incurred is not questioned, for it is settled by the stipulation that either the county or the defendant was bound to incur the expense.

When the defendant took office in January, 1927, the County Government Act for Marin county provided that the surveyor should receive "such fees as are now or may be hereafter allowed by law" (Stats. 1925, pp. 693, 697). That provision was superseded by an amendment which provided that thereafter the surveyor should receive an annual salary of $4,000 "and in addition thereto * * * his actual traveling and other necessary expenses incurred by him while engaged in work for the county" (Stats.1927, pp. 1157, 1161). The act as amended in 1929 contained the same provision as to compensation and expenses as the 1927 act, but it provided also for the appointment by the surveyor of two transit men at $9 a day and three at $8 a day, to be paid by the county (Stats.1929, pp. 993, 996). In 1931 the county was reclassified but no change was made in the existing provision relating to the office of surveyor (Stats.1931, pp. 1078, 1082; Pol. Code, sec. 4252, subd. 12).

The county contends that this statutory language authorizes only the expenses of the surveyor himself, this position being stated in its brief as follows: "The statute is silent with respect to the traveling expenses or transportation charges of these employees. Neither they nor the surveyor are allowed these charges. It is too obvious for argument that had it been in the mind of the legislature to allow these expenses it would have clearly provided therefor as it did in other sections of the Political Code dealing with identical subject matter. The very fact that the compensation of the employees was provided and no provision made for traveling expenses is the clearest indication that such expenses were not intended to be allowed." The defendant, on the other hand, contends that when the statute speaks of the surveyor's expenses it includes those of everybody working under him. Moreover, the defendant relies upon section 4044 of the Political Code, which reads as follows: "The board shall provide, for the use of the surveyor, a suitable office, office furniture, heat, light, and care for the same, office and record books, and other necessary material, *also all necessary expenses and transportation on work performed in the field.* * * *" (Emphasis ours.)

[1-8] In arguing that the County Government Act for Marin county is controlling and exclusive, the county points to the contrast between it and sections "dealing with identical subject matter", for other counties, namely, Sonoma, Stanislaus, Merced, Siskiyou and Mendocino, in which the legislature has expressly provided for expenses for the surveyor's assistants. Our own investigation discloses that the same is true also of San Diego, Santa Clara, Fresno, Colusa and Kern counties. This circumstance, however, proves nothing, for it is well known that there are about as many diverse provisions in every County Government Act as there are counties. For instance: As compared with the ten counties just mentioned, there are four—Napa, Sutter, Tehama and San Joaquin—where the statute allows the surveyor his expenses but is silent respecting those of his assistants, while in Ventura and Santa Cruz counties the statute is silent not only with respect to the expenses of the assistants but with respect to those of the surveyor himself. In Alameda county elaborate provision is made for assistants but no *express* provision for *their* expenses. The Alameda statute (sec. 4232, subd. 13, Pol.Code) reads substantially the same as section 4044, Pol. Code, to-wit: "the surveyor shall be allowed * * * all necessary expenses and transportation for work performed in the field". San Mateo's section (sec. 4244, subd. 12, Pol.Code) is substantially the same. Thus it will be seen that there are at least eight counties where the statute is silent with respect to expenses for the surveyor's assistants, as against ten where they are mentioned. And in at least eight—Orange, Shasta, Butte, Amador, Mariposa, Alpine, Ventura and Santa Cruz,—no mention at all is made of the surveyor's *own* expenses. According to the argument of the county, in all these counties where the statute makes no express provision for the expenses of the surveyor or his assistants they cannot legally collect from the county for their transportation to and from the work in the field which they do for the county. We do not follow this argument, for section 4044 of the Political Code is general in its scope and application, and its language is broad enough, in our opinion, to cover *all* traveling expenses to and from work in the field, for *every* county surveyor in the state. The County Government Acts are enacted pursuant to section 5 of article XI of the Constitution, which directs the legislature to "regulate the compensation of all such officers, in proportion to duties, * * *". The Constitution says nothing with respect to the expenses of such officers. Simply because the legislature, when fixing compensation *in obedience to this constitutional mandate*, has in some instances ex industria superadded provisions for traveling expenses, it does not by any means follow that in the counties where the legislature went no further than to fix the compensation, it intended to discriminate against the surveyors and their assistants in the other counties in the matter of traveling expenses. There is no apparent reason why the surveyor of one county should be entitled to his traveling

expenses while his colleague in the next county should not be; or why the surveyor's assistants in X county should be entitled to their traveling expenses and those in Y county should not be. We are of course mindful that it is well-settled that fees and compensation of public officers, being of statutory origin, may be collected and retained only when they are specifically provided by law; moreover, the laws granting the same are to be strictly construed in favor of the government; and where ambiguity arises and the enactment admits of two interpretations the rule of strict construction in favor of the government must be applied. But it must be remembered that section 4044 of the Political Code is as much a part of the County Government Act as the sections therein which deal with the several classified counties; and it must be remembered, also, that section 4044 deals only with the subject of accommodations and expenses of county surveyors. Section 4044 is found in that part of the Political Code prescribing the powers and duties of boards of supervisors. The part of the section which attempted to delegate to the board the power to fix the compensation of surveyors was held unconstitutional in the case of Arnold v. Sullenger, 200 Cal. 632, 254 P. 267, but with that exception the statute has remained substantially unchanged for forty-eight years, since it first appeared in section 145 of the County Government Act of 1893 (Stats. 1893, pp. 346, 382). In our opinion this section, which directs the board to provide for the surveyor "all expenses and transportation on work performed in the field. * * *" makes *all* such transportation expenses—those of his assistants as well as those of himself—a county charge as certainly and as effectively as section 4307 of the Political Code makes the traveling expenses of a district attorney or sheriff a county charge. Section 4307 reads in part as follows: "The following are county charges: * * * 2. The traveling and other personal expenses of the district attorney, and the sheriff * * * and all other expenses necessarily incurred by either of them in the detection of crime, and in the prosecution of criminal cases, * * *". The provisions of section 4307 (in so far as they relate to district attorneys) likewise appear in the County Government Act of 1893 (Stats.1893, p. 346, sec. 230, p. 511). They had appeared first in an earlier act. Both sections 4044 and 4307 are found among the general sections of the County Government Act, and they are to be found in every such act since 1893. They would seem clearly to be in pari materia. During all the years that these two sections have been in the County Government Acts, unchanged in any substantial respect, there have been, as already noted, innumerable changes in the same acts dealing with compensation and expenses of county officers in the fifty-eight counties (three, for example, in Marin county within the period involved in this litigation). There is nothing in the briefs or arguments of the county which convinces us that the 1927 and 1929 amendments,—although later and although relating specifically to the surveyor of Marin county,—were intended to supersede or to repeal by implication the provisions of section 4044.

[9] The 1927 and 1929 amendments (sec. 4252, subd. 12, Pol.Code) allow the surveyor "*his* actual traveling and other necessary expenses incurred by *him* while engaged in work for the county". It is because of this language that the county invokes the expressio unius rule and contends that the statute means only the surveyor's *own* expenses. But the language of section 4307, dealing with district attorneys and sheriffs, is no more comprehensive or inclusive than that of section 4044. Moreover, similar language is used in the statute relating to the surveyor of Glenn county where section 4271, subdivision 12, Political Code, provides that the surveyor "shall receive *his* actual traveling and other necessary expenses incurred by *him* while engaged in work in the field for the county". (Emphasis ours.) In Severance v. Ball, 93 Cal.App. 56, 268 P. 1068, 1070, the treasurer was directed by mandate to pay claims for services rendered by assistants of the surveyor,—a chain man, a rod man and a stenographer. The court there said, "Common experience, of which we must take judicial knowledge, teaches that a surveyor in the field must ordinarily, in order to perform his duties as a surveyor, have with him men, in common parlance denominated 'chain men' and 'rod men'". The claims for these assistants were held to be county charges under the Glenn county section, which differs from the Marin county section (sec. 4252, subd. 12) only in the immaterial addition of the words "in the field". The same result has been reached in several cases arising under section 4307, supra. In Langdon v. Koster, 157 Cal. 39, 106 P. 209, and in Darrah v. County of San Joaquin, 103 Cal.App. 76,

283 P. 962, it was held that expenses incurred by a district attorney for the services of detectives employed by him in criminal cases were county charges. It was contended in the Darrah case, as it is here, that the statute authorized only the expenses of the officer himself. County of Yolo v. Joyce, 156 Cal. 429, 105 P. 125, was an action to recover money which the county had paid on a claim allowed by the supervisors for a transcript ordered by the district attorney in a criminal case where there had been a long interruption in the trial. The court held that the district attorney could properly order the transcript under section 4307. In the Langdon and Darrah cases, supra, the officer himself brought the action. There are, however, other cases under section 4307 where the claimants who furnished the services contracted for by the sheriff or district attorney were permitted to maintain the action. Thus in Victors v. Kelsey, 31 Cal.App. 796, 161 P. 1006, it was held that the district attorney could lawfully contract, under section 4307, for the services of an expert witness, and in Cunning v. County of Humboldt, 204 Cal. 31, 266 P. 522, it was held that a district attorney could lawfully contract for detectives' services. There are other cases holding that the expenses involved were authorized under that portion of section 4307 of the Political Code providing that the district attorney or sheriff is entitled to "all other expenses necessarily incurred by either of them in the detection of crime." It would seem to follow that similar language in section 4252(12) of the same Code (the 1927 and 1929 amendments) to the effect that the surveyor shall receive his "other necessary expenses incurred by him while engaged in work for the county" permits the surveyor to contract with third persons for the transportation of the members of his surveying parties to and from their work. Although the language of the two sections differs slightly, both deal with "necessary expenses" of county officers.

[10, 11] If, under section 4252(12) of the Political Code, the surveyor can lawfully contract with third persons for the necessary transportation of his employees, then it follows that under section 920 of the Political Code he can lawfully collect such transportation charges when they are personally furnished by him. That section, after prohibiting public officials from being interested in any contract made by them in their official capacity, contains the proviso that, "when traveling expenses are allowed by law to any such officer, he may contract with the appropriate authorities for an allowance or mileage rate for the use of *vehicles* owned or rented and used by him in the performance of duty, in lieu of the usual transportation charges". It will be noted that the opening clause is that "when traveling expenses are allowed by law". It does not say "when *his* traveling expenses are allowed by law". The expression "traveling expenses" includes not only his personal traveling expenses, but also allowances for transportation of county employees which come within section 4252 (12) of the Political Code. This is also indicated by the use of the plural *"vehicles"* later in the section. That clearly indicates that there might be the simultaneous use of several vehicles, which in turn indicates an intent to allow a mileage rate for transportation of persons other than the surveyor himself. The interpretation of the words "traveling expenses" in the opening clause of section 920 as including transportation charges for other necessary employees is fortified by the presence of the words "transportation charges" as the concluding words of the section. The section does not read that the officer shall receive mileage in lieu of *his* usual transportation charges, but "in lieu of *the* usual transportation charges".

In 1933 section 4252, subdivision 12, was amended (Stats.1933, p. 855) to provide that the five transit men should receive "their actual traveling and other necessary expenses incurred while engaged in work for the county". This amendment filled, in part, (it did not cover traveling expenses of other members of the party such as chain men, rod men and laborers) the claimed void in the earlier statutes, which gave rise to this litigation. The county argues that the fact that the statute was amended shows that "prior thereto, such traveling expenses were not county charges". The preceding discussion we think answers this contention.

[12, 13] Our conclusion on this phase of the case is that section 4044 at all times here in question authorized the transportation expenses of the assistants as a county charge; that section 4252, subdivision 12 (as it read before the 1933 amendment), was itself sufficient to warrant as a county charge such assistants' transportation expenses, under the reasoning of the Severance, Langdon, Darrah, Joyce and Victors cases, supra; that, therefore, under the

proviso of section 920, such traveling expenses being "allowed by law to any such officer" (the surveyor) he could legally make the mileage arrangement, as he did, "for the use of vehicles owned or rented and used by him in the performance of duty, in lieu of the usual transportation charges".

The Claims for Rental of Equipment.

[14, 15] As already appears, the single exception noted by section 920, granting the right to contract, is restricted to the matter of an allowance for the use of vehicles just discussed. The claims for the rental by the surveyor to the county of his equipment fall, in our opinion, squarely within the prohibition of section 920. This section, after all, is merely an express legislative declaration of the common-law rule upon the subject. County of Shasta v. Moody, 90 Cal.App. 519, 521, 265 P. 1032, and cases cited. Osburn v. Stone, 170 Cal. 480, 490, 150 P. 367, 371, was a taxpayer's suit to recover money claimed to have been illegally paid out for public work. One of the items attacked was for a surveying outfit rented to the city by the street superintendent. With respect to this the court said "Contracts such as these are not only denounced by public policy, but are expressly forbidden by section 811 of the Municipal Corporation Act (St.1883, p. 266) * * *. This section not only prohibits such contracts and makes them void, but forbids the payment of claims arising under them. It would therefore appear, in the absence of an explanatory answer, that the payment of $125 for the rental of a surveying outfit belonging to the street superintendent of the city and rented by him to the city was an illegal payment, * * *". Section 811 read as follows: "No officer of such city shall be interested, directly or indirectly, in any contract with such city, or with any of the officers thereof, in their official capacity, or in doing any work, or furnishing any supplies for the use of such city or its officers in their official capacity; and any claim for * * * supplies or materials furnished, in which any such officer is interested, shall be void. * * *" Although the language of section 811 is somewhat more explicit than that of section 920, we are satisfied that these claims for rental are within the same rule of public policy mentioned in the Osburn case, and that that case is controlling. See, also, Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 320, 293 P. 145, and cases cited. On this phase of the appeal we are unable to agree with the defendant that the pertinent statutory enactments warrant a construction contrary to the one placed upon them by the trial court.

[16] Nor is there any merit in defendant's contention that if there was a contract, express or implied, between him and the board of supervisors, it was made by him in his private and not in his official capacity. The general rule is that "Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance". 2 Dillon on Municipal Corporations, p. 1146. In the present case the agreement was made with defendant solely because of his official position as county surveyor, and was carried out by him as such. It was intended that the engineering equipment which was the subject of the agreement was to be used, and it was used, in performing county work, planned and supervised by defendant in the exercise of his duties as county surveyor; and the claims for its rental were filed by him while he occupied that position. Therefore the case is no different in principle from Osburn v. Stone, supra, and must be governed by the doctrine stated therein.

[17] Likewise without merit is defendant's point that the action herein constitutes an illegal collateral attack upon the decisions and quasi-judicial determinations of the board of supervisors. It is quite true that where jurisdiction is vested in the board to determine questions of fact, such as whether particular claims have been necessarily incurred, and the claims are valid on their face, the action of the board in approving the same is not subject to collateral attack. The cases cited and relied upon by defendant are to that effect. But that doctrine has no application where, as here, the board has acted without jurisdiction and allows claims which upon their face are invalid, and expressly prohibited by law. In such cases the approval of the board adds nothing to the validity of the claims and they are subject to attack under the provisions of section 4005b of the Political Code. County of Alameda v. Evers, 136 Cal. 132, 68 P. 475; County of Shasta v. Moody, supra.

[18] Defendant's contention that the county is estopped from recovering the moneys paid is based principally upon the

premise that the action is one upon an implied equitable contract for money had and received; that in equity and good conscience the moneys sought to be recovered do not belong to the county, and that therefore the doctrine of equitable estoppel precludes the county from recovering any part thereof. The case of County of Sacramento v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825, is mainly relied upon in support of the foregoing contention. Obviously, however, the action is not one upon an implied equitable contract, but as already pointed out is a statutory action based on Political Code section 4005b, wherein it has been shown that the board and the defendant acted, although perhaps innocently, in violation of statutory mandate with respect to the rental of the engineering equipment. Under such circumstances the doctrine of equitable estoppel declared in the case cited has no application.

[19] With respect to the disputed question as to which of the three statutes of limitations must govern, it will suffice to say that the action is not one, as contended by defendant, upon an implied contract for money had and received, wherein the two-year statute is controlling; nor is it one, as contended by the county, to recover money from an involuntary trustee, wherein the four-year statute applies. As heretofore stated, it is an action based upon a liability created by statute, to-wit, section 4005b of the Political Code; and therefore, as held by the trial court, the three-year statute (sec. 338, subd. 1, Code Civ.Proc.) is controlling.

[20, 21] The point made by the county in support of its appeal, that in addition to the recovery of moneys paid it was entitled as a matter of law to an additional judgment for twenty per cent damages, cannot be sustained. While section 4005b makes it the imperative duty of the district attorney to institute suit for the recovery of moneys alleged to have been illegally paid "and twenty per cent damages for the use thereof", there is no mandatory duty imposed upon the court by statute or judicial decision to impose such damages. Therefore the matter of awarding damages rested in the sound discretion of the trial court; and in view of the facts it cannot be said that such discretion has been abused.

The conclusions of law and the judgment are modified by striking therefrom the sum of $3,050 awarded plaintiff for the sums collected by defendant as mileage. This leaves the judgment at $1,072.50, the aggregate amount of the claims for the rental of equipment. As so modified the judgment is affirmed. The defendant will recover his costs on the plaintiff's appeal and both sides will bear their own costs on the defendant's appeal.

I concur: PETERS, P. J.

WARD, Justice (dissenting).

I dissent. I agree that the board and the defendant acted in violation of a statutory mandate with respect to the rental of the engineering equipment; and with the conclusions reached on all other questions disposed of in the majority opinion except that reached upon the subject of mileage paid for the use of automobiles employed in transportation with which I emphatically disagree.

The question involved in the action was whether the county surveyor of Marin County violated the provisions of section 920 of the Political Code in entering into a contract with the board of supervisors whereby it was agreed that he should receive from the county (a) certain rental for the use of surveying equipment owned and furnished by him to county employees assisting him in performing his duties in the field; and (b) additional sums of money as mileage for the transportation of said employees to and from their places of work in automobiles owned and furnished by the county surveyor. If the inhibitions of said section 920 were thereby violated, then all payments made to him pursuant to said contract were void, and the judgment entered in favor of the county for the recovery of said moneys should be affirmed in its entirety. The appeal is now before the court on rehearing. The majority opinion filed as the result of the former hearing, written by Justice Knight and in which I concurred, held that said contract was illegal as to both subject matters to which it related, and that therefore the judgment should be affirmed as rendered. County of Marin v. Messner,— Cal.App.2d —, 108 P.2d 74, 77. That decision was in conformity with the ruling of the trial judge who passed upon the demurrer to the complaint, and also with the decision of the trial judge who heard and determined the cause on the merits. If that part of the contract was valid, authority therefor must be found either in the provisions of the county government act fixing the salary of the surveyor of Marin County, or in the provisions of section 4044 of the Political Code relating to county surveyors generally. In the opinion written by Justice Knight, it was stated in substance that the provisions of section 4044 were no broader in their scope than those of the county government act, and that under the latter the surveyor was authorized to collect mileage to cover his own personal expenses only. I adhere to the views expressed in that opinion, and adopt the following portion thereof in my dissent herein:

"It is well settled that fees and compensation of public officers, being of statutory origin, may be collected and retained only when they are specifically provided by law; moreover, the laws granting the same are to be strictly construed in favor of the government; and where ambiguity arises and the enactment admits of two interpretations the rule of strict construction in favor of the government must be applied. Irwin v. County of Yuba, 119 Cal. 686, 52 P. 35; City of Corona v. Merriam, 20 Cal. App. 231, 128 P. 769; County of San Diego v. Bryan, 18 Cal.App. 460, 123 P. 347; County of Santa Barbara v. Rucker, 35 Cal.App. 676, 170 P. 860; County of Santa Barbara v. Twitchell, 179 Cal. 772, 178 P. 945. Here the three county government acts above referred to provided merely that 'in addition thereto (referring to the annual salary) he shall receive *his* actual traveling and other necessary expenses incurred *by him* while engaged in work for the county' (italics ours); *and it is apparent that the provisions of section 4044 of the Political Code do not in any way enlarge upon the provisions of the County Government Act* [italics added]. Fairly construed, therefore, in the light of the legal rules above cited, the language employed imports a clear legislative intent to limit the matter of travelling and other necessary expenses therein mentioned to such as are incurred personally by the surveyor. * * * That being so, there is no legal ground upon which those provisions may be extended judicially to include also expenses incurred by the surveyor for the transportation of county employees working under his supervision, much less rentals for engineering equipment used by said employees.

"If it had been the intention of the lawmaking body to include therein the traveling and other expenses of the surveyor's assistants and other employees of the surveying party, it could easily have been accomplished by the use of appropriate language to that effect, as was done in the cases of several other counties. For example, the provision relating to Mendocino County (Stats.1931, p. 1120) reads: 'The surveyor shall also be paid the actual and necessary expenses of transportation of himself, his deputy and surveying crews, and subsistence of himself and deputy, all while in the field.' And in the case of Siskiyou County the provision reads (Stats. 1931, p. 1124): '* * * that said county surveyor shall be allowed all necessary transportation and expenses incurred by himself or deputies for work performed in the field.' The provisions relating to some of the other counties have been framed in substantially the same language. Moreover, the fact that in the provisions relating to other counties the legislature expressly granted the right of the surveyor to be paid also for the transportation and subsistence of the members of the surveying party working under his supervision, may be taken as evidence of a legislative interpretation that such right did not exist under the general section 4044 of the Political Code; otherwise it would not have deemed it necessary to include the same in provisions relating to particular counties."

Cases arising under section 4307 of the Political Code, cited in the majority opinion, should not be persuasive in this case. It is a well-known fact that in the detection of crime and in the prosecution thereof it is important that the activities of peace officers should not be blazoned forth to the public perhaps to the detriment of an innocent person, at least during the period of investigation; and there is sound reason for permitting the advancement and expenditure of funds by a peace officer without prior authorization and with the right to be subsequently reimbursed therefore. An apt illustration is the necessity at times for the investigation of actions of county officials where prior authorization for the necessary expenditure might not be easily obtained. There is no reason why a surveyor should be given a free hand in the expenditure of county funds unless by specific authorization. None of the peace officer cases cited in the majority opinion approve the use of personal property of district attorneys or sheriffs, such as automobiles used by investigators, a charge for which is made against the county. The automobiles in the present case were owned by defendant and operated under his direction and supervision; the rental or mileage therefor was paid him by the county. In other words, the defendant as county surveyor contracted with himself to supply automobile transportation to county employees. As surveyor he determined the necessity and extent of such transportation. In his personal capacity he supplied the means of transportation, collecting therefor as a public official for his personal business. The principle that county officials shall not have a personal interest in public contracts is controlling in this case. Political Code, sec. 920.

In his official capacity the surveyor had a financial interest in subject matter not specifically permitted by statute and the trial court so found. The informal contract, originally entered into without official approval, is against public policy. Judicial sanction of such conduct tends to widen the door to further disregard of statutory provisions by county officers. The transaction, if not based upon fraud, is at least tainted with illegality. The statute requires a strict rather than a liberal construction. In my opinion the judgment should be affirmed, without modification.

SPARKS v. BERNTSEN et al.

JOHNSON v. SAME.

COKER v. SAME.

Civ. 6470–6472.

District Court of Appeal, Third District, California.

April 29, 1941.

Rehearing Denied May 29, 1941.

See 113 P.2d 735.

1. Torts ⇨22

The liability of two or more persons who jointly engage in commission of a tort is "joint and several".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint and Several".

2. Trial ⇨335

There can be no apportionment of damages between joint tort-feasors.

3. Automobiles ⇨200

The statute limiting liability of automobile owner for injury to one person to $5,000, and for more than one in the same accident to $10,000, creates a "joint and several" liability against the owner and operator of an automobile. Vehicle Code, § 402, St.1935, p. 153, as amended by St. 1937, p. 2353.

4. Automobiles ⇨249

Under statute limiting liability of automobile owner for injury to one person to $5,000, and for more than one in same accident to $10,000, the award against owner is restricted to $5,000 where that against operator equals or exceeds that sum, and where award is for less than $5,000, the award against owner must be in the same amount as that against the operator. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

5. Trial ⇨328

In action against automobile operator and owner for injuries sustained in accident, on principle, there should be but one verdict against both operator and owner as joint tort-feasors leaving it to court to apply the statute limiting liability of owner for injury to one person to $5,000, and for more than one in same accident to $10,000. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

6. Trial ⇨339(3)

In action against automobile operator and owner for injuries sustained in automobile accident, verdicts returned, while informal, were not void, where each fixed extent of recovery against operator and award to be made against owner followed as matter of law, and verdicts being informal, it was within the province, and may have been the duty of the trial court to send jury out again. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353; Code Civ. Proc. § 619.

7. Trial ⇨339(4)

Where verdicts were in writing and signed by foreman of jury, verdicts were read to jury by clerk and query was made of jurors whether such were their verdicts, affirmative answers were given and the jurors were polled and no disagreement with verdicts was expressed, verdicts became complete and the jury as matter of law discharged from further consideration of case, and hence when jury was again sent out time had gone by for any amendment to, or change in, the verdicts. Code Civ.Proc. §§ 618, 619, 628.

8. Trial ⟹342

The entry of verdicts in the minutes as required by statute need not be done prior to discharge of jury as is the case in a criminal proceeding. Code Civ.Proc. § 628; Pen.Code, § 1164.

9. Trial ⟹339(1)

When under statute a verdict is completed, no authority exists in the jury to alter or amend its verdict. Code Civ.Proc. §§ 618, 619, 628.

10. Judgment ⟹256(1)

Where verdicts first returned in actions against automobile operator and owner for injuries sustained in automobile accident although informal were completed verdicts and hence not subject to alteration or amendment, and jury was again sent out, and jury returned other verdicts, judgments based upon such other verdicts could not stand, since judgments had no sufficient foundation. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353; Code Civ.Proc. §§ 618, 619, 628.

11. Appeal and error ⟹1151(2)

Where a single verdict is brought in against operator and owner of an automobile in excess of $5,000, such verdict although informal is not void but may be corrected by a reduction to $5,000 as against the owner. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353; Code Civ. Proc. §§ 618, 619, 628.

12. Automobiles ⟹249

Where in each of completed verdicts in favor of three plaintiffs against operator and owner of automobile amount of recovery against operator was established in the case of one plaintiff in the sum of $8,000, and in each of the other cases at $1,250, the law thereupon stepped in and, liability of owner being admitted, fixed amount of recovery against him in the first case at $5,000, and in each of the other cases at $1,250. Vehicle Code, § 402, St. 1935, p. 153, as amended by St.1937, p. 2353; Code Civ.Proc. §§ 618, 619, 628.

13. New trial ⟹164

Where judgments against automobile owner were entered contrary to statutory limitations, it was duty of trial court on motion for a new trial to correct the error. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

14. Appeal and error ⟹1151(1)

Where judgments against automobile owner and operator failed to limit owner's liability to amount fixed by statute, obligation rested on appellate court to correct the error. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

15. Jury ⟹37

An increase by the court of amount awarded by jury against automobile owner does not deprive him of constitutional right to jury's determination of amount of damages to be assessed against him, since the jury having determined award against automobile operator, by such act, by operation of law, fixed the assessment against owner, and if jury attempted to assess owner for a less sum than law required, such attempt was futile. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

16. Appeal and error ⟹1151(3)

Where appellate court determined that a plaintiff injured in automobile accident properly had verdict against operator in sum of $8,000, court would vacate the judgment against owner of automobile for sum less than $5,000, and order entry of judgment against owner in sum of $5,000. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

17. Appeal and error ⟹1151(3)

Where appellate court determined that plaintiffs injured in automobile accident properly had verdicts against operator for sums less than $5,000, court would direct entry of judgments against owner of automobile to equal those against the operator. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

18. Appeal and error ⟹930(2)
Trial ⟹335

A plaintiff could not claim that jury when it found a verdict of $8,000 against operator and $3,000 against owner of autobile, intended to find a total damage of $11,000, and that judgment against operator should be in such sum, where jury were instructed that as against operator they could assess damages up to $20,000, the amount demanded in complaint, and it would be presumed that jury understood instruction as given, and hence verdict as to operator was final. Vehicle Code, § 402, St.1935, p. 153, as amended by St.1937, p. 2353.

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

Actions by Bert Sparks, James L. Johnson, and Bernard A. Coker, etc. against

Paul Anker Berntsen and another for injuries and damages sustained in an automobile accident. From judgments for plaintiffs, defendants appeal.

Modified and as modified affirmed.

Hoge, Pelton & Gunther, of San Francisco, and Butler, Van Dyke & Harris, of Sacramento, for appellants.

Henry & Bedeau, of Sacramento, Nathan Goldwater and Leo Murcell, both of Oakland, and Orrin J. Lowell, of Auburn, for respondents.

PER CURIAM.

Bert Sparks, James L. Johnson and Bernard A. Coker, respondents herein, each brought an action against appellants Paul Anker Berntsen and Reidar Enge, to recover damages for injuries received in the same automobile accident. The three cases were consolidated for trial and on appeal. Respondent Johnson included in his action a claim for property damage incurred in the same accident. Appellant Berntsen was the operator, and appellant Enge the owner, of the responsible automobile. At the opening of the trial, it was stipulated that appellant Berntsen was, at the time of the accident, driving the automobile of appellant Enge, with the consent and permission of the latter, but not in the capacity of either servant, agent, or employee of Enge. Appellants conceded liability; the actions were consolidated and tried together on the sole issue of the amount of damages to which the several plaintiffs were entitled. Respondent Sparks claimed $20,000, Johnson claimed $15,095, and Coker claimed $10,000.

The case called for the application of section 402 of the Vehicle Code, St.1935, p. 153, as amended by St.1937, p. 2353 (formerly sec. 1714¼, Code Civ.Proc.), which limits liability of the owner for injury to one person to the sum of $5,000, and for more than one in the same accident to $10,000. The proceedings surrounding the return of the verdicts illustrate again the difficulty encountered by juries in comprehending the provisions of the law concerning the limitation of liability of the owner of an automobile under this section.

After deliberating for approximately two hours, the jury in this case returned into court, and through one of its number asked for further instructions as to the extent of the amount of damages that might be awarded, and the apportionment thereof to be made between the two defendants. By stipulation of counsel certain instructions theretofore given the jury were again read, and upon the retirement of the jury these were taken into the jury room. Thereafter, the jury again came into court and announced that verdicts had been arrived at. These they presented to the court. Each verdict found in favor of the plaintiffs and against defendants as follows: "We, the Jury, find in favor of the above-entitled plaintiff and against Paul Anker Berntsen and defendant Reidar Enge." In each case, there was added to the above-quoted language an assessment of damages, which in the Sparks case read as follows: "and assess damages against Paul Anker Berntsen in the sum of $8,000.00, and assess his damages against Reidar Enge in the sum of $3,000.00." In the Johnson case, the added language was "and assess damages against Paul Anker Berntsen in the sum of $1,250.00 and assess as damages against Reidar Enge in the sum of $845.00"; and in the Coker case was added "and assess as damages against Paul Anker Berntsen in the sum of $1,250.00 and assess as damages against Reidar Enge in the sum of $750.00".

The several verdicts were thereupon read to the jury by the clerk of the court, and the jurors were asked if these were their verdicts. The answer was in the affirmative. At the request of plaintiffs, the jury was polled, and no dissent by any of the jurors appears in the record. The court thereupon directed the clerk to enter the verdicts, but before the order was complied with, the plaintiffs objected to such entries; the defendants, on the other hand, insisted that the verdicts spoke for themselves and requested that the same be entered, and that "the court make the necessary allocation under the law". After considerable discussion, in which the court, counsel, and several of the jurors participated, the court furnished the jury with stationery and directed them to again retire and prepare such verdicts as they desired to render. The jurors again retired, and later came into court with three verdicts, one in each case. In each they again found for the plaintiff and against the defendants, and the assessment of damages was then made as follows:

In the Sparks case: "and assess damages against the said defendants in the total sum of $11,000.00, of which said sum we assess damages against defendant Paul Anker Berntsen in the sum of $8,000.00, and assess damages against defendant Reidar Enge in the sum of $3,000.00."

In the Johnson case: "and assess damages against the said defendants in the total sum of $2,095.00, of which sum we assess damages against defendant Paul Anker Berntsen in the sum of $1,250.00, and assess damages against defendant Reidar Enge in the sum of $845.00."

In the Coker case: "and assess damages against said defendants in the total sum of $2,000.00, of which sum we assess damages against defendant Paul Anker Berntsen in the sum of $1,250.00, and assess damages against defendant Reidar Enge in the sum of $750.00."

These several verdicts were read to the jury by the clerk, and the jurors were asked if such were their verdicts. The answers were in the affirmative. Again there followed discussion between the court and counsel, and over the objection of appellants the court directed the clerk to enter judgment against both defendants and in favor of respondent Sparks for the sum of $11,000; in favor of respondent Johnson in the sum of $2,095; and in favor of respondent Coker in the sum of $2,000. On the following day, the court directed that there be added to the judgment in the Sparks case the words "however limiting the amount payable by defendant Enge to the sum of $5,000.00". From the judgments so entered this appeal is prosecuted.

[1-6] It is settled law that the liability of two or more persons who jointly engage in the commission of a tort is joint and several. Grundel v. Union Iron Works, 127 Cal. 438, 59 P. 826, 47 L.R.A. 467, 78 Am.St.Rep. 75. There can be no apportionment of damages between joint tort-feasors. Oldham v. Aetna Insurance Co., 17 Cal.App.2d 144, 61 P.2d 503. Section 402 of the Vehicle Code creates a joint and several liability against the owner and the operator of an automobile. Kerrison v. Unger, 135 Cal.App. 607, 27 P.2d 927. That section, however, places a limitation upon the extent of recovery against the owner and the award against him is restricted to $5,000, where that against the operator equals or exceeds that sum, and where the award is for less than $5,000 the award against the owner must be in the same amount as that against the operator. Bradford v. Brock, 140 Cal.App. 47, 34 P.2d 1048; Kerrison v. Unger, supra. On principle, there should be but one verdict against both joint tort-feasors (Marriott v. Williams, 152 Cal. 705, 93 P. 875, 125 Am.St. Rep. 87), leaving it to the court to apply the law as found in section 402 of the Vehicle Code. The trial court here properly instructed the jury as to the provisions of that section, but also furnished them forms of verdict calling for an entirely separate award against each defendant. Out of this, arose the confusion which followed. The verdicts which were first returned, while informal, were not void. Each fixed the extent of recovery against the operator, and the award to be made against the owner followed as a matter of law. The verdicts being informal, it was within the province, and may have been the duty, of the trial court, to send the jury out again. Code Civ. Proc. sec. 619. This was done, but only after the verdicts had become final and completed, and after the jury, in the eyes of the law, had been discharged.

[7, 8] The record discloses that, as required by section 618 of the Code of Civil Procedure, the verdicts were in writing, and signed by the foreman of the jury. They were read to the jury by the clerk; inquiry was made of the jurors whether such were their verdicts, affirmative answers were given, the jurors, at the request of plaintiff, were polled, and no disagreement with the verdicts was expressed. Section 618 of the Code of Civil Procedure provides that "If upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case." In the instant case, the procedure laid down by section 618 was followed, to and including the stage where the statute declares the verdict to have been complete, and the jury, as a matter of law, discharged from further consideration of the case. Therefore, when the jury was again sent out, the time had gone by for any amendment to or change in the verdict. The statute provides that at a certain stage of the proceedings, the verdict is complete, and to allow a change after a verdict is complete would be to ignore the statute entirely. The entry of the verdicts in the minutes is required by section 628 of the Code of Civil Procedure, but we find no requirement that this must be done prior to the discharge of the jury, as is the case in a criminal proceeding. Pen.Code, sec. 1164.

There are cases wherein may be found language that would indicate that the verdict of a jury may be altered or amended after the jury has indicated its assent to the verdict first announced, but it is to be noted that in none of such cases is involved the question of the particular stage of the proceedings at which the change might be made. In Pray v. Trower Lumber Co., 101 Cal.App. 482, 281 P. 1036, objection to the informality of the verdict was made after the jury was polled, and was overruled by the court. On appeal, it was held that reconsideration of the verdict was not required, the verdict being legally sufficient to justify the entry of a proper judgment. In Redo y Cia v. First National Bank, 200 Cal. 161, 252 P. 587, in Awbrey v. De Rose, 98 Cal.App. 223, 276 P. 1080, and in Kerrison v. Unger, supra, the court declined to accept informal verdicts, and in each case, prior to the completion of the verdict, directed the jury to retire and further consider its verdict. In Brown v. Regan, 10 Cal.2d 519, 75 P.2d 1063, in Logan v. Lewis, 35 Cal.App. 663, 170 P. 851, and in McNutt v. Pabst, 25 Cal.App. 177, 143 P. 77, the record does not disclose to what stage the proceedings had advanced when the jury was sent out to reconsider its verdict. In Hallinan v. Prindle, 220 Cal. 46, 29 P.2d 202, 206, where the court said: "The jury should have been returned to the jury room with instructions to reconsider and reframe their verdict", it must be assumed that this language applied to a time prior to the completion of the verdict.

[9, 10] It is our conclusion that when, under the statute, a verdict is completed, no authority exists in the jury to alter or amend its verdict. The verdicts first returned herein, although informal, were therefore completed verdicts, and not subject to alteration or amendment. The judgments finally entered were not in accordance with such verdicts, hence those judgments cannot stand, for they have no sufficient foundation.

[11] It has been held that where a single verdict is brought in against the operator and owner in excess of $5,000, such verdict, although informal, is not void, but may be corrected by a reduction to $5,000 as against the owner. Garrison v. Williams, 128 Cal.App. 598, 17 P.2d 1072; Carnes v. Pacific G. & E. Co., 21 Cal.App.2d 568, 69 P.2d 998, 70 P.2d 717; Harveld v. Milani, 1 Cal.App.2d 157, 36 P.2d 393.

[12-14] In each of the completed verdicts rendered herein, the amount of recovery against the operator was established; in the Sparks case in the sum of $8,000, and in each of the other cases at $1,250. The law thereupon steps in, and liability of the owner being admitted, fixes the amount of recovery against him in the Sparks case at $5,000 and in each of the other cases at $1,250. Judgments against the owner, contrary to this, having been entered herein, it was the duty of the trial court, on the motion for a new trial, to correct the error. King v. Unger, 35 Cal.App.2d 192, 94 P.2d 1040; Garlick v. Bower, 62 Cal. 65. The same obligation now rests upon this court. Milburn v. Foster, 8 Cal.App.2d 478, 47 P.2d 1106.

[15-17] Nor, may it be said that an increase by the court of the amount awarded by the jury against the owner deprives him of the constitutional right to a jury's determination of the amount of damages to be assessed against him. There is, in fact, no such increase, for the jury having determined the award against the operator, by that very act, by operation of law, fixed the assessment against the owner. If the jury attempted to assess the owner for a less sum than the law required, such attempt was futile. It may be noted, too, that here the appellant owner concedes that the increase of the award against him would be proper. On the completion of the verdicts, he asked that the same be entered, and "that the court make the necessary allocation under the law". In King v. Unger, supra, informal verdicts were rendered, but the court declined to receive the same, and sent the jury out before their completion. Thereafter, the jury returned into court and announced verdicts awarding $5,341.71 against the operator and $1,335.45 against the owner. On appeal, the latter amount was increased to $5,000. The same course must be followed here in the Sparks case; and in the Johnson and Coker cases the awards against the owner must be increased to equal those against the operator.

[18] Respondents contend that the jury, when it found a verdict of $8,000 against the operator and $3,000 against the owner, intended to find a total damage of $11,000, and that the judgment against the operator should be in such sum. The jury were instructed that, as against the operator, they could assess damages up to the amount demanded in the complaint. It must be presumed that the jury understood the instructions as given. Poncino v. Sierra Nevada L. & C. Co., 104 Cal.App. 671, 675, 286 P. 729. The verdict, then, as to the operator, was legal and final. The only question is the correctness of the verdict against the owner. As we have pointed out, that was a matter for the court in the application of section 402 of the Vehicle Code.

It is therefore ordered that the judgments entered in each of these cases be vacated and set aside, and that judgment be entered in the trial court in favor of respondent Sparks, and against appellant Berntsen, in the sum of $8,000, and against appellant Enge in the sum of $5,000; in favor of respondent Johnson, and against both appellants, in the sum of $1,250; and in favor of respondent Coker, and against both appellants, in the sum of $1,250.

As so modified, the judgment in each action is affirmed. Appellants will recover their costs on appeal.

* * *

44 Cal.App.2d 455

LEWIS et al. v. WESTERN TRUCK LINE et al.

GIBBS v. SAME.

Civ. 2564, 2565.

District Court of Appeal, Fourth District, California.

April 24, 1941.

Rehearing Denied May 24, 1941.

Hearing Denied June 19, 1941.

1. Evidence 🔑256, 258(1)

For a statement to be used against party as admission, there must be at least prima facie proof that it was made by him or some person whose statements may legally affect him.

2. Evidence 🔑256

For written admission to be used as evidence against party, there must be some proof of authenticity of writing.

3. Evidence 🔑256

Preliminary proof of authenticity of party's alleged answers to questions in writing is indispensable predicate to introduction of writing in evidence as statement against his interest. Code Civ.Proc. § 2052.

4. Evidence 🔑256

Where defendants' offer of proof of certain answers, appearing in plaintiffs' depositions before their correction thereof, did not show whether defendants could have established that such answers were given before correction or whether correction was due to error of reporter taking depositions and did not set forth original depositions or refer to specific questions propounded and answers thereto, with immaterial exceptions, defendants failed to lay proper foundation for admission of original answers in evidence. Code Civ.Proc. § 2052.

5. Appeal and error 🔑1048(6)

In death actions, where defendants' counsel were allowed considerable latitude in cross-examination of adult plaintiff and made apparent to jury contradictions between plaintiffs' answers in depositions before and after correction thereof, and there was ample substantial evidence by one defendant and other witnesses than plaintiffs to establish defendants' negligence, trial court's refusal to allow such counsel to read to jury original answers in depositions and cross-examine witnesses in reference thereto was not prejudicial error. Code Civ.Proc. § 2052.

6. Evidence 🔑256
Witnesses 🔑388(8)

Where defendants made no attempt to impeach minor plaintiff, called as witness under statute, by previous or contradictory statements in his deposition while he was on stand, and filed general written offer of proof of original answers in plaintiffs' depositions before their correction thereof, with additional specific offer to prove change of answers in such witness' deposition, after written statements signed by him and another plaintiff were received in evidence for impeachment purposes, proper foundation was not laid for admission in evidence of such original answers either for impeachment purposes or as admissions or declarations against interest. Code Civ.Proc. §§ 2052, 2055.

7. Appeal and error 🔑1005(1)

The trial court's denial of defendants' motion for new trial after duly considering questions presented by them is entitled to much consideration on their appeal from judgment on jury's verdict for plaintiffs.

8. Appeal and error 🔑1066

In actions for deaths of driver of and passenger in automobile, struck by defendants' truck proceeding in opposite direction, instruction as to duty to drive vehicle close to right-hand edge of roadway was not prejudicial to defendants, though inapplicable as in language of statute enacted for benefit of motorists traveling in same direction, in view of statute requiring drivers of vehicles proceeding in opposite directions to pass each other to right and give each other at least half of main traveled portion of roadway whenever possible. Vehicle Code, § 525, St. 1935, p. 181, as amended by St.1937, p. 619, and § 527, p. 182.

9. Trial ⚷241

In action for death of passenger in automobile, struck by defendant's truck proceeding in opposite direction behind another automobile, which was sideswiped by automobile in which deceased was riding, plaintiffs were entitled to instruction in language of statute, providing that one vehicle shall not follow another more closely than is reasonable and prudent, on their theory that driver of such other automobile and defendants were jointly liable because of their concurrent negligence or contributing proximate cause of fatal accident. Vehicle Code, § 531, St.1935, p. 183.

10. Appeal and error ⚷1068(2)

Generally, judgment on jury's verdict may not be reversed on ground that evidence was insufficient to sustain cause of action or defense to which an instruction applied, if evidence as to other causes of action or defenses is sufficient to sustain verdict.

11. Trial ⚷203(1)

Each of parties to consolidated actions against same defendants for deaths of two persons was entitled to have his theory of case presented to jury in instructions.

◆

Appeals from Superior Court, Kern County; W. H. Bradshaw, Judge.

Actions, consolidated for trial, by Leone Lewis on her own behalf and as guardian ad litem of four minor children, and by Norma Gibbs, as administratrix of the estate of Jack Gibbs, deceased, against the Western Truck Line and another, to recover damages for the deaths of Ernest Lewis and Jack Gibbs, respectively. Judgments for plaintiffs, and defendants appeal.

Affirmed.

Harvey, Johnston & Baker, of Bakersfield, and Betts & Garrison, of Los Angeles, for appellants.

W. C. Dorris, Claflin, Dorsey & Campbell, and Borton, Petrini, Conron & Borton, all of Bakersfield, for respondents.

GRIFFIN, Justice.

This appeal involves two separate actions brought against appellants Western Truck Line, a corporation, hereinafter called the corporation, and its employee, Rudolph Maurin, as defendants, which actions were consolidated for trial. The evidence introduced at the consolidated trial is applicable to both actions, with the exception of the evidence relating to the measure of damages.

These actions arose out of an accident on the highway involving two automobiles, and a truck and trailer owned by the corporation and driven by appellant Maurin, as a result of which Ernest Lewis and Jack Gibbs were killed. The first action was brought by Leone Lewis, the wife of the deceased Ernest Lewis individually on her own behalf, and as guardian ad litem on behalf of the four minor children of Ernest Lewis, for damages resulting from the death of Ernest Lewis. The other action was brought by Norma Gibbs, the wife of the deceased Jack Gibbs, as administratrix of his estate, to recover damages sustained as the result of the death of Jack Gibbs. These appeals are taken from the judgment entered on the verdict of the jury in favor of the plaintiff in the Lewis case for $25,000, and from the judgment similarly entered in the Gibbs case in the sum of $10,000. Prior to appeal, motions for new trial were made, argued, and by the trial court denied.

Appellants contend that these judgments must be reversed and a new trial granted because of claimed prejudicial error occurring during the course of the trial. It is claimed that (1) the court refused to permit the defendants to introduce into evidence certain answers made by some of the plaintiffs in their depositions and later corrected by them at the time of the signing of the depositions. It is argued that these answers, before corrected, were admissible either by way of impeachment or as constituting admissions of the parties; (2) that the court gave to the jury certain instructions on points of law which were admittedly proper statements of the law, but it is claimed they were not applicable to the facts of these cases and that they thereby tended to confuse the jury and tended to leave in the minds of the jurors an erroneous impression of the principles of law properly to be considered by them in arriving at a verdict.

The accident out of which the actions here on appeal arose consisted of two collisions, one collision following shortly after the other. It happened at about 10:25 o'clock p.m. on the evening of December 24, 1938, on the highway running between Mojave and Lancaster, at a point about 1½ miles south of Mojave. This highway approaching Mojave runs slightly upgrade in a general northerly direction and is an improved, paved highway, 15 feet in width, divided in the center with a white line, and has an oiled shoulder 3 to 4 feet in width on each side thereof. At the place where the accident happened and for a considerable distance to the north and south the road is straight. A short time prior to the accident the Gibbs Chevrolet sedan, driven by the decedent Jack Gibbs, with the decedent Ernest Lewis in the right front seat as a passenger, left Mojave traveling in a southerly direction. Following a short distance behind the Gibbs car was an Oldsmobile coach belonging to the Lewis family and driven at the time by the minor respondent Theodore Lewis. Riding in the front seat of the Lewis automobile with the driver were the respondents Norma Gibbs and Leone Lewis, who were the wives of the two men riding ahead in the Gibbs Chevrolet. As these two cars approached the scene of the accident there was at the same time approaching from the opposite direction, i. e., traveling uphill in a northerly direction, an automobile driven by C. D. Arrowsmith. Some distance behind (which distance is quite in dispute), and following the Arrowsmith car also proceeding in a northerly direction, was a truck and trailer belonging to the appellant corporation, driven by the appellant Maurin. He was admittedly in the course of his employment by the corporation. The truck and trailer were of a size and capacity capable of carrying 17 tons over and above the weight of the equipment. The entire unit was 58 feet over all. Each was equipped with air brakes. The brakes of the trailer were made effective by means of a hand-brake,—the brakes of the truck by means of a foot-brake. Ten pneumatic tires were on the truck and twelve were on the trailer. As the Arrowsmith car, traveling in a northerly direction on the east side of the highway near the center line, and the Gibbs Chevrolet, traveling in a southerly direction on the west side were about to pass each other the Gibbs car apparently struck a "rut" and suddenly swerved to a point somewhere near the white center line of the roadway and sideswiped the Arrowsmith automobile. This contact between the cars caused both of them to proceed onward on the highway, but out of control. The Arrowsmith car proceeded a distance of approximately 80 feet northerly and to the west side of the road before stopping. At the same time the Gibbs Chevrolet went skidding and careening for a distance of about 65 feet in a southeasterly direction over to the east edge of the highway and stopped partly on the east shoulder thereof. Appellants' oncoming truck had been following behind the Arrowsmith car. The distance the truck was behind the Arrowsmith car is quite material as bearing on the doctrine of last clear chance. The facts in this regard are quite in dispute, and will be discussed later in this opinion. The truck ran into the Gibbs car and pushed it in a northeasterly direction about 56 feet, up against a bank off the east shoulder of the highway, crushing and killing the two occupants of the Gibbs car. The truck driver was uninjured.

Respondents Leone Lewis, Theodore Lewis and Norma Gibbs testified at the trial that when the sideswipe collision occurred they were riding in the Lewis car a distance of about 100 feet behind the Gibbs car; that the Gibbs car after colliding with the Arrowsmith car careened over to the east edge of the pavement and stopped for two or three seconds before the second collision with the truck occurred, and that the truck, at the time the Gibbs car came to a stop after the sideswipe collision, was still about a block away from the spot where the Gibbs car had stopped. It was stipulated that a block was about 300 feet.

Appellant Maurin testified that shortly before and at the time of the sideswipe collision he was driving his truck at a distance of approximately 100 feet behind the Arrowsmith automobile at about 28 miles per hour well to the east side of the paved highway and partly on the east shoulder; that he turned his truck to the right, applied the foot-brake and reached for the hand-brake lever which controlled the trailer brake and that it was then that the force of the impact between the truck and the Gibbs car threw him entirely out of control of the truck; that no appreciable interval of time elapsed between the sideswipe collision and the second collision with the truck; and that the Gibbs car was still in motion at the time of the second collision.

The Lewis case was based on the theory that the appellant company through its driver was negligent in the operation of the truck and trailer; that such negligence was the proximate cause of the death of Ernest Lewis, the passenger in the stricken car; that the latter was not himself guilty of negligence; and that any negligence on the part of the driver Gibbs could not be imputed to him.

The Gibbs case was founded on the doctrine of last clear chance. It was Mrs. Gibbs' theory that Jack Gibbs had placed himself in a position of danger from which he could not extricate himself with the exercise of due care, and that Maurin when made aware of his plight still had a clear chance to avert the accident but negligently failed to avail himself of it.

Appellants, on the other hand, contend that the facts were such that the accident was inevitable in so far as the driver Maurin was concerned in that he had no reason to anticipate that the sideswipe collision between the Gibbs car and the Arrowsmith car would occur or to anticipate that the Gibbs car would careen onto the wrong side of the road directly into his pathway, and that as soon as he observed that such was the situation he used all means available to him to stop his truck and avoid the collision.

Respondents contend that the record fully establishes many acts of negligence in addition to the failure of appellant Maurin to exercise reasonable care under the doctrine of last clear chance in this, that: (1) The driver Maurin was exceeding the lawful rate of speed; (2) he was following the other car too closely; (3) he was driving off the paved portion of the highway; (4) though he saw the danger more than 100 feet away he failed to apply all his brakes; (5) he veered over into the path of the oncoming car; (6) he failed to keep his equipment under control; and (7) the driver jumped from the truck at least 100 feet before it collided with the Gibbs car and negligently allowed it to crash into the Gibbs car unattended and uncontrolled.

From the record it appears that prior to trial the depositions of Theodore Lewis, Leone Lewis and Norma Gibbs, were taken but were not corrected and signed until the day of trial. The answers to certain questions were set forth in a deposition referred to in the record and hereinafter discussed, which answers were claimed to have been given originally and were at variance with the answers given as corrected. Some of the general questions in the deposition propounded to Theodore Lewis, who was not called as a witness for respondents but was called by appellants under section 2055 of the Code of Civil Procedure, were:

"Q. How far were you away from the truck when the truck was pushing the car in which your father was riding, along?" (Indicated original answer): "A. About a block." (Indicated corrected answer): "A. About 100 feet."

"Q. And how far apart was the car in which your father was riding, the Gibbs car, and the truck when you commenced to stop your car?" (Indicated original answer:) "A. The truck had hit them." (Indicated corrected answer): "A. About a block or more."

"Q. How far away was the truck from the Gibbs car when you first saw it?" (Indicated original answer): "A. Oh, I don't know, about—pretty close." (Indicated corrected answer): "A. About three or four hundred feet."

Similar changes were made by respondents' witness Leone Lewis, with an exception in reference to this question:

"Q. How long had the Gibbs car come to a stop before the truck hit it?" (Indicated original answer): "A. I don't know, just—came to a stop and the truck plowed into it." (Indicated corrected answer): "A. It had stopped two or three seconds."

It is claimed that the trial court refused to allow counsel for appellants to read the answers originally appearing in the depositions before correction and refused counsel permission to cross-examine the witnesses in reference thereto. Such refusal would be erroneous if the entire depositions were legally and properly before us, both as to the original and corrected answers and if the proper foundation had been laid for their admission and appellant was denied the opportunity to cross-examine the witnesses in this regard and the proper offer of proof was made in reference thereto. Sec. 2052, Code Civ.Proc.; Lawson v. Steinbeck, 44 Cal.App. 685, 186 P. 842; Lanigan v. Neely, 4 Cal.App. 760, 89 P. 441; Gasquet v. Pechin, 143 Cal. 515, 77 P. 481; Card v. Boms, 210 Cal. 200, 291 P. 190.

Appellants cannot and do not question the sufficiency of the evidence to support the judgment when viewed in a light most favorable to respondents. Bechtold v. Bishop & Co., Inc., Cal.Sup., 105 P.2d 984; Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915. It is contended, however, that had they been permitted to show the inconsistencies between the respondents' testimony at the trial and the answers they originally gave in the depositions, a different result in the verdict of the jury would have obtained. It is difficult to say, in any given case, that the rejection of evidence which may tend to contradict or impeach the testimony of certain witnesses of a number who testified in the case would or would not result in a different verdict.

From a study of the confused record we are unable to say that the original answers and the corrected answers were not before the jury. It appears that the witness was cross-examined in reference to many of the claimed changes, if not all of them. To illustrate our statement, during the cross-examination of Mrs. Lewis, we find the following:

"Q. By Mr. Baker: You recall, do you not, Mrs. Lewis, that your deposition was taken last June in this case? A. Yes.

"Q. And I call your attention to your deposition on page 12. Will you read from lines 7 to 11?

"Mr. Campbell: We will stipulate that question was asked and that she gave that answer.

"Mr. Baker: Suppose I read it aloud. (Reading deposition) 'Let me put it this way, when you saw this collision between the car which was driven by Mr. Gibbs and the Arrowsmith car, when you saw that collision ahead of you, about how long was it after that before your car was stopped? A. It was stopped right now, at once.' * * * Q. What do you mean by 'stopped right now'?"

Full cross-examination was then had on that subject.

"Q. (By Mr. Baker): I call your attention now to your deposition on page 21. Shall I permit the witness to read that or read it aloud?

"Mr. Campbell: What is the purpose, impeachment?

"Mr. Baker: The purpose is cross-examination.

"Mr. Campbell: We object, then, on the ground no such a method in the law for that.

"Mr. Baker: It is impeachment and cross-examination.

"By the Court: All right, then.

"Mr. Campbell: What line?

"Mr. Baker: Line 5, from there on, on page 21 to, I think line 2 on page 22.

"Mr. Dorris: I object to that, it is not proper cross-examination, nothing impeaching in there, and not a subject he has examined her on. * * *

"Mr. Baker: I will ask her some more questions, then. You have testified, have you not, Mrs. Lewis, as to the distance between the Gibbs car in a stopped position at L-5, and the truck at L-4? A. Yes.

"Q. How far did you say that it was? A. It is a block or over. * * *

"Q. Which would be longer, the 100 feet or the block? A. The block.

"Q. (By Mr. Baker): Now, I am going to read these. * * *

"Mr. Campbell: We will stipulate she gave that testimony. Read it to the jury. * * *

"Mr. Baker (reading): 'Q. Well, had the Gibbs car come to a stop before the truck had hit it? A. Yes. Q. How long had the Gibbs car come to a stop before the truck hit it? A. I don't know, just came to a stop.' * * *

"Mr. Baker (reading): 'Q. How long had the Gibbs car come to a stop before the truck hit it? A. I don't know, just came to a stop and the truck plowed into it.'

"Mr. Campbell: Nothing impeaching in that.

"Mr. Baker: Here is written in * * * 'It had stopped for 2 or 3 seconds'. * * *

"Mr. Petrini: Just a minute, is that a correction?

"Mr. Baker: Yes.

"Mr. Petrini: I move the answer be stricken excepting the corrected answer, everything but the corrected answer.

"By the Court: That may go out.

"Mr. Baker: The correction is in addition, the other isn't stricken out.

"Mr. Petrini: Well, then, it may stand, the corrected answer should be read.

"By the Court: That's right, it is apparently added to what is typed."

(Mr. Baker continued to read from the deposition.)

"Q. Well, we will put it this way. How far away was the truck from the Gibbs car when the Gibbs car came to a stop? A. When I first noticed the truck it was about a block down the road behind the Arrowsmith car.

"Q. Will you now answer the question, how far away was the truck from the Gibbs car when the Gibbs car stopped? A. When the Gibbs car stopped the truck plowed into it. I don't know how far it was, it plowed into it right now.

"Q. Right now? All right, and the Gibbs car was clear over on the east side of the road at the time the truck collided with the Gibbs car wasn't it? A. Yes.

"Mr. Dorris: That's not impeachment.

"Mr. Baker: Page 28, lines 4 to 6.

"Mr. Campbell: We will stipulate she gave that answer and was questioned that way.

"Mr. Baker (reading): 'Q. You say the truck collided with the Gibbs car right now as the Gibbs car stopped, that is correct, isn't it? A. Yes.'

"Mr. Baker: I believe you testified, Mrs. Lewis, that a block is longer than 100 feet when you used the word 'block', is that correct? A. I did. * * *

"Q. Now I call your attention to page 8, lines 17 to 23,—

"Mr. Campbell: We will stipulate she so testified. Mr. Baker (reading): 'Q. How closely did your car follow the Gibbs car down to the place of collision? A. We were 100 feet away.' You struck out the words 'about a block'.

"Mr. Petrini: We object to that as being misconduct of counsel. The witness has a right to read and correct her deposition and the corrected deposition is the only part that counsel has * * *

"By the Court: That is correct.

"Mr. Bodder: I submit while the witness has a right to correct her deposition counsel manifestly has a right to ask her about the sources of changes.

"By the Court: Not in a deposition—read only the part as it is corrected. * * *

"Q. (By Mr. Baker): I call your attention to your deposition, page 17, lines 11 to 13. May I read it?

"Mr. Petrini: Yes, you can read it.

"Mr. Baker (reading): 'Q. Then was the Arrowsmith car at the time of the collision on the east side of the road? That would be your left, you have already testified to that? A. Yes, that is right.'

"Mr. Baker: Then I wish to read from there on.

"Mr. Campbell: How about reading lines, 19, 20, 21, 22 and 23, and lines 17 and 18?

"Mr. Baker (reading): 'Q. On the east side of the road. Your car, the one you were traveling in at the time of the collision, was on the west side of the road, wasn't it? A. Yes. Q. Did you see the Gibbs car swerve or go over to the east side of the road before the collision? A. No. Q. It was traveling in the same course at the time of the collision it had been traveling? A. Yes.'

"Mr. Baker: Now, we ask at this time to read it the way it was originally written and the way it has been corrected.

"Mr. Campbell: To which we object.

"Mr. Petrini: We wish to read it.

"Mr. Baker: On page 17?

"Mr. Petrini: Yes.

"Mr. Campbell: Let it go.

"Mr. Baker: I believe that is all."

The witness was then excused and respondent Mrs. Lewis rested her case. Thereafter, in chambers, in the absence of the jury, appellants made an offer of proof, in writing, after the witness had left the witness stand. The parties agreed that this offer of proof might be considered as made both before and after plaintiffs rested. The proposed offer was "the depositions" of Leone Lewis, Theodore Lewis and Norma Gibbs, as filed in said causes, to show the exact answers of the deponents under oath before and after corrections. "* * * and to permit these defendants full opportunity to examine and cross-examine the deponents with respect to the original answers and the corrections * * *." The offer, in this form, was denied. In the reporter's transcript, immediately preceding a copy of the exhibits and the court's certificate are what purport to be copies of several designated pages or portions of Mrs. Lewis' deposition. Under what legal authority they may have become a part of the record on appeal is not shown.

[1-3] In order that a statement may be used against a party as an admission, there must be at least prima facie proof that it was made by him or by some person whose statements may legally affect him. Where the admission is a written one, there must be some proof of the authenticity of the writing. 22 C.J. p. 411, sec. 493; German Ins. Co., etc. v. Gibbs, etc., Co., 42 Tex. Civ.App. 407, 92 S.W. 1068, 96 S.W. 760. Preliminary proof of the authenticity of the alleged incorporated answers is indispensable as a predicate to the introduction of a writing as a statement against interest. Section 2052 of the Code of Civil Procedure provides that in laying a predicate for impeachment "* * * before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them". Ray v. Pt. Arthur, etc. Ry., 2 Ont. Weekly Reporter, 345, 347; 70 C.J. p. 1129, sec. 1308. 24 Cal.Jur. p. 761, sec. 42, recites: "Where an offer of evidence includes many different propositions grouped together, and the proof of any one is incompetent, irrelevant or immaterial, the court may reject the entire offer. A general offer to prove a variety of things without producing the witness or evidence whereby they are to be proved, or segregating the different items, is improper."

[4, 5] It was said in Rose v. Doe, 4 Cal. App. 680, 89 P. 135, 137, that "A mere 'offer' without having the witness in court, or, if he be present, without putting a question to him in such form as to give an opportunity for an objection, would be a sufficient ground for the ruling." See also Davey v. Southern Pacific Co., 116 Cal. 325, 330, 48 P. 117. From the cited cases it affirmatively appears that appellants failed to lay the proper foundation for admission of those portions of the depositions in evidence bearing on the original answers given before correction. We are not apprised by the offer of proof whether appellants could have established that the witness gave the original answer before correction or whether the correction was due to an error of the reporter taking the deposition. It is apparent that some of the claimed corrections were on immaterial matters. The offer of proof did not set forth the original depositions or refer to the specific questions propounded and the answers given thereto, with two exceptions, which exceptions were questions and answers that had no bearing on the question of the distance the truck was from the Gibbs car when the Gibbs car came to a stop. The offer of proof, for the reasons expressed, in this respect was defective. It appears from an examination of the testimony of Mrs. Lewis on cross-examination, that considerable latitude was allowed counsel for appellants and whatever contradictions that may have appeared in the depositions were made quite apparent to the jury. It also appears that there was ample substantial evidence by the appellant Maurin and other witnesses excluding the testimony of the Lewis's to establish appellants' negligence.

Maurin, although testifying at the trial that he was about 100 feet behind the Arrowsmith car, also testified at the coroner's inquest that he was "about 150 to 200 feet behind him". He also testified that just preceding the accident he had been traveling in his truck at about 35 miles per hour; that Arrowsmith had passed him a short distance down the highway.

Arrowsmith testified that the distance was 2.2 miles south of the scene of the accident and that he (Arrowsmith) was then traveling and continued to travel thereafter "between 40 and 45 miles per hour". This evidence would tend to corroborate the testimony of respondents that the truck was more than 100 feet behind the Arrowsmith car at the time of the sideswipe collision. Maurin also testified that he applied the brakes on the truck but could not say that he applied them on the trailer. He also testified that at 30 miles per hour on a level highway he could stop his truck and trailer within a distance of 50 feet from the time he applied his brakes.

Although Maurin denied the fact, Mrs. Lewis testified that about 100 feet before the collision "I saw someone jump from the truck"; that at that time the truck veered into them and up over the bank. There was no one on the truck except the driver Maurin.

In view of the following decisions: Umemoto v. McDonald, 6 Cal.2d 587, 592, 593;

58 P.2d 1274; Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 P. 1077; Shasta Lumber Co. v. McCoy, 85 Cal.App. 468, 259 P. 965; Johnson v. Ulrey, 201 Cal. 456, 257 P. 505; Naylor v. Ashton, 20 Cal.App. 544, 548, 130 P. 181; Fowler v. International Railway Co., 217 App.Div. 537, 216 N.Y.S. 558, 561, affirmed, 244 N.Y. 592, 155 N.E. 910; San Joaquin Valley Bank v. Bours, 73 Cal. 200, 14 P. 673, we are unable to hold that prejudicial error has resulted.

The witness Norma Gibbs made some corrections in the answers in her deposition to similar questions propounded to the witnesses above mentioned. She admittedly made the changes and fully explained her reasons.

[6] The witness Theodore Lewis, called under section 2055 of the Code of Civil Procedure, testified generally, and in answer to the following questions said:

"Q. When you saw the sideswipe did you see another car or a truck coming north? A. After all three cars had stopped I noticed the truck.

"Q. Then the Gibbs car and the Arrowsmith car and the car that you were driving had all three stopped before you had seen the truck, is that right? A. Yes.

"Q. Whereabouts was the truck at that time? A. Oh, three or four hundred feet back or a city block."

No attempt was then made, while the witness was on the stand, to impeach him by previous or contradictory statements in his *deposition.* However, two statements, signed by Theodore Lewis were later received in evidence for impeachment purposes. One signed by Mrs. Gibbs was likewise received in evidence. Thereafter, appellants filed another general written offer of proof of the depositions as before, with the additional specific offer in reference to the "change of answers in the deposition of the plaintiff Robert Thomas Lewis", especially on pages 40 and 47 of the deposition and the corrections there appearing. The proper foundation was not laid, for the reasons expressed and under the authorities cited, for that portion of the Lewis deposition containing the claimed original answers before correction, entitling it to be admitted in evidence for impeachment purposes or as admissions or declarations against interest. Further cross-examination on the question of the claimed changed answers was not requested by appellants other than as set out in the offer of proof.

[7] The questions here presented were duly considered by the trial court before denying appellants' motion for a new trial. The conclusion of the trial court on this motion is entitled to much consideration. Citti v. Bava, 204 Cal. 136, 266 P. 954; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346. In view of the evidence, the ruling of the trial court can not be said to be erroneous.

[8] The second point involves an instruction dealing with the duty to drive a vehicle close to the right-hand edge of the roadway, which was given in the language of the first paragraph of section 525 of the Vehicle Code, St.1935, p. 181. This section has been held to have been enacted for the benefit of motorists traveling in the same direction. Polk v. Weinstein, 12 Cal.App.2d 360, 55 P.2d 588; Arundel v. Turk, 6 Cal.App.2d 162, 44 P.2d 383. However, section 527 of the Vehicle Code provides that drivers of vehicles proceeding in opposite directions shall pass each other to the right and "* * * each driver shall give to the other at least one-half of the main traveled portion of the roadway whenever possible". Assuming that the instruction given in the language of section 525 of the Vehicle Code was not applicable, we do not deem it to be prejudicial. O'Brien v. Edens, 125 Cal.App. 100, 103, 13 P.2d 754; 24 Cal.Jur. p. 865, sec. 114; Silvey v. Harm, 120 Cal.App. 561, 568, 8 P.2d 570; Crooks v. White, 107 Cal.App. 304, 312, 290 P. 497; Neilson v. Walker, 105 Cal.App. 23, 27, 286 P. 1091.

[9] As to the other criticized instruction, i. e., the instruction in the language of section 531 of the Vehicle Code, respecting the subject matter that one vehicle shall not follow another vehicle more closely than is reasonable and prudent, it should be noted that respondents Lewis were entitled to have such instructions given upon one of their theories of the case, i. e., that both Arrowsmith and appellants were jointly liable to them for the death of Ernest Lewis, due to their concurrent negligence or contributing proximate cause of the fatal accident. Bechtold v. Bishop & Co., Inc., supra; Cummings v. Kendall, 34 Cal.App.2d 379, 93 P.2d 633.

[10, 11] It is the general rule of law that even though the evidence may not be sufficient to sustain a cause of action or

defense to which an instruction applies, a reversal may not be had upon that ground if the evidence as to the other causes of action or defenses is sufficient to sustain the verdict. Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 282 P. 1009. Each of the parties in the consolidated causes was entitled to have his theory of the case presented to the jury in the instructions. Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 89 P.2d 453; Valencia v. San Jose Scavenger Co., 21 Cal.App.2d 469, 69 P.2d 480. We perceive no prejudicial error in this regard.

For the reasons expressed the judgments are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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44 Cal.App.2d 475

QUEEN v. QUEEN.

Civ. 11478.

District Court of Appeal, First District, Division 1, California.

April 25, 1941.

Rehearing Denied May 24, 1941.

Hearing Denied June 23, 1941.

1. Divorce ⚷108

In a divorce proceeding, issues may be broadened at trial to include questions not made an issue by the pleadings.

2. Divorce ⚷249(1)

In a divorce proceeding, the court as representative of public interest has the power, irrespective of a contract settlement or silence of the pleadings with reference thereto, to make a fair disposition of property rights in consonance with the law thereon. Civ.Code § 136 et seq.

3. Divorce ⚷255

A property settlement, although merely referred to in divorce decree as such, may become "res judicata" of validity of agreement, but agreement must be sufficiently certain or a reasonable means of ascertaining its terms must be available from the pleadings or evidence before it may be enforced and constitute an estoppel between the parties. Civ.Code § 136 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

4. Divorce ⚷269(2)

The provisions of property settlement agreement, which was complete in itself and was merely referred to in divorce decree and approved by court, but not actually made part of decree, could not be enforced by contempt proceedings.

5. Divorce ⚷255

Where divorce decree approved property settlement agreement, but did not actually make agreement a part of decree, and there was not sufficient reference to agreement to identify its terms, divorce decree was not "res judicata" as to validity of agreement.

6. Divorce ⚷269(2)

If property settlement agreement is made part of subsequent divorce decree, terms of agreement will be enforceable by contempt proceedings.

7. Divorce ⚷254

Where property settlement agreement contained provision that agreement would be binding only if a divorce decree was granted wife within period of six months, that terms of agreement should be approved by decree, and that if decree contained any additional or inconsistent provisions the agreement should become void, an interlocutory divorce decree granted wife within six months' period which sufficiently referred to agreement to indicate court's intention that agreement should govern question of property rights and wife's support constituted performance of "conditions precedent" of agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

8. Husband and wife ⚷278(2)

A property settlement agreement which contained provision that agreement should be binding only if a divorce decree should be granted wife within period of six months, and that terms of agreement should be approved by decree and that if decree contained any additional or inconsistent provisions the agreement should become void was not invalid as contrary to "public policy."

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

9. Contracts ⟹71(3)

A forbearance to sue unless upon a promise to forbear is not a good "consideration."

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

10. Husband and wife ⟹281

Where it appeared that husband was not delinquent on any payments due under original property settlement agreement with wife at time of entering into supplemental agreement, which contained provision granting wife right to recover attorney's fee, the consideration for which was forbearance of wife to pursue any claims she had against husband, supplemental agreement was without a valid "consideration", and hence wife could not recover attorney's fees under supplemental agreement.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Elizabeth F. Queen against Clyde L. Queen to recover unpaid balance due plaintiff under a property settlement agreement in which defendant obligated himself to pay plaintiff the sum of $150 a month until a total of $9,000 has been paid. From a judgment for plaintiff, the defendant appeals.

Modified, and as modified, affirmed.

Hearing denied; CARTER, J., dissenting.

H. W. Glensor, of San Francisco, for appellant.

Walter H. Duane, of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendant from a judgment in the sum of $4,800, together with interest, $500 counsel fees, costs and disbursements. The action arose in connection with an unpaid balance due plaintiff under a property settlement agreement in which defendant obligated himself to pay her the sum of $150 a month until a total of $9,000 had been paid.

Plaintiff and defendant married on September 6, 1916; they separated on November 2, 1931. Thereafter, on January 7, 1932, a written property settlement agreement as above mentioned was entered into between them, following which plaintiff filed a divorce action on January 21, 1932, to which defendant answered by general denial. On March 11, 1932, an interlocutory decree of divorce was entered. On January 19, 1934, a supplemental agreement was entered into by the parties, the purport of which was that, in the event of court action or proceeding to collect any of the amounts due under the first agreement, the defendant husband should pay a reasonable attorney's fee in the prosecution of such action, also that in case of default in the payment of any installment, the entire balance should, at the option of the wife, become immediately due. The final judgment and decree of divorce was entered on February 5, 1934. The present action, filed July 16, 1934, is based upon the two agreements.

Appellant contends that the original property settlement agreement is void because contrary to public policy and morals; and that it gains no validity by its approval in a subsequent divorce action. He also asserts that there was no consideration for the supplemental agreement providing for attorney's fees.

It is respondent's contention that the parties separated as the result of domestic difficulties, the wife determining to sue for divorce; that after a separation of approximately two months they entered into an agreement settling their property rights, which agreement was subsequently approved by the court in the divorce action; that two years later, and while the said agreement was in full force and effect, by reason of the default of the husband and in consideration of the wife's forbearance to take legal action against him, the parties entered into the supplemental agreement which among other things confirmed the original agreement.

The pertinent portions of the original agreement in dispute in the present action are as follows: "This agreement shall be and become effective if, as, and when within a period of six (6) months from the date hereof a decree of divorce is entered granting to the party of the second part a divorce from the party of the first part and including as a part of its terms the provisions herein contained. If a divorce shall not be so granted or shall be granted but shall not contain as provision for the settlement of property rights the provisions of this agreement, or shall contain additional provisions, or provisions inconsistent herewith, then this agreement shall be and become forthwith null and void and of no effect * * * provided that the party of the first part shall not be obliged to make any payments after the 15th day of June, 1932, unless a decree of divorce has been obtained by the party of the second part as herein contemplated, but in the event such decree of divorce has been obtained the party of the first part shall continue payments from and after the time of obtaining such decree of divorce and until the said sum of nine thousand ($9,000) dollars has been paid."

The interlocutory decree contains the following: "And it further appearing to said court that said parties have heretofore entered into an agreement settling their property rights, and said agreement having been presented to this court for its approval, it is hereby adjudged and decreed that said agreement be and the same is hereby approved and made by reference a part of this interlocutory decree of divorce, and it is further ordered, adjudged and decreed that the parties to said agreement, to-wit: the plaintiff and defendant in the above-entitled action, fully and completely perform said agreement all in accordance with the terms thereof." This is the only reference in the decree to a property settlement.

[1-3] Respondent argues that the approval of the agreement by the court in the divorce action renders the question of its validity res judicata. Neither the complaint in that action nor the answer contained any reference to a property settlement or support for the wife. The complaint prayed for dissolution of the bonds of matrimony and for such other and further relief as to the court seemed proper. In a divorce proceeding issues may be broadened at the trial to include questions not made an issue by the pleadings. The court as representative of the public interest has the power, irrespective of a contract settlement or the silence of the pleadings with reference thereto, to make a fair and just disposition of property rights in consonance with the law thereon. Civ. Code, div. 1, part 3, title 1, chap. 2, art. 4, § 136 et seq.; Moog v. Moog, 203 Cal. 406, 264 P. 490; Robertson v. Robertson, 34 Cal.App.2d 113, 93 P.2d 175. A property settlement, although merely referred to in the decree as such, may, under circumstances not necessary to enumerate herein (Wallace v. Wallace, 136 Cal.App. 488, 29 P.2d 314), become res judicata, but it must be sufficiently certain and definite or a reasonable means of ascertaining its terms must be available from the pleadings or evidence (Moran v. Moran, 3 Cal.2d 342, 44 P.2d 546; Armstrong v. Armstrong, 132 Cal.App. 609, 23 P.2d 50; Wallace v. Wallace, supra; Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53; Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520; Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540) before it may be enforced and constitute an estoppel between the parties. 1 Freeman on Judgments, p. 126; 14 Cal.Jur., p. 954. Plaintiff could not have the same rights on the judgment in a divorce case, which while purporting to confirm a property settlement lacks the necessary details thereof, as on a judgment setting forth the terms of the agreement.

[4, 5] It is suggested that plaintiff's testimony that she was satisfied with a settlement giving her $150 a month, taken with a statement of her counsel, is sufficient to identify the agreement. This was adequate to establish that a property settlement had been made by the parties, but not sufficient to identify its terms. The statement by the attorney is as follows: "Yes, he is providing a life insurance policy which he is paying for, and it is placed in escrow, and in the event of his death, the amount that may then remain over the balance of $9,000 will be paid from that policy to this plaintiff. As regards the payments during his life, we have no guarantee other than the agreement that he will pay." Referring to the payments, counsel further stated "that it is so provided in the decree". However, the decree does not so provide. Without incorporating the agreement therein (Moran v. Moran, supra), or referring specifically to its terms, or introducing it in evidence, the decree simply directs that it be performed. The agreement in question covered disposition of household furniture, real property, moneys and securities, the assumption of indebtedness, the maintenance in good standing of a life insurance policy, etc. The decree in the divorce action could not furnish a basis for execution or for contempt proceedings. Lazar v. Superior Court, Cal.Sup., 107 P.2d 249. The approval in the decree of the agreement is insufficient to be relied upon in the present proceeding as an adjudication of its terms. However, independent of the decree it may be a valid agreement.

In the present action the court found: "That on the 7th day of January, 1932, the said parties entered into an agreement in writing, wherein and whereby they settled their rights as to community property and the sum to be paid to Elizabeth F. Queen by Clyde L. Queen for the maintenance and support of the said Elizabeth F. Queen; that it was provided in said agreement that Clyde L. Queen should pay to Elizabeth F. Queen the sum of $150 per month, each and every month, until the total sum of $9,000 was paid; that said agreement was and is in all respects valid, lawful and not contrary to public morals or to public policy."

Appellant urges that the agreement was absolutely void because contrary to public policy and morals; that the instrument never became an agreement between the parties because it could be binding only if a decree of divorce should be granted the wife within a period of six months; that its provisions should have been included in the decree of divorce, and further that it should have been confirmed by the court in the divorce proceedings. Passing for the present the contention that the agreement is against public policy and morals, the interlocutory decree at least—which is the only one that could have been considered—*was* granted within the six months' period.

[6, 7] When the contract is read in its entirety, with particular consideration given to provisions objected to by appellant, it is plain that the purpose of the agreement was to assure to the husband that the full measure of his obligation had been met, and that if the wife obtained the rights accorded her therein she should have no additional rights against him in respect to property or support. The parties evidently recognized the power of the court to disregard the agreement and to provide other terms which to it might seem fair and just (Moog v. Moog, supra; Robertson v. Robertson, supra); but, to guard against the imposition of additional terms or the possibility of a double obligation, the husband was protected by the provision in the agreement that its terms should be a part of the decree, and that if the decree contained any additional or inconsistent provisions the agreement should become forthwith null and void. The agreement was approved in the divorce proceeding, ineffectively in so far as the doctrine of res judicata is concerned, but there was sufficient reference to the property settlement to indicate the intention of the court that an agreement executed by the parties should govern the question of property rights and the wife's support. The husband's attorney was present during the hearing on the merits, and could have requested the insertion of the agreement as part of the decree. The purpose of the agreement was satisfied when no terms were provided in the decree inconsistent therewith. A specific approval in the decree of the terms of the agreement would have placed a more onerous burden on the husband than the enforcement of the property settlement as a contract only. If a part of the decree, the terms would have been enforceable by contempt proceedings. When considered in connection with the terms of the agreement as they appear in the present proceeding, the language of the decree sufficiently meets the requirements of the instrument as to performance of the conditions precedent to insure its effectiveness. Cases cited by appellant dealing with various subjects, such as completeness of a record on appeal (Northern Railway Co. v. Jordan, 87 Cal. 23, 25 P. 273), insufficient description of property in replevin actions (Cooke v. Aguirre, 86 Cal. 479, 25 P. 5; Welch v. Smith, 45 Cal. 230), description in a quiet title action (Powers v. Perry, 12 Cal. App. 77, 106 P. 595), are not sufficiently in point to assist his contention. Where an instrument is referred to in a decree, it should be made a part of the decree or sufficiently described to obviate any question of its identity arising thereafter (Emeric v. Alvarado, 64 Cal. 529, 2 P. 418), but in the present case no one has challenged the fact that a property settlement was signed and that the instrument under consideration is the particular instrument in controversy.

It is not contended that the divorce was collusive, but that the agreement was void as against public policy and morals in that it was an inducement not only to obtain a divorce but that it be obtained within six months. The contention is based solely upon the terms of the agreement. No testimony was presented upon this subject. If it is claimed that the six months' period was inserted to expedite the divorce, why did the parties delay the matter? It is a well-known fact that an interlocutory decree under the circumstances herein presented may be obtained in a much shorter period. Irrespective of the time limit, if the contention is that by the agreement the wife was persuaded to obtain a divorce, the answer appears in the opening paragraphs of the agreement: "That Whereas, said parties have separated and said party of the second part has stated that she is about to institute an action for divorce from the party of the first part; and

Whereas, said parties are desirous of arriving at an agreement respecting the settlement of their property rights and providing for the support and maintenance of the party of the second part in the event that a divorce shall be granted to the party of the second part. * * *" We adopt the language used in Cookinham v. Cookinham, 219 Cal. 723, 725, 28 P.2d 1045, 1046: "Appellant's contention is, as is apparent from our recital of the allegations of the complaint, that the agreement was contra bonos mores, and therefore null and void, and may be so declared in this section. With this assertion we cannot agree. First, it is to be observed that the parties were living separate and apart, and the agreement conclusively establishes their intent to amicably settle and adjust all of their property rights. This they were competent to do and were authorized by law to do."

[8] The agreement does not indicate that it was promotive of divorce but rather incidental thereto, the means employed in the disposition of the property of the parties and the assumption of an obligation to support the wife. It is unnecessary to differentiate between the facts in this case and in the cases cited by appellant which have received consideration in later decisions. Howard v. Adams, Cal.Sup., 105 P.2d 971, 130 A.L.R. 1003; Morrow v. Morrow, 40 Cal.App.2d 474, 105 P.2d 129.

[9, 10] Respondent's right to recover attorney's fees and to declare the entire unpaid balance due in accordance with the original agreement depends on the validity of the January 19, 1934, supplementary agreement, the consideration for which was the forbearance of the wife to pursue any claims she had against the husband. The trial court found that on the date of the supplementary agreement the husband was delinquent in monthly payments. The evidence shows to the contrary. The husband and wife testified that on the date of the agreement the husband was not in default. It is the law in this state that forbearance to sue unless upon a promise to forbear is not a good consideration. Wine Packing Corp. of California v. Voss, 37 Cal.App.2d 528, 100 P.2d 325. Accordingly plaintiff is precluded from the collection of attorney's fees, and is bound by the provisions of the original settlement agreement, namely, the recovery of delinquent payments at the rate of $150 per month.

The trial court is directed to modify the findings and the judgment in accordance with the views herein expressed. As modified, the judgment is affirmed, each party to pay his or her own costs on appeal.

We concur: PETERS, P. J.; KNIGHT, J.

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44 Cal.App.2d 393

WILKES v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11490.

District Court of Appeal, First District, Division 1, California.

April 23, 1941.

Rehearing Denied May 23, 1941.

Hearing Denied June 19, 1941.

1. Municipal corporations ⟹79

The approval of a municipal charter by the state legislature confers the power of home rule upon the municipality, but the power is limited to municipal affairs, and in nonmunicipal matters the general law controls. Const. art. 11, § 6.

2. Municipal corporations ⟹79

Approval of a freeholders' charter by legislature is by resolution and not by bill, and is a legislative act approving home rule for municipality, and does not ipso facto repeal laws generally applicable throughout the state. Const. art. 11, § 6.

3. Municipal corporations ⟹79

The approval by the state legislature of a municipal charter may confer upon local government a method of procedure different from a general statute if the subject matter is solely a municipal affair. Const. art. 11, § 6.

4. Municipal corporations ⟹79

The right to fix time within which to file claim against municipality under the Public Liability Act, based on defect in maintenance of a highway, is purely a legislative matter, and such a claim must be filed in accordance with time limit provided by the act rather than time limit provided by a municipal charter. St.1923, p. 675; St.1931, p. 2475; Const. art. 11, § 6.

5. Municipal corporations 🔑812(1)

One of the underlying purposes in designating a department wherein to file a claim against a municipality based on a defect in maintenance of a highway, as authorized by the Public Liability Act, is that the claim may be paid without litigation if it is found to be just. St.1923, p. 675; St.1931, p. 2475.

6. Municipal corporations 🔑1009

If a claimant who seeks to hold a municipality liable for defect in maintenance of a highway, under the Public Liability Act, prevails, with or without litigation, the legislative body, which in the case of the city and county of San Francisco is the board of supervisors, has authority to allow payment. St.1923, p. 675; St.1931, p. 2475.

7. Automobiles 🔑252

Right to maintain action against municipality for injuries sustained in automobile accident as result of negligence of a municipality in construction and maintenance of a highway is purely statutory. St. 1923, p. 675; St. 1931, p. 2475.

8. Municipal corporations 🔑755(1), 811

The right and remedy provided by statute authorizing recovery of damages from municipality resulting from defect in maintenance of a highway must be in pursuance of provisions of the statute, which are exclusive. St.1923, p. 675; St.1931, p. 2475.

9. Municipal corporations 🔑79

Existence of liability for defective highways is a matter of general state concern and cannot be chartered away even though a municipality should attempt to do so. St. 1923, p. 675; St. 1931, p. 2475.

10. Municipal corporations 🔑755(1), 763(1)

Although a municipality is not an "insurer" of safety of travelers on its streets, the duty is imposed upon it by Public Liability Act to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner. St. 1923, p. 675; St.1931, p. 2475.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

11. Municipal corporations 🔑756

The provisions of the Public Liability Act of 1923 and supplemental act of 1931 are "mandatory" and are required to be strictly construed. St.1923, p. 675; St.1931, p. 2475.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

12. Municipal corporations 🔑79

Where claimant, who sought to recover damages from city and county of San Francisco for injuries sustained in automobile accident resulting from city's negligence in construction and maintenance of a highway, filed claim with controller in compliance with provisions of city charter and did not file the claim with the clerk or secretary of the legislative body of the city as required by 1931 supplement to the Public Liability Act, claimant could not recover for the injuries sustained, since compliance with provisions of the act was required. St.1923, p. 675; St.1931, p. 2475; St.1935, p. 2421, § 87.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Bertha J. Wilkes against the City and County of San Francisco for injuries sustained in an automobile accident. From an adverse judgment, plaintiff appeals.

Affirmed.

Rehearing denied; PETERS, J., dissenting.

Hearing denied; CARTER, J., dissenting.

A. Dal Thomson, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Edmond P. Bergerot, Deputy City Atty., both of San Francisco, for respondent.

WARD, Justice.

This is an appeal by plaintiff from a judgment decreeing that she take nothing by her action. The suit was brought to recover damages for personal injuries suffered by her as the result of an automobile accident attributable, as the court found, to defendant's negligence in the construction and maintenance of a highway. The ground on which the trial court denied the relief sought is the failure of plaintiff to file a claim for said damages as required by the provisions of the Public Liability Act of the state of California, Act 5149, St.1931, p. 2475, Deering's General Laws, 1937, volume II.

The injury for which damages are sought occurred in the City and County of San Francisco. The question involved on the appeal is whether claims under the state Public Liability Act must be filed as provided by Statutes of 1923 and 1931, pages

675 and 2475, respectively, or in accordance with the provisions of section 87 of the charter of the City and County of San Francisco. Stats.1935, p. 2421. The claim in this action was filed in compliance with the charter provisions prior to the appearance of the plaintiff's present attorney herein.

The act of 1923 provides that a municipality shall, within certain limitations, be liable for a defect in the maintenance of a highway. The act of 1931 supplemental thereto provides that as a foundation for any recovery of damages resulting from a defect of the character mentioned, a verified claim shall be filed with the clerk or secretary of the legislative body of the municipality, etc., within ninety days after such accident has occurred. Stats.1931, p. 2475; Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580. The charter provides that all claims for damages must be presented to the controller within sixty days after the occurrence from which it is claimed they arose. Stats. 1935, p. 2421. The claim in the case before us was filed within both the charter and statutory periods. The person with whom filed, or the place of filing, is the vital question herein, and in arriving at its determination the time limit provided in those respective enactments for the filing of claims throws light upon that question.

[1-3] The contention stressed by appellant is that the charter in its present form was approved by the legislature of 1935 (Stats.1935, p. 2421), a date subsequent to the enactment of the statutes mentioned, and that such approval operated as an amendment pro tanto of the state law. The approval of a municipal charter by the state legislature confers the power of home rule upon the municipality, but this power is limited to municipal affairs. In non-municipal matters the general law controls. Const. of California, art. XI, sec. 6; Mesmer v. Board of Public Service Com'rs, 23 Cal.App. 578, 138 P. 935. In approving a freeholders' charter the procedure is by resolution and not by bill. It is a legislative act approving home rule for a municipality but it does not ipso facto repeal laws generally applicable throughout the state. The approval by the legislature may confer upon the local government a method of procedure different from a general statute if the subject-matter is solely a municipal affair.

[4] If the matter of *where* the claim is to be filed is purely a question of local concern, the charter is controlling regardless of the date of its enactment; if it is a matter of state-wide concern the general statute controls, and does so without regard to whether its enactment preceded or followed the charter provision. The right to recovery does not arise under charter provisions but under state law. The state has the power to prescribe the method of enforcing the claim. If the state fixes the period as ninety days within which such a claim may be filed, a municipality, even by charter provisions, may not ordain that the claim will not be recognized unless filed within a shorter period. No right of action is given by charter to seek damages against the City and County of San Francisco as the result of a defective or dangerous condition of a public highway. Such right exists only under the state law. The municipality may not curtail or abridge such right by providing that the claim shall be filed within eighty-nine days or one day. If it had the right to fix a period of sixty days it likewise has the power to change that period. The right to fix the time within which the claim may be filed is purely a legislative matter. Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Wicklund v. Plymouth E. School Dist., 37 Cal.App.2d 252, 99 P.2d 314; Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Johnson v. City of Glendale, supra; Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185; Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29; Strath v. City of Santa Rosa, 19 Cal.App.2d 382, 65 P.2d 894; Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102; Kline v. San Francisco U. School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29. If the soundness of the rule that the claim must be filed in accordance with the time limit provided in the statute rather than in the charter has been recognized by the courts of this state, as appears above, there can be no doubt that the same rule holds relative to the place of filing unless some good reason appears to the contrary.

[5, 6] The matter of *where* the claim was filed may be intimately connected with the fiscal system of a municipality in preparing budgetary matters as part of its in-

ternal business; but one of the underlying purposes in designating a department wherein to file such a claim is that it may be paid, if found just, without litigation. If the claimant prevails, with or without litigation, it is the legislative body—in this instance the board of supervisors—that is given authority to allow payment, and not the controller. Douglass v. City of Los Angeles, supra. The accumulation of funds (West Coast Advert. Co. v. San Francisco, 14 Cal.2d 516, 95 P.2d 138) and the disposition or depositary thereof (Rothschild v. Bantel, 152 Cal. 5, 91 P. 803) are internal business affairs, but not so the filing of a claim under the Public Liability Act. The budgetary matter is incidental, and subordinate to the power of the legislative body of the municipality to adjust, contest or finally pay if the municipality is liable for damages.

[7, 8] The right to maintain the present action is statutory (George v. City of Los Angeles, 11 Cal.2d 303, 79 P.2d 723) and did not exist at common law. Under such circumstances the right and the remedy must be in pursuance of the provisions of the statute, and are exclusive. 25 Corpus Juris p. 1185; 25 R.C.L. 1058; People v. Craycroft, 2 Cal. 243, 56 Am.Dec. 331; Reed v. Omnibus R. R. Co., 33 Cal. 212; County of Monterey v. Abbott, 77 Cal. 541, 18 P. 113, 20 P. 73; Estate of Ward, 127 Cal.App. 347, 15 P.2d 901; Estate of Troy, 1 Cal. App.2d 732, 37 P.2d 471; County of Alameda v. Freitas, 8 Cal.App.2d 653, 48 P.2d 165.

[9, 10] The existence of liability for defective highways is a matter of general state concern and "cannot be chartered away, even though a municipality should attempt to do so". Rafferty v. City of Marysville, 207 Cal. 657, 665, 280 P. 118, 122; Douglass v. City of Los Angeles, supra. In George v. City of Los Angeles, supra, 11 Cal.2d page 308, 79 P.2d page 725, the court said: "The rule adopted by the courts of this state is that while a municipality is not an insurer of the safety of travelers on its streets, the duty is imposed upon it by the Public Liability Act of 1923 to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner. Rodkey v. City of Escondido, supra [8 Cal.2d 685, 67 P.2d 1053]; Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725; Waldorf v. City of Alhambra, 6 Cal.App.2d 522, 45 P.2d 207; Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993, and Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540. * * * This is the construction placed upon the Public Liability Act of 1923 by the courts in Rafferty v. City of Marysville and kindred cases cited above."

[11] It must be concluded that an action such as this is based solely upon the provisions of the Public Liability Act. (Stats. 1923 and 1931, pp. 675 and 2475, respectively.) The provisions of the two acts are mandatory and are to be strictly construed. Whiting v. City of National City, 9 Cal.2d 163, 69 P.2d 990; Johnson v. City of Glendale, supra; Rafferty v. City of Marysville, supra; Douglass v. City of Los Angeles, supra; White-Satra v. City of Los Angeles, 14 Cal.App.2d 688, 58 P.2d 933.

Citation of Cathey v. City and County of San Francisco, 37 Cal.App.2d 575, 99 P.2d 1109, is not of assistance to appellant. The action therein was not based upon the Public Liability Act.

[12] It is interesting that each side discusses at length Douglass v. City of Los Angeles [5 Cal.2d 123, 53 P.2d 355], supra. Appellant contends that it was therein held that a provision of the Los Angeles charter did not comprehend a claim for tort. Respondent quotes and emphasizes the following: "It must inevitably follow that if a claimant in this state is to obtain redress against the city itself for injuries received by reason of the negligent acts or omissions of its servants, such claimant must rest upon the liability imposed by the general statute, and must conform with the requirements of that statute in enforcing that liability. One of the requirements of the general statute since 1931 has been that as a prerequisite to suit to enforce such liability against a city, the claimant must have filed with the clerk of the legislative body of the city, here the city council, a verified claim for damages. St.1931, p. 2475; St. 1931, p. 2477." Primarily the decision holds that a recovery may not be had unless a claimant pleads and proves a compliance with the 1931 act. Thereafter, as a secondary basis for the opinion rendered, the court carefully analyzed the provision of the Los Angeles charter, and determined that the board of public works had no authority, either express or implied, to recognize such a liability as sued upon in that case. The gist of the decision is that the filing of a claim with a municipal department without authority to order the claim paid without suit would be

futile. It is not necessary in the present case to consider the phraseology of the provision of the charter of the City and County of San Francisco. The first point determined in the Douglass opinion removes any doubt on the question involved herein. Cottle v. City of Los Angeles, 5 Cal.2d 140, 53 P.2d 361; Skinner v. City of Los Angeles, 5 Cal.2d 317, 54 P.2d 446; Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Kelso v. Board of Education, City of Glendale, 42 Cal.App.2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 223, 82 P.2d 216; Kline v. San Francisco U. School Dist., supra. There is no contention that the city and county controller could order the claim paid without suit.

The conclusions herein are based solely upon an action wherein the filing of the claim arises under the state Public Liability Act.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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44 Cal.App.2d 379

FENTON v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 6572.

District Court of Appeal, Third District, California.

April 22, 1941.

1. Workmen's compensation 🔑723

A California state relief administration office employee who was instructed on Saturday to call on relief applicants before returning to office on Monday, and who was killed on Monday morning on way from his home to make calls, was performing a "special mission" in "course of employment", within rule that employee while going to or returning from place of employment is within scope of employment if actually performing a special mission at request of employer, and hence his death was compensable, notwithstanding that employee had not reached home of first applicant, and that accident occurred on direct route to office. St.1917, p. 877, § 69, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Mission" and "Course of Employment".

2. Workmen's compensation 🔑723

The rule that workman employed to perform labor in particular building, place of business or specified district cannot recover compensation for injuries sustained while merely going or coming from work, is not applicable to workman engaged in performing special mission intrusted to him by employer in course of workmen's duties, and an employee so engaged is acting in "course of employment".

3. Workmen's compensation 🔑723

An employee who is actually engaged in performing a special mission when he is injured is acting in course of employment, notwithstanding that he is compelled to start on his journey along a course usually followed to or from his work and that he has not yet reached a point where he could turn off toward his assigned destination when the accident occurred, or that the errand is to be performed at a destination which happens to be on the regular route of employee to or from his work.

◆

Proceeding under the Workmen's Compensation Act by Kathryn Fenton, claimant, for compensation for death of Lowell Del Fenton, who was claimant's husband, opposed by the California state relief administration, employer. To review an order of the Industrial Accident Commission refusing to allow compensation, Kathryn Fenton brings certiorari.

Order reversed and commission directed to make award.

Horace E. Dunning, of Sacramento, for petitioner.

E. A. Corten, of San Francisco, for respondents.

THOMPSON, Justice.

Kathryn Fenton, the widow of Lowell Del Fenton, deceased, seeks by means of a writ of certiorari to reverse an order of the Industrial Accident Commission refusing to allow compensation for the death of her husband which resulted from a railroad crossing casualty while he was engaged in investigating applications for relief in behalf of the California State Relief Administration.

The deceased resided with his wife at Woodland. He was engaged as an office employee with the California State Relief Administration at Sacramento. For the purpose of administering relief work the state of California is divided into sections. District No. 4 includes Yolo, Sacramento, Placer, El Dorado, Nevada, Sierra and Amador counties. Mr. Thomas J. Dillon was the "Area Director" of that district, with his principal place of business in the city of Sacramento. The duties of Mr. Fenton sometimes required him to investigate, as a "case worker", certain claims of petitioners for relief, outside of the office. This special duty made it necessary for him to visit the homes of applicants to secure the desired information which he subsequently reported to the office. On those occasions he drove his own machine, during which time the employer allowed him mileage for the distance he actually traveled. On account of the congestion of work, the supervisor assigned to him on Saturday, April 13, 1940, several cases for investigation in Hooverville, Gardenland and the vicinity of Sacramento, instructing him to make the calls and obtain the desired information before he returned to the office the following Monday. To assist him in making those investigations, he was handed several files containing documents and data relating to the applications for relief. This method of performing the field work was resorted to for the benefit of the service, to expedite the work and to save time and expense.

When Mr. Fenton left the office on Saturday night he took with him the required information and agreed to perform the service on Monday morning before returning to the office. Before leaving home at an unusually early hour on Monday, the 15th, he exhibited the folders to his wife, and made certain notations thereon, presumably with respect to the route he was to travel, telling her that he was then going to make a number of calls before he went to the office. He left the house at 7 o'clock in the morning and drove toward the home of the first applicant on his list, which happened to be upon the regular highway to Sacramento. Near Woodland his machine was struck by a train at a railroad crossing and he was killed.

A claim for compensation was filed by the widow with the Industrial Accident Commission. After hearing, the petition was denied on the ground that Mr. Fenton was not killed in the course of his employment for the reason that he was then merely going to the location of his work.

We are required to determine in this proceeding whether the claimant is barred from recovering compensation for the death of her husband on account of the "going and coming" rule, or whether the facts bring the case within the exception to that rule because he was engaged in a special mission for his employer when the accident occurred.

[1] We are of the opinion Mr. Fenton was killed while he was performing a special mission for the master, in the course of his employment, and that his widow is entitled to recover compensation on that account. Clearly the circumstances of this case present an exception to the general "going and coming" rule. The office in Sacramento was the place where the deceased usually reported for work. On this particular occasion he was assigned a special mission to investigate and report on several applications for relief, at the homes of the claimants in the vicinity of Sacramento. The superintendent directed him to perform the work over the weekend, before he returned to the office the following Monday. That meant he was to work from his home in Woodland. He was furnished documents and data from the files in the office, to aid his investigation. He took them with him to his home. He exhibited them to his wife and made notes upon them, informing her that he was then going to make several calls before he went to the office. He was paid extra compensation of mileage while he was performing that service. He began this employment the minute he left home. Unquestionably the employer had authority to direct the manner of proceeding to perform that field work. Under such circumstances the special assignment of work falls within the recognized exception to the "going and coming" rule and the employee is entitled to compensation for injuries received in the course of his employment.

It is true that Mr. Fenton was killed en route to the first home which was on his list and before he actually reached his destination. It is immaterial that Davis, toward which city he was traveling when he was killed, is situated on the direct route he was accustomed to travel in going to his regular place of business, for he was engaged in his employment the minute he left home, regardless of the route he traveled in reaching the several homes he was directed to visit. It is not true that he was *merely* going toward his place of business. For the purpose of this special assignment of work, his usual place of business in Sacramento was definitely eliminated when the superintendent told him to perform the work before he returned to the office. It is true that "case workers" were sometimes sent on similar assignments of field work after they had arrived at the office. That was not done in the present case. There is no conflict of evidence regarding the fact that Mr. Fenton was told to perform this work before he returned to the office. This case merely involves the application of the "going and coming" rule of law to the undisputed facts. Section 69 of the Workmen's Compensation Act, St.1917, p. 877, requires a liberal construction of the law "with the purpose of extending the benefits of the act *for the protection of persons* injured in the course of their employment".

In construing the application of the "going and coming" rule, the courts of this state have significantly said in at least two well-considered cases that compensation may not be allowed when the workman is "*merely* on his way to his employment" when he is injured. Starr Piano Co. v. Industrial Accident Commission, 181 Cal. 433, 184 P. 860, 861; Cromwell v. Los Angeles Ry. Corp., 102 Cal.App. 499, 283 P. 375. In both of these cases awards for compensation were upheld.

[2] It is true that when a workman is employed to perform labor in a particular building, place of business or specified district, he may not ordinarily recover compensation for injuries sustained while he is merely going or coming from his work. Makins v. Ind. Acc. Comm., 198 Cal. 698, 247 P. 202, 203, 49 A.L.R. 411; 27 Cal.Jur. 380, sec. 84; 1 Campbell on Workmen's Compensation page 146, sec. 163; 27 Cal. Jur. 380, sec. 84. However, there is a well-established exception to that general rule. When the workman is engaged in performing a special mission entrusted to him by the employer in the course of his duties, the going and coming rule has no application. In the Makins case, supra, the claimant was hired to deliver newspapers in a specified district in the city of Oakland. He furnished his own conveyance and was paid a stipulated amount each month for his services. After completing all deliveries of newspapers on his route, he was injured after he started to go home. An award of compensation was affirmed by the Supreme Court on the specific declaration that the going and coming rule was not applicable. With relation to the circumstances under which he was injured, the court says: "After the last delivery on his route, and *with the purpose of proceeding to his home,* which was situated several blocks to the south and west, * * * he received injuries from an automobile being driven westerly across such intersection."

In that case the claimant's place of business was deemed to be the particular district in which he distributed newspapers. He was riding a bicycle toward his home along a street adjacent to the district when he was injured. The court properly said: "Each case must be adjudged by the facts which are peculiarly its own."

Numerous cases in this and other jurisdictions hold that, as an exception to the general "going and coming" rule, an employee should be regarded as having been injured in the course of his employment, entitling him to compensation, when the accident occurs while he is going to or coming from his work, either on his own time or on that of his employer, if he is then engaged in some substantial mission, growing out of his employment, which has been assigned to him by the employer. State Compensation Insurance Fund v. Ind. Acc. Comm., 89 Cal.App. 197, 264 P. 514; Ocean Accident & Guar. Corp. v. Ind. Acc. Comm., 132 Cal.App. 207, 22 P.2d 538; Robinson v. George, Cal.Sup., 105 P.2d 914; 27 Cal. Jur. 381, sec. 84; 10 Words and Phrases, Permanent Edition, Course of Employment, 174; 1 Campbell's Workmen's Compensation, p. 171, sec. 182. In 27 California Jurisprudence, at page 383, it is said that when a workman is engaged in traveling from place to place without the necessity of reporting at a particular place of business, he may be deemed to enter upon his employment when he leaves his home to proceed to the first place to which his duty calls him, and "where an employee is not required to report for work at any particular place but travels in the course of his duties, since in such case he immediately enters upon his employment when he leaves his home to proceed to the first place to which duty calls him". The foregoing text is supported by several cases cited in the Industrial Accident Reports.

In 1 Campbell's Workmen's Compensation, page 171, section 182, it is said: "When the employee is sent on a special errand either as part of his regular duties or at the express order of his employer, the former is under the Act and injuries sustained in course thereof are compensable from the time of his beginning the assignment to its completion; that is, both going and coming or until he deviates for personal reasons."

Similarly, section 185 of the last-cited text reads in part: "Where the home of the employee serves as his office or headquarters, none other having been furnished by the employer, business errands start and end at home, and the going and coming rule has no application."

In 10 Words and Phrases, Permanent Edition, page 174, under the caption "Course of Employment", several cases in support of the foregoing text are cited. In Harvey v. Bakers' & Consumers' Compressed Yeast Co., 244 App.Div. 838, 279 N.Y.S. 511, it was held that the death of a salesman who took merchandise from the office of his employer to his home at night, and who was to deliver the merchandise before reporting at the office, but who was killed the following morning while he was en route to the office, was compensable as occurring in the course of his employment.

In the case of Bennett v. Marine Works, 273 N.Y. 429, 7 N.E.2d 847, 849, it was held that an inside employee or office clerk, who was instructed by his employer to perform an errand "before reporting at the office", and who was injured while he was engaged in performing that errand, was entitled to compensation on the theory that the accident occurred in the course of his employment. It is there held the going and coming rule had no application under such circumstances. It is also held in that case that in the performance of a special mission or errand on the way home from the fixed place of business, the employee would not "enter into the course of his employment" *until he deviated* from his usual route to perform the assigned duty. This last-mentioned principle has no application to the present case, for the reason that Mr. Fenton never did deviate from the most direct course to the home of the parties he was instructed to interview.

[3] The limitation of the rule, which is frequently cited in compensation cases, that the going and coming doctrine does not apply to an employee who is actually performing a special mission at the request of his employer, until he deviates from his usual course to or from his place of work, should be carefully applied to the particular facts of a case. The strict application of that deviation rule without regard to the circumstances may result in defeating justice. We assume the deviation principle was adopted as a rule of evidence to aid the court in determining whether an employee is actually engaged in performing a special mission entrusted to him, or whether he is merely on his way to or from work or his home. If the evidence is clear that an employee is actually engaged in performing a special mission when he is injured, it would be illogical to hold that he is not acting "in the course of his employment" when he is compelled to start on his journey along a course usually followed to or from his work, merely because he had not yet reached the point where he could turn off toward his assigned destination when the accident occurs. If the errand is to be performed at a destination which happens to be on the regular route of the employee to or from his work, we assume he would still be entitled to compensation and he would actually be engaged in the course of his employment, notwithstanding the fact that he did not and could not diverge from his usual route in fulfilling his mission. In any event the rule has no application to the present case.

For the reason that Mr. Fenton was actually engaged in fulfilling a special mission assigned to him by his employer, which began when he left his home, and which was to be completed before he returned to the office, the going and coming rule has no application, and the petitioner is entitled to recover compensation for his death which occurred in the course of his employment.

The order of the Industrial Accident Commission denying compensation is reversed, and the commission is directed to make an award in accordance with the evidence adduced at the hearing.

We concur: PULLEN, P. J.; TUTTLE, J.

44 Cal.App.2d 531

Ex parte COON et al.

Cr. 1761.

District Court of Appeal, Third District, California.

April 28, 1941.

1. Habeas corpus 🔑96

Whether complaints on which defendants were convicted did not state a public offense and were deficient in other particulars could properly be raised on habeas corpus proceeding. Pen.Code, § 1426.

2. Habeas corpus 🔑96

Contention that, in criminal prosecution, court refused to grant challenges for cause based on bias and prejudice, refused to grant motion for change of venue, and refused to issue subpœna duces tecum for witnesses residing outside county, could not be raised in habeas corpus proceeding, since contentions involved "errors of law committed at the trial".

See Words and Phrases, Permanent Edition, for all other definitions of "Errors of Law Committed at the Trial".

3. Habeas corpus 🔑30(1)

The function of the writ of "habeas corpus" is not to serve the purpose of an appeal, so that a prisoner cannot predicate as ground for discharge errors of law committed by a trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Habeas Corpus".

4. Constitutional law 🔑268
Habeas corpus 🔑30(1)

Mere errors of law arising out of rulings of court at trial do not come within "due process of law" clause, as respects prisoners' right to habeas corpus. U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

5. Habeas corpus 🔑30(1)

Adverse rulings, such as refusal to grant challenges for cause, refusal to grant motion for change of venue, and refusal to issue subpœna duces tecum for witnesses residing outside county, were not acts in excess of "jurisdiction", as respects prisoners' right to habeas corpus, but were merely errors committed in exercise of jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

6. Courts 🔑1

Since "jurisdiction" is the power to hear and determine, it does not depend either on regularity of exercise of such power, or on correctness or rightfulness of decision made, for power to decide necessarily carries with it power to decide wrongly as well as rightly, subject to qualification that court can render only such judgment as does not transcend in extent or character the law which is applicable to that class of cases.

7. States 🔑34, 39½

A complaint for violation of statute penalizing persons who wilfully refuse to be sworn or answer material and proper question before legislature or committee thereof was sufficient to state a public offense and complied substantially with penal code. Pen.Code, §§ 87, 1426.

8. States 🔑34, 39½

A complaint for violation of section of Penal Code, penalizing persons who refuse to be sworn or answer questions before legislature or committee thereof was not insufficient on theory that section of political code requiring committee to report contempt to Senate or Assembly was applicable. Pen. Code, § 87; Pol.Code, § 302.

9. States 🔑34

A complaint for violation of statute penalizing persons refusing to be sworn or to answer questions before legislature or committee thereof, which set out questions asked including question relating to membership in Communist Party, was not insufficient because of failure to recite that legislative committee was empowered to ask such questions. Pen.Code, § 87.

10. Habeas corpus 🔑30(1)

In prosecution for violation of statute penalizing persons refusing to be sworn or answer questions before legislature or committee thereof, refusal to indorse subpœna for witnesses residing outside county was not prejudicial, as respects defendants' right to habeas corpus, where facts which were expected to be proved by such witnesses were that purpose of committee was to harass and destroy certain organization, relief officials, and others, since such evidence would not constitute a defense, nor would it tend or assist toward such end. Pen.Code, §§ 87, 1330.

11. States ⇨34

As respects conviction for refusing to answer questions before legislative committee of legislature, it is not only right, but duty, of state particularly at present time, to ascertain if there are any in its employ who belong to any group or organization which advocates and practices overthrow and destruction of state by subversive activities. Pen.Code, § 87.

12. Criminal law ⇨304(2)

It is a matter of common knowledge that the Communist Party comes within category of organizations which advocate and practice overthrow and destruction of state by subversive activities.

◆

Proceeding in the matter of the application for a writ of habeas corpus on behalf of Boyd Coon and others.

Writ denied and proceeding dismissed and petitioners remanded to custody of sheriff.

Gladstein, Grossman, Margolis & Sawyer, of San Francisco, for petitioners.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and Raymond Dunne, Dist. Atty., Maxwell M. Willens, Asst. Dist. Atty., and H. C. Stanley, Asst. City Atty., all of Stockton, for respondent.

PER CURIAM.

Petitioners were found guilty by a jury in the police court of Stockton, of a violation of section 87 of the Penal Code. Judgments were duly entered as to each, that they should be confined in the county jail for one hundred eighty days on count one, and one hundred eighty days on count two of the complaint, pay a fine of $250 on the third count, and $250 on the fourth count. Upon appeal to the superior court by petitioners, the conviction was affirmed, but the judgment was modified by striking out the sentence imposed under all counts except count one. All of the defendants in said actions now contend that the said conviction can and should be nullified by means of this proceeding in habeas corpus.

On the 6th day of January, 1940, Governor Olson called a special session of the legislature to consider an act upon relief matters and to make appropriations for the relief of hardship in the state of California. During this session, pursuant to assembly house resolutions No. 9 and No. 29 (attached to the record as Exhibits No. 1 and No. 2), the assembly appointed a committee of its members for the purpose of investigating, surveying and studying in detail the entire problem of relief of hardship and destitution. This committee was authorized to hold public hearings and subpoena witnesses, and in addition, under house resolution No. 29, were authorized, in the words of the resolution, "to have the power to investigate and report upon the extent to which the activities of groups, and organizations, which include among their members persons who are either employees of the state relief administration, or who are receiving relief, affect the cost of the administration of unemployment relief, and to recommend such legislation in connection therewith as the committee may deem necessary or advisable".

Pursuant to these resolutions, the committee met in the city of Stockton and examined numerous witnesses. Nineteen of the witnesses who appeared before this committee, upon being first duly sworn to testify, refused to answer questions propounded to them relative to their communistic activities or affiliations. Subsequently, complaints were filed against these nineteen witnesses for violations of section 87 of the Penal Code, which provides: "Every person who, being present before either house of the legislature or any committee thereof, willfully refuses to be sworn or to answer any material and proper question * * * is guilty of a misdemeanor."

The contention of petitioners is that they were denied due process of law in violation of the fourteenth amendment of the Constitution of the United States, and that habeas corpus may be resorted to as a remedy under such circumstances. They urge that all or any of the following questions may be raised upon this proceeding:

The complaints do not state a public offense, and are deficient in other particulars;

The court refused to grant challenges for cause based upon bias and prejudice;

The court refused to grant a motion for change of venue;

The court refused to issue a subpoena duces tecum for witnesses residing outside the county.

[1] As to the first question mentioned, it is clearly the law that it can properly be raised on this proceeding. Ex parte Williams, 121 Cal. 328, 53 P. 706; 13 Cal. Jur. page 232, sec. 14.

[2] The other questions all relate and arise out of the ruling of the court adverse to petitioners. In other words, they involve errors of law committed at the trial. None of them is based upon facts and circumstances not arising out of, or presented at the trial. In respect to such questions, the rule is found in 13 Cal.Jur. page 236, section 17, where it is said:

[3] "The function of the writ of habeas corpus is not to serve the purpose of an appeal, so that a prisoner cannot predicate as grounds for discharge errors of law committed by a trial court. Thus, the erroneous refusal of a lower court to change the venue upon the ground of bias and prejudice on the part of the trial judge, or the denial by a Justice's Court of statutory rights which may be waived by defendant, are mere errors not going to the question of jurisdiction, and may not be inquired into on habeas corpus. Likewise, the writ does not lie because of error in disregarding the plea of once in jeopardy, for the improper admission of evidence, or for error in the failure to inform the defendant of his rights. Nor does error in rendering the judgment, or defects in the form of the judgment, afford grounds for the operation of the writ."

In the case of In re Martin, 132 Cal. App. 64, 22 P.2d 269, 270, forty specific grounds were advanced for the issuance of a writ of habeas corpus. Among them were accusations of fraud, conspiracy, corruption and impure motives on the part of the district attorney's office, the witnesses for the prosecution, a former attorney for the defense and certain insurance companies; others in their nature are an attack upon the integrity of the trial judge, the jury and the court reporters; a number involve alleged errors of law which it is claimed were committed during the trial of the action; and several pertain to the weight of testimony and the credibility of certain witnesses, alleged misconduct of the district attorney, and the legal sufficiency of the evidence to support the verdict of the jury. In denying the application, the court carefully reviewed the decisions of this state relating to the scope of the inquiry upon habeas corpus, in the following language:

"As held in the cases hereinafter cited, the function of a writ of habeas corpus is to inquire into the jurisdiction of the court from whence the process is issued under which the accused is being held. In re Vitalie, 117 Cal.App. 553, 4 P.2d 171. It cannot be made the vehicle for the consideration of alleged errors where a conviction has been had and the commitment thereon is in due form; nor to subserve the office of a motion in arrest of judgment, In re Stambaugh, 117 Cal.App. 659, 4 P.2d 270; nor can it be used as a means of considering the question of the insufficiency of the evidence, In re Horr, 177 Cal. 721, 171 P. 801; In re Williams, 183 Cal. 11, 190 P. 163; In re Gutierrez, 46 Cal.App. 94, 188 P. 1004; In re Jacobs, 175 Cal. 661, 166 P. 801; In re Kaster, 52 Cal.App. 454, 198 P. 1029; nor for the purpose of reviewing errors alleged to have been committed in the course of the trial. Ex parte Lehmkuhl, 72 Cal. 53, 13 P. 148; Ex parte Noble, 96 Cal. 362, 31 P. 224. Furthermore, the affirmance on appeal of a judgment of conviction operates as a final adjudication against the appellant of all questions raised by the assignments of error or which could have been so raised. [Ex parte] Cohen, 107 Cal.App. 288, 290 P. 512; France v. Superior Court, 201 Cal. 122, 255 P. 815, 52 A.L.R. 869."

The identical language appears in In re Cutler, 1 Cal.App.2d 273, 36 P.2d 441, (hearing in Supreme Court denied). It must be remembered that petitioners availed themselves of the right of appeal, and that all of such questions, according to petitioners, were presented for determination a second time to the superior court.

To meet this situation, so far as our own jurisdiction is concerned, petitioners rely upon the case of Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406. There, the defendant had been convicted of murder in the first degree in this state, and his conviction was affirmed upon appeal to the Supreme Court. People v. Mooney, 177 Cal. 642, 171 P. 690. Thereafter defendant asked leave of the Supreme Court of the United States to file a petition for an original writ of habeas corpus. He charged that he was held in confinement without *due process* in violation of the fourteenth amendment of the federal Constitution, by reason of the fact that he had *been convicted upon perjured testimony which was knowingly produced by the prosecuting officials.* The court held, in effect, that habeas corpus was the proper remedial course for defendant to pursue, but denied the writ upon the ground that Mooney had not exhausted his judicial remedy under the laws of California. Upon subsequent application to the Supreme Court of this state, a writ of habeas corpus was denied. In re Mooney, 10 Cal.2d 1, 73 P.2d 554.

[4] We are unable to agree with petitioners when they urge that mere errors of law, arising out of rulings of the court at the trial, come within the due process clause, nor do we believe that the Mooney case, in so far as such matters are concerned, alters the rule which prevails in this state, and to which we have alluded. In the Mooney case the facts which were used as a basis for an application for the writ did not arise out of anything which took place during the course of the proceedings, and upon which the trial court was given the opportunity to rule. Such facts arose outside the record, and the attack involved the *good faith* of those prosecuting the case. The United States Supreme Court held that, to be entitled to the writ, and to come within the due process clause, it was incumbent upon the defendant to prove not only that perjured testimony was used, but that the prosecuting officials *knowingly* used it. The Supreme Court of this state, in People v. Mooney, 178 Cal. 525, 174 P. 325, where a certificate of probable cause was sought to stay the execution of the defendant upon the ground of misfeasance and fraud upon the part of the district attorney, it was held that such an attack should have been made upon motion for new trial or appeal. *It thus appeared that there was no available remedy under the laws of this state which the defendant could pursue.* This was the situation when the application for habeas corpus was made to the United States Supreme Court. The contention of the defendant had never been adjudicated by any court of this state, by reason of the fact that there was no existing procedure whereby that could be accomplished. Herein lies the distinction between that case and the one under consideration. Here, the questions raised were actually and admittedly presented, under appropriate procedural statutes and the decisions of our courts, and were actually passed upon by both the trial court and the superior court on appeal. If the theory of petitioners here were carried out to its logical conclusion, every adverse ruling in a criminal trial could be made the basis for a charge of a violation of the due process clause, and all of such cases would then be within the jurisdiction of the Supreme Court of the United States. We do not believe that court ever intended to lay down such a rule and expand the scope of the due process clause to such an unlimited extent.

[5] Petitioners, in the same manner, seek to extend the definition of "jurisdiction" so that where adverse rulings of the character mentioned above are made, it is an act of the court in excess of its jurisdiction, if such ruling is erroneous. The recent case of Abelleira v. District Court of Appeal, Cal.Sup., 109 P.2d 942, 948, 132 A.L.R. 715, is relied upon by petitioners. That case merely holds that where a court purports to act under the authority of a particular statute but acts contrary thereto, it acts in excess of its jurisdiction and certiorari will lie. The District Court of Appeal, when the writ was issued, had under submission an application for a writ of mandamus, arising out of the question of the right of the California employment commission to make certain payments to individuals who claimed to be entitled thereto. Pending the final determination of the matter, and for the sole purpose of preserving the status quo, this court restrained the commission from paying out such funds. Before this court had the opportunity to dispose of the attack upon its own jurisdiction, the Supreme Court decided it for us, upon the ground that we had no jurisdiction to decide whether or not we ourselves had jurisdiction. In undertaking to define the word "jurisdiction", after rejecting all "fundamental" definitions, the Supreme Court concludes with the pronouncement that: "As a practical matter, *accuracy in definition is neither common nor necessary*". In spite of the foregoing, we cannot see how that case can be said to lay down a rule which says that the act of the trial court, in *ruling* upon legal questions such as we have here, is a jurisdictional matter. If the trial court was mistaken in its rulings, it was, at the most, error committed in the exercise of its jurisdiction. The fundamental rule govern-

ing the situation (for we still cling to fundamentals), is found in 15 C.J., pages 729, 730, section 26, 21 C.J.S., Courts, § 27, is stated as follows:

[6] "Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power, or upon the correctness or rightfulness of the decision made, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly, subject to the qualification that the court can render only such judgment as does not transcend in extent or character the law which is applicable to that class of cases."

[7] Coming to the question of the alleged failure of the complaint to state a public offense, we believe that it is not vulnerable to the attack made upon it by petitioners, and that it complies substantially with the provisions of section 1426 of the Penal Code, which reads as follows: "All proceedings and actions before a justice's or police court, or a municipal court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendants to understand distinctly the character of the offense complained of, and to answer the complaint. In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft, it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

[8] Numerous objections to the complaint are made. First, it is contended that section 302 of the Political Code, dealing with contempt before legislative committees, is applicable. The pertinent portion of that section reads as follows: "* * * provided, however, that if any such contempt be committed before such committee during the session of the Legislature, said committee shall report the contempt to the Senate or Assembly, as the case may be, for such action as may be deemed necessary by the Senate or Assembly."

The section has no application here, as the charge there is not based upon a violation of the Penal Code, but to proceedings initiated under that section.

[9] It is next contended that the questions were not material to the inquiry, and that the right of privacy of petitioners was violated. We believe it necessary to set forth in full one of the complaints.

"J. I. Harkins on oath complains and says:

"That Boyd Coon First Count: committed misdemeanors as follows, to-wit: The said Boyd Coon on or about the 11th day of April, 1940, at the City of Stockton, County of San Joaquin, State of California, being then and there present as a witness before a committee of the House of the Legislature, did then and there wilfully and unlawfully refuse to answer a material and proper question, being a violation of section 87 of the Penal Code of the State of California, and said question being as follows:

"Question: Are you a member of the Communist Party?

"Second Count: That said Boyd Coon on or about the 11th day of April, 1940, at the City of Stockton, County of San Joaquin, State of California, being then and there present as a witness before a committee of a House of the Legislature, did then and there wilfully and unlawfully refuse to answer a material and proper question, being a violation of section 87 of the Penal Code of the State of California, and said question being as follows:

"Question: Isn't it a fact that you have been an active member of the Young Communist League?

"Third Count: That said Boyd Coon, on or about the 11th day of April, 1940, at the City of Stockton, County of San Joaquin, State of California, being then and there present as a witness before a committee of a House of the Legislature, did then and there wilfully and unlawfully refuse to answer a material and proper question, being a violation of section 87 of the Penal Code of the State of California, and said question being as follows:

"Question: Isn't it true that you were a delegate to the Convention of the Young Communist League in New York City?

"Fourth Count: That said Boyd Coon, on or about the 11th day of April, 1940, at the City of Stockton, County of San Joaquin, State of California, being then and there present as a witness before a committee of a House of the Legislature, did then and there wilfully and unlawfully refuse to answer a material and proper question, being a violation of section 87 of the Penal Code of the State of California, and said question being as follows:

"Question: Did you ever sell subscriptions for any other Communist Organizational paper?

"Contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the People of the State of California."

The complaints against the other defendants include other questions, but all have, in common, the question relating to membership in the Communist Party. As pointed out above, the resolution of the assembly which created the investigating committee provided that: "It shall have the power to investigate and report upon the extent to which the activities of groups and organizations, which include among their members persons who are either employees of the State Relief Administration, or who are receiving relief, affect the cost of the administration of unemployment relief, and to recommend such legislation in connection therewith as the committee may deem necessary or advisable." All defendants were employees of the state relief administration. The Communist Party certainly comes under the designation of a "group" or "organization", and consequently, the development of the fact whether or not such employees were connected with that group or organization was pertinent, material and proper. The cases cited by petitioners, and dealing with the right of privacy, did not involve the right of the state to conduct an inquiry among its *own employees* to determine their qualifications and fitness to continue in its service, and they have no application here.

Petitioners rely upon In re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497. There, a committee was appointed by the legislature to investigate collusive bidding among manufacturers of cement. Upon the refusal of a witness to answer, he was cited for contempt by the legislature, and ordered into custody until such time as he might answer. The Supreme Court, upon habeas corpus, discharged the witness from custody upon the ground that the commitment did not recite the acts constituting the contempt. Here, it is urged, the complaint should have recited the facts that the legislative committee was empowered to ask the questions which are made the basis of the complaint. The answer to that contention is that we are not dealing here with a contempt proceeding, but a violation of a section of the Penal Code. The same test should be applied here as obtains in the case of any complaint, indictment or information under the Penal Code. This test is found in section 1426 of said code, which is quoted above. This action is entirely independent and separate from the proceedings authorized by section 302 of the Political Code, referred to above.

Summing up the question last discussed, the Supreme Court of the United States, in a case very similar—McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319, 330, 71 L. Ed. 580–594–595, 50 A.L.R. 1—pointed out the presumptions in which a court will indulge in a case of this character. Daugherty was the brother of the attorney-general of the United States. The United States senate, by resolution, authorized a committee of its members to investigate the department of justice and its failure to prosecute certain individuals. A subpoena was issued by the committee for Daugherty and served upon him, but he failed to appear. He was found guilty of contempt, and ordered into custody. In holding that he was not entitled to his liberty under habeas corpus the court said:

"The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. In the Chapman Case, where the resolution contained no avowal, this court pointed out that it plainly related to a subject-matter of which the Senate had jurisdiction, and said: 'We cannot assume on this record that the action of the Senate was without a legitimate object;' and also that 'it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.' 166 U.S. [661], 669, 670, 17 S.Ct. [677] 681 [41 L.Ed. 1154]. In People [ex rel. McDonald] v. Keeler, 99 N.Y. 463, 2 N.E.

615, 52 Am.Rep. 49, where the Court of Appeals of New York sustained an investigation ordered by the House of Representatives of that state where the resolution contained no avowal, but disclosed that it definitely related to the administration of a public office the duties of which were subject to legislative regulation, the court said (pages 485, 487 [2 N.E. 627]): 'Where public institutions under the control of the state are ordered to be investigated, it is generally with the view of some legislative action respecting them, and the same may be said in respect of public officers.' And again: *'We are bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed, and we have no right to assume that the contrary was intended.'"* (Italics ours.)

[10] One of the questions raised at the trial is strongly urged as coming within the due process rule. We refer to the act of the court in refusing to endorse a subpoena for witnesses residing outside the county, under the provisions of section 1330 of the Penal Code. Conceding that the court erred in said ruling, we are of the opinion that no prejudice resulted. The application of counsel for petitioners for the issuance of such subpoena shows that the six witnesses named therein were shorthand reporters. It appears that they took testimony produced before the committee in various portions of California. In the affidavit of said counsel he sets forth some fifteen matters to which said witnesses would testify. They are all predicated, as petitioners state, upon the fact "that the real and primary purpose of the committee and each of its members, was not to make an investigation with a view to determining what further legislation was necessary, and recommend the adoption thereof as provided in house resolution No. 9 and No. 29, as amended, but on the contrary was one or more of the following:" Then follow the facts which they expect to prove by said witnesses. These facts are all of the same tenor and character. We quote several which are typical:

"A. To harass, interfere with, drive out of the state Relief Administration and destroy the State, County and Municipal Workers of America;

"B. To embarrass, harass, and destroy other CIO Unions, and, in particular, the American Newspaper Guild;

"C. To destroy Labor's Non-Partisan League of California;

"D. To destroy the Workers' Alliance of California;

"E. To attack, harass, hinder, defame and cause to lose their positions, various administrative officials of the State Relief Administration, political leaders and others, including Alice Orans, Sam Houston Allen, Sam Ayeroff, Jules Kievitz, Allen Metcalfe, Don Healey, Willard Harper, Catherine Kilbourne, Patrick J. Gallagher, and Fred Lefever;"

We do not believe that such evidence would constitute a defense to the action, nor would it tend or assist toward that end. The purpose of the committee and its powers and legitimate objectives must be found in the legislative resolution to which we have alluded above, and such matters cannot be impeached by this proposed method. The evidence sought to be elicited from these witnesses was therefore immaterial to the issues, and had no bearing upon the guilt or innocence of petitioners. We conclude that, assuming the question could be raised in this proceeding, and that error was committed, no prejudice resulted from the ruling. We might add, however, that this court has held. In the Matter of the Application of Harley Noyes for a Writ of Habeas Corpus, 39 Cal.App. 746, 179 P. 696, that: "The refusal to issue a subpœna for witnesses by a committing magistrate, or even the refusal to cause one to be issued for a like purpose by the superior court, is not a ground for the release of a prisoner on habeas corpus. Discretion in that regard may be abused and error thereby committed, and thus a person examined or on trial on a criminal charge deprived of a lawful hearing or trial; but such abuse of discretion either by the magistrate or the superior court is mere error, which does not go to the question of jurisdiction to make the order of commitment or to impose judgment of sentence, and, therefore is not reviewable in a proceeding under a jurisdictional writ. Matter of Jacobs [38 Cal.App. 474], 176 P. 698."

[11, 12] In conclusion, we might add that we have examined the entire record and are satisfied that petitioners were justly and fairly tried and convicted. It is not only the right, but the duty of the state, particularly at this time, to ascertain if there are any in its employ who belong to

any group or organization which advocates and practices its overthrow and destruction by subversive activities. It is a matter of common knowledge that the Communist Party comes within that category. Self-preservation is said to be the first law of nature, but that maxim is even more applicable to the state, if its survival is to be ensured.

The writ is denied and the proceedings dismissed, and the petitioners are remanded to the custody of the sheriff.

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44 Cal.App.2d 932

In the Matter of the Application of Jessie SMITH for a Writ of Habeas Corpus.

Cr. 1762.

District Court of Appeal, Third District, California.

April 28, 1941.

Petition for writ of habeas corpus.

Writ denied.

Honey & Mayall, of Stockton, for petitioner.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and R. M. Dunne, Dist. Atty., Maxwell M. Willens, Asst. Dist. Atty., Joseph C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., all of Stockton, for respondent.

PER CURIAM.

Under the authority of the opinion filed this day. In the Matter of the Application for a Writ of Habeas Corpus on Behalf of Boyd Coon, Steve Daduk, Howard Edmonds, Goodman Brudney, Earl Kinna, Clarence Vicklund, Alan Fite, Ramon Durem, Herbert Naboisek, Frances Schultz, Estelle Fels, Harriet Hoffman, Estell Cochran, Ida Pollack and Merle Reese, Criminal No. 1761, 112 P.2d 767, the petition is denied, the proceeding is dismissed, and petitioner remanded to the custody of the sheriff.

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44 Cal.App.2d 517

GLAVICH et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 6532.

District Court of Appeal, Third District, California.

April 28, 1941.

Rehearing Denied May 27, 1941.

Hearing Denied June 26, 1941.

1. Workmen's compensation ⇨1274

It is not ordinarily timely to file a claim under Workmen's Compensation Act for death benefit within one year from date of death unless it is also within two years from date of injury. St.1937, pp. 284, 295, §§ 4701, 5406.

2. Workmen's compensation ⇨995, 1274

An employee's widow was barred from recovering death benefit and funeral expenses under Workmen's Compensation Act, for failure to comply with statute requiring a claim to be filed within one year from date of death unless it is also within two years from date of injury. St.1937, pp. 284, 295, §§ 4701, 5406.

3. Workmen's compensation ⇨995, 1274, 1285

Dependent minors did not lose their right to recover death benefit and funeral expenses under Workmen's Compensation Act incident to their father's demise, merely because father failed to ask for or secure compensation for his disability during his lifetime by filing a claim therefor within six months from time he had actual knowledge of disease with which he was afflicted, since statute of limitations is tolled as to minor dependents until a guardian is appointed to represent them, and claims for compensation, and for death benefit and funeral expenses were separate and distinct. St. 1937, pp. 284, 292, 295, 296, §§ 4701, 5303, 5405, 5406, 5408.

4. Workmen's compensation ⇨995, 1274

Death benefit and burial expenses allowable under Workmen's Compensation Act are different and distinct obligations provided for benefit of individuals dependent upon workman, and hence dependent claimants are not barred from recovering funeral expenses and death benefit because deceased workman has not filed claim within six months as required by statute, on theory that claim for funeral expenses and death benefit is an inseparable part of original proceeding for compensation to workman during his lifetime. St.1937, pp. 284, 292, 295, 296, §§ 4701, 5303, 5405, 5406, 5408.

5. Workmen's compensation ⚷50, 412, 989.

The sections of Workmen's Compensation Act should be read together to ascertain intention of Legislature which is to grant to dependents of workmen who die as result of injuries received in course of their employment death benefits and funeral expenses. St.1937, pp. 284, 292, 295, 296, §§ 4701, 5303, 5405, 5406, 5408, 5409.

6. Workmen's compensation ⚷1269

The failure of workman to comply with statute of limitations does not satisfy liability of employer created by Workmen's Compensation Act, but merely bars workman's remedy for satisfaction of debt due him. St.1937, pp. 284, 292, 295, 296, §§ 4701, 5303, 5405, 5406, 5408, 5409.

7. Workmen's compensation ⚷989, 1266

The workmen's compensation claims growing out of the "transaction" which may not be split into different causes of action do not include both disability payments to which workman is entitled on account of his injuries, and death benefits and burial expense which accrue only after his death. St. 1937, p. 292, § 5303.

See Words and Phrases, Permanent Edition, for all other definitions of "Transaction".

8. Workmen's compensation ⚷989, 1266

The Workmen's Compensation Act provision that there is but one cause of action for each transaction coming within act, and that all claims for medical expense, disability payments, death benefits, burial expense, liens or any other matter arising out of such transactions may in discretion of Industrial Accident Commission be joined in same proceeding, may not be construed as a bar, to widow or minor children of a workman, to maintaining a proceeding to recover death benefit or funeral expenses, merely because workman failed to present his claim for compensation within statutory time, since claim of widow and minor children have not accrued at time workman sought to recover compensation for his disability. St.1937, p. 292, § 5303.

9. Workmen's compensation ⚷993, 1170

The Workmen's Compensation Act provision that there is but one cause of action for each transaction coming within act, and that all claims for medical expense, disability payments, death benefits, burial expense, liens or any other matter arising out of such transactions may in discretion of Industrial Accident Commission be joined in same proceeding should receive a liberal construction to prevent the denial of subsequent valid causes of action. St.1937, p. 292, § 5303.

10. Workmen's compensation ⚷993, 1170

The Workmen's Compensation Act provision that there is but one cause of action for each transaction coming within act, and that all claims for medical expense, disability payments, death benefits, burial expense, liens or any other matter arising out of such transactions may in discretion of Industrial Accident Commission be joined in same proceeding, is intended to prevent splitting of causes of action necessarily involved in same transaction, to save the obligor costs and vexation of different suits. St.1937, p. 292, § 5303.

11. Workmen's compensation ⚷1266

Where claim of workman's widow and minor children for death benefit and funeral expenses did not exist at time workman's application for compensation was made, the failure to include such claim in the first proceeding could not constitute a "splitting of causes" so as to preclude widow and minor children after workman's death from recovering on such claim. St.1937, pp. 284, 292, 295, 296, §§ 4701, 5303, 5406, 5408, 5409.

See Words and Phrases, Permanent Edition, for all other definitions of "Splitting of Causes".

12. Workmen's compensation ⚷1274

Under statute providing that a right created in favor of several persons is presumed to be joint and not several, the presumption that claims for death benefit or funeral expenses under Workmen's Compensation Act are merely "joint" and not "severable", and that dependents must all join in proceeding for disability compensation, is dispelled by Compensation Act provision that no limitation of time shall run against any minor or incompetent until a guardian or trustee is appointed. Civ.Code, § 1431; St.1937, pp. 284, 296, §§ 4701, 5408.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint" and "Severable".

◆

Proceeding under the Workmen's Compensation Act by Mrs. John Glavich and others, claimants, opposed by the Industrial Accident Commission of the State of

California and others. To review an order of the Industrial Accident Commission disallowing compensation, the claimants bring certiorari.

Affirmed in part, and reversed in part.

M. L. Pierovich and Jas. J. Arditto, both of Sacramento, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

Keith & Creede, of San Francisco, for respondents Fred A. Mueller and Employers Liability Assur. Co.

THOMPSON, Justice.

The widow and minor children of John Glavich, deceased, seek by means of certiorari to reverse the order of the Industrial Accident Commission disallowing compensation claimed by them for death benefit and funeral expenses under the provisions of section 4701 of the Labor Code, St.1937, p. 284. The claim was denied on the ground that it is barred by the failure of the workman to present his demand for compensation for disability incurred in the course of his employment, under section 5405, St.1937, p. 295, within six months from the time he acquired knowledge thereof. The claim of the widow and children was denied on the theory that it is based on the same transaction which was involved in Mr. Glavich's application for compensation, and that his failure to apply for compensation within the statutory period also bars their subsequent claim because section 5303 of the same Code, St.1937, p. 292, provides that there can be but one cause of action growing out of the same transaction.

The petitioners are the widow and minor children of John Glavich, deceased. He worked as a miner for the respondent, Fred A. Mueller, at Fiddletown, from August, 1933, to August, 1935, during which time he incurred silicosis. He filed his claim for compensation therefor with the Industrial Accident Commission, November 12, 1936. An award was first made in his favor, April 24, 1937. On application therefor, a rehearing of the cause was granted on the ground that the award was made without due notice. Upon rehearing the Commission found that John Glavich "was advised on April 22, 1936, that he was suffering from silicosis, resulting from his occupation as a miner, and the date of his injury, therefore, by reason of the combination of such knowledge and disability is April 22, 1936. The application was not filed herein until November 12, 1936, more than six months thereafter, and the claim is accordingly barred". Based upon that finding, his petition for award was denied December 14, 1938. A subsequent petition for rehearing thereof was also denied.

John Glavich became a patient in Weimar Sanatorium April 21, 1936. He died January 15, 1939. The death certificate assigned the cause of his death as "Pulmonary Tuberculosis", contributed to by "Pneumononiosis" (silicosis).

October 11, 1939, the widow and minor children of John Glavich filed their claim with the Industrial Accident Commission, for death benefit and funeral expenses, under section 4701 of the Labor Code. After hearing upon the last-mentioned claim, the Commission found that: "There being but one cause of action for each transaction coming within the provisions of division IV of the Labor Code, * * the application filed herein on October 11, 1939, is based upon the same transaction involved in the application filed by John Glavich November 12, 1936, and which has heretofore been adjudicated."

The Commission thereupon denied the application of these petitioners for funeral expenses and death benefit. A petition for rehearing of the last-mentioned proceeding was also denied. This petition for a writ of certiorari was then filed.

The petitioners contend that the death benefit and burial expenses provided for in section 4701 of the Labor Code create a liability against the employer separate and distinct from the disability compensation to which the workman is entitled; that the claims of the workman for disability compensation and those of the dependents for death benefit and funeral expenses are not joint, within the provisions of section 5303 of the Labor Code, but on the contrary they are severable and therefore they are not required to be joined in the cause of action; that the failure of John Glavich to present his claim for compensation within six months from the time he acquired knowledge of his disability, does not bar the widow and minor children from maintaining this proceeding, and that the statute of limitations with respect to the claim of the minor dependents is specifically tolled by the provisions of section 5408 of the Labor Code.

The statute of limitations prescribing the time within which a proceeding to collect death benefit authorized by section 4701 of the Labor Code is determined by section 5406 of that Code. It provides that the periods within which proceedings of that nature may be commenced are as follows:

"(a) One year from the date of death, and in any event within—

"(1) Two years from the date of injury, except as otherwise provided in this section.

"(2) 240 weeks from the date of injury, where the injury causing death also caused disability which continued to the date of death and for which a disability payment has been made, or agreed to be made, or proceedings for its collection had been instituted within the time limits set forth in section 5405.

"(b) Two years from the date of injury, in cases described in section 5405 (b)."

[1] Applying the preceding section to the facts of this case, it appears that the claim for death benefit was filed within one year from the date of death. However, it was not filed within two years from the date of injury, which was found by the Commission in the first proceeding to have been on April 22, 1936. In fact, John Glavich did not die until more than two years thereafter. We assume from subdivision (a) of the foregoing section that it is not ordinarily timely to file a claim for death benefit within one year from the date of death unless it is also within two years from the date of injury, for the clause reads that "in any event" the claim must be filed within two years from the date of injury. Subdivision (a) (2) has no application to this case because it provides that the claim may be filed within 240 weeks from the date of injury, only when the disability continues to the time of death, and then only when disability benefits have been actually paid, or agreed to be paid. No compensation was paid to Mr. Glavich. Neither does subdivision (b) of the foregoing section have any application to this case. That subdivision is based on conditions which do not exist in the present proceeding.

[2] It follows that the petitioners in this case are barred from recovering death benefit and funeral expenses under section 4701, for failure on their part to comply with the provisions of section 5406, unless the minors are relieved from that limitation of time by the provisions of section 5408 of the Labor Code.

[3-5] We are of the opinion the dependent minors did not lose their right to recover death benefit and funeral costs, incident to their father's demise, merely because he failed to ask for or secure compensation for his disability during his lifetime by filing a claim therefor within six months from the time he had actual knowledge of the disease with which he was afflicted. It may be true that, as a mere matter of procedure, when the workman has been allowed compensation for injuries sustained during his lifetime, his widow or minor children may be allowed death benefit and funeral expenses accruing after his death, incident to the original proceeding. Clearly, section 4701 of the Labor Code provides for death benefit and burial expenses "with or without disability" payments, separate and apart from the compensation due to the workman for injuries sustained in the course of his employment. Death benefit and burial expenses are different and distinct obligations provided for by statute for the benefit of each and all of the individuals dependent upon the workman. It follows that the dependent claimants are not barred from recovering funeral expenses and death benefit, under the provisions of section 5303 of the Labor Code on the theory that a claim therefor is an inseparable part of the original proceeding for compensation to the workman during his lifetime. That construction of the last-mentioned section would render nugatory the provisions of section 5408, and would apparently defeat the wholesome purpose of section 4701. These sections should be read together to ascertain the intention of the legislature. The act appears to grant to the dependents of workmen who die as a result of injuries received in the course of their employment death benefit and funeral expenses.

[6] The failure of the workman to comply with the statute of limitations does not satisfy the liability of the employer, created by statute. It merely bars his remedy for the satisfaction of the debt due to him. Section 5409 of the Labor Code provides in that regard: "The running of the period of limitations prescribed by this chapter is an affirmative defense and operates to bar the remedy and not to extinguish the right of the employee."

It follows that if the liability for death benefit and funeral expenses is not extinguished by the failure of the workman to demand payment to him of disability compensation within six months, and his claim is severable from that to which the dependents are entitled, they are not barred by his default.

We are of the opinion, however, that the claim of the widow is specifically barred by the provisions of section 5406 for the reason that she failed to file her claim within two years from the date of the disability with which her husband was afflicted.

[7] The minor children, however, are not so barred on that account, because the statute of limitations is specifically tolled as to any and all minor dependents until a guardian is appointed to represent them. Fogarty v. Dept. of Ind. Relations, 206 Cal. 102, 273 P. 791; 1 Campbell's Workmen's Comp. p. 846, sec. 963; sec. 5408, Labor Code. The claims growing out of the "transaction" which may not be split into different causes of action clearly do not include both the "disability payments" to which the workman is entitled on account of his injuries, and "death benefits" and "burial expense" which accrue only after the workman has died. Section 5303 of the Labor Code recognizes those claims as founded on different transactions, for it permits the Commission in its discretion to join "in the same proceeding" those different claims "arising out of such transactions".

We are of the opinion the Commission erred in denying relief to the minor children on the ground that section 5303 barred them from recovering death benefit and funeral expenses merely because Mr. Glavich's claim for compensation for an entirely different cause was not filed within the statutory time.

Section 5303 of the Labor Code provides that: "There is but one cause of action for each transaction coming within the provisions of this division. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such transactions may in the discretion of the commission, be joined in the same proceeding at any time."

[8, 9] The preceding section may not be construed as a bar, to either the widow or minor children of a workman, to maintaining a proceeding to recover death benefit or funeral expenses, merely because he failed to present his claim for compensation for disabilities incurred within the time allowed by law. The statute should receive a liberal construction to prevent the denial of subsequent valid causes of action. The claim of the widow and minor children had not accrued at the time Mr. Glavich sought to recover compensation for his disability. Since their claim did not then exist, it certainly could not be barred by his failure to apply for compensation.

[10, 11] Section 5303 is intended to prevent the splitting of causes of action necessarily involved in the same transaction, to save the obligor the costs and vexation of different suits. 1 C.J. p. 1106, sec. 276. Since the claim of the widow and minor children did not exist at the time the application of Mr. Glavich was made, the failure to include it in the first proceeding could not possibly constitute a splitting of causes. 1 C.J.S., Actions, 1310, § 102f. It is said in 1 Corpus Juris, page 1108, section 278, in that regard: "Nor is there any splitting of causes where the demand which is the subject of the second action was not due at the time of the first action."

The case of Sears v. Majors, 104 Cal. App. 60, 285 P. 321, upon which the respondent relies, is distinguishable from the proceeding which is involved in this case. In the Sears case a judgment, which was rendered pursuant to an order sustaining a demurrer to the complaint, was affirmed. That was a suit by the widow and minor child of Edward E. Sears, for his death caused by wrongful acts of the defendant, which suit must be brought within one year from the date of death, under subdivision 3 of section 340 of the Code of Civil Procedure. Section 377 of the same Code authorizes the maintenance of an action for damages for that cause by the "heirs or personal representatives" of the deceased person. Sears was killed January 3, 1925. The suit was not commenced until March 28, 1927. The appellants admitted that the action was barred as to the widow, but maintained that the statute of limitations was tolled as to the minor. The court affirmed the judgment on the theory that the obligation for the wrongful death of Mr. Sears was "joint, and not several", and that, since it was barred as to the widow, it was also barred as to the minor child. As authority for that conclusion the court relied on the case of Robertson

v. Burrell, 110 Cal. 568, 42 P. 1086. Section 1431 of the Civil Code provides that: "An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary."

The preceding section merely declares that an obligation "in favor of several persons, is presumed to be joint." Our attention is called to no California statute with relation to obligations toward minor children for the wrongful death of their father, similar to section 5408 of the Labor Code, which dispels the presumption in this case that it is joint and not several and tolls the statute of limitations. For that reason the Sears case was properly determined. But that case has no application to the statute which is controlling in this proceeding.

[12] In the present case the language of section 5408 of the Labor Code, with relation to claims for death benefit or funeral expenses under the Workmen's Compensation Act, clearly renders such claims severable as to each or any one of the dependents. We therefore conclude that the presumption that such claims are merely joint and not severable and that the dependents must all join in the proceeding for disability compensation is clearly dispelled by the language of section 5408. It says in that regard:

"If an injured employee or, in the case of his death, any of his dependents, is under twenty-one years of age or incompetent at any time when any right or privilege accrues to such employee or dependent under this division, a general guardian, appointed by the court, or a guardian ad litem or trustee appointed by the commission or a commissioner may, on behalf of the employee or dependent, claim and exercise any right or privilege with the same force and effect as if no disability existed.

"No limitation of time provided by this division shall run against any person under twenty-one years of age or any incompetent unless and until a guardian or trustee is appointed."

In the Robertson case, supra, cited in the Sears opinion as authority for the last-mentioned decision, the Supreme Court merely held, in accordance with the syllabus which correctly states the issue determined, as follows: "The heirs of a deceased person are not the proper parties to maintain an action for an accounting and settlement of a partnership between the decedent and a surviving partner or his representatives, and they have no legal capacity to do so; but the surviving partner is required to account not with the heirs, but with the executor or administrator of the deceased partner, regardless of whether the partnership assets consist of real or personal property, or both."

It was not an issue in the Robertson case and the court did not determine that because the widow of a deceased partner failed to demand an accounting of her husband's partnership interest within the time allowed by law, that the minor child was thereby barred from maintaining that action. The question of the tolling of the statute of limitations during the minority of a child was not involved in that suit. It appears the father died in 1864. His partner died in 1893. The widow died in 1871. She had knowledge of her husband's partnership interest just before her death. Long before her death their child reached the age of majority. The claim for a partnership accounting was not made until 1894 when the daughter must have been over thirty years of age. The court merely held that the heir of a deceased partner could not properly maintain an action for a partnership accounting in her own name, but on the contrary, under section 1585 of the Code of Civil Procedure, now section 571 of the Probate Code, the surviving partner must "account to the executor or administrator" of the deceased partner, in his representative capacity. We think the Robertson case is not authority in support of the respondents' contention in this proceeding. In spite of that fact we are of the opinion the Sears case was properly decided, but that it is distinguishable from the facts of this case for the reason heretofore stated.

Nor is the case of Flynn v. New York, N. H. & H. R. Co., 283 U.S. 53, 51 S.Ct. 357, 75 L.Ed. 837, 72 A.L.R. 1311, upon which the respondent strongly relies, in conflict with what we have formerly said regarding the tolling of the statute under the circumstances of this proceeding. That was a suit instituted by the executor of the estate of Edward L. Flynn, deceased, under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., in behalf of his dependent widow and children, for injuries wrongfully inflicted which caused his death five years later. The statute provides that suit must be commenced thereunder by any and all dependent persons within two years from the time when the cause accrues. Like the Sears case, supra, the Flynn cause was an action for his wrongful death. There was no provision in that Liability Act, similar to section 5408 of the Labor Code, applicable to this proceeding which specifically tolls the statute of limitations against any minor dependent, until his guardian has been appointed. The application of the last-mentioned section of the Labor Code clearly distinguishes the cases relied upon by the respondent from the present proceeding.

The order of the Industrial Accident Commission is affirmed in so far as it denied compensation to the widow of John Glavich, deceased. It is annulled in its application to the three minor children, and the Commission is directed to make an award in their favor in accordance with the evidence adduced as compensation for death benefit and burial expenses of their deceased father.

We concur: PULLEN, P. J.; TUTTLE, J.

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44 Cal.App.2d 526

RICH v. RICH.

Civ. 6580.

District Court of Appeal, Third District, California.

April 28, 1941.

Rehearing Denied May 27, 1941.

1. Divorce 🔑254

A property agreement, although approved by the court in divorce action, is not thereafter subject to modification by action of the court.

2. Divorce 🔑254

Property settlement agreement providing husband should pay wife $2,400, payable monthly, "as alimony for her support and maintenance" and not in lieu of property rights, payments to continue even if wife should remarry, made part of interlocutory divorce decree, could not be modified by court so as to discontinue monthly payments on wife's remarriage, notwithstanding statute making husband no longer liable for wife's support on her remarriage. Civ.Code, § 139.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Divorce action by Isabelle Marie Rich against Clarence Owen Rich, in which a divorce was granted to plaintiff. Defendant moved to modify the interlocutory decree by eliminating therefrom all payments of alimony accruing after the remarriage of plaintiff. From an order denying such motion, defendant appeals.

Affirmed.

Don Lake, of Los Angeles, for appellant.

Sherman & Sherman, of Los Angeles, for respondent.

SCHOTTKY, Justice pro tem.

A property settlement agreement was entered into between respondent and appellant, which contract recited that an action for divorce had been filed by respondent, and that said parties had agreed upon a mutual property settlement of every kind and nature pertaining to property belonging to them, or either of them. After some specific provisions with reference to different properties the agreement provided further:

"Payment of money to first party by second party.

"Second party does hereby agree to pay to first party the sum of $2400.00, payable $100.00 a month, commencing on the 1st day of September, 1937, and $100.00 on the first day of each and every month thereafter until the full sum of $2400.00 has been paid. Said $2400.00 in monthly installments shall be paid to first party as alimony for her support and maintenance and it is particularly understood and agreed that said payments are not in lieu of any property right or interest in any community property of first party. Said payments to continue even in event of remarriage."

An interlocutory decree of divorce was granted to respondent on September 16, 1937, providing in part as follows:

"Decreed that the property settlement agreement between plaintiff and defendant * * * is hereby approved and incorporated herein and made a part hereof as though set forth herein. * * *

"It is further ordered, adjudged and decreed that defendant shall pay to plaintiff the sum of $2400.00 as alimony for her support and maintenance, payable as follows: $100.00 as of the first day of September, 1937; $100.00 on the first day of each and every month thereafter until the full sum of $2400.00 has been paid, said payments to continue even though plaintiff remarries."

A final judgment of divorce was entered on October 16, 1938, and on December 22, 1938, plaintiff (respondent herein), remarried. Appellant moved to modify the interlocutory decree by eliminating therefrom all payments accruing after the remarriage of respondent. The court below denied the motion, and this appeal is from that order.

[1, 2] Appellant contends that under section 139 of the Civil Code, which provides that "upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support", the obligation of a husband to support his divorced wife is terminated by her remarriage, and that the order of the court below denying appellant's motion to modify the interlocutory decree was erroneous.

Respondent argues that by reason of the fact that there was a property settlement agreement which was adopted by the court and incorporated in the interlocutory decree, which contract and decree provided for said payments, the court below had no power to modify said decree by eliminating or discontinuing said payments.

As was said by our Supreme Court in the case of Miller v. Superior Court, 9 Cal.2d 733, at page 737, 72 P.2d 868, at page 871: "There are certain generally settled distinctions between alimony awarded by the court and payments due by virtue of property settlement between the parties. An award of alimony is subject to modification by the court to meet changed conditions. Ross v. Ross, 1 Cal.(2d) 368, 35 P.(2d) 316; Armstrong v. Armstrong, 132 Cal.App. 609, 610, 23 P.(2d) 50; section 139, Civ.Code, as amended by St. 1933, p. 1039. A property agreement, although approved by the court in the divorce action, is not thereafter subject to modification by action of the court. Ettlinger v. Ettlinger, 3 Cal.(2d) 172, 44 P.(2d) 540; Moran v. Moran, 3 Cal. (2d) 342, 44 P.(2d) 546; Parker v. Parker, 55 Cal.App. 458, 203 P. 420."

In the case of Ettlinger v. Ettlinger, 3 Cal.2d 172 at page 177, 44 P.2d 540, at page 543, the court said:

"We are satisfied from an examination of the entire agreement, having particular reference to the above-quoted provisions thereof, that it was the intention of the parties to definitely, fully, and permanently adjust and settle all of their property rights. The agreement indicates that the monthly payments to be made thereunder by defendant to plaintiff, stated to be for the latter's 'support and maintenance,' constituted an integral and important element in the amicable adjustment and liquidation of such property rights. In our opinion, the contract suggests that such payments were to be made to and received by plaintiff as part of the property settlement and in lieu of property rights. This would appear to have been recognized in both the interlocutory and final decrees of divorce, for each provides that 'neither the making of this decree nor anything herein contained shall in any manner modify, restrict, affect or prejudice the provisions or any of them, of said agreement hereinabove mentioned * * * which agreement and all of its provisions shall remain in full force and effect.' Each decree thereupon directs the payment by defendant to plaintiff of $250 a month 'in pursuance of the aforementioned agreement.'

"That the parties may contract with regard to their properties and their respective interests therein is now settled. Though not binding in the first instance on the court in which the divorce action is pending, such contract may be approved and confirmed by the court, and if appropriately referred to and adopted in its decree, as here, such decree, as to the matters covered by the agreement, becomes immune from subsequent modification."

In the case of Hodgson v. Hodgson, 6 Cal.App.2d 496, at page 499, 44 P.2d 544, at page 545, this court said: "We are likewise of the opinion here that upon the authority of the case of Ettlinger v. Ettlinger, supra, the property settlement in the instant case, having been accepted and adopted by the trial court, and incorporated in the interlocutory decree, became a binding settlement and is not subject to modification. What we have said relates only to the provisions of the agreement relating to alimony or support of the former wife—no attempt was made to reduce the amount of the allowance for the support of the minors, and that issue is not before us."

The question, therefore, to be decided upon this appeal is whether the provision in the property settlement agreement by which appellant agreed to pay to respondent the sum of $2,400, is such an element in the property settlement between the parties as to make it not thereafter subject to modification by the court.

Appellant points to the clause in the agreement which states that said $2,400 in monthly installments shall be paid to respondent "as alimony for her support and maintenance" and "not in lieu of any property right or interest in any community property of first party", and contends that even though the agreement further provided that the monthly payments should continue until completed even in the event of the remarriage of respondent, upon the remarriage of respondent, appellant was no longer obligated to provide for her support and continue said monthly payments until the full sum of $2,400 had been paid.

Appellant's contention cannot be sustained. The payment of $2,400 to respondent was an integral part of the property settlement agreement, and the fact that it was stated to be "alimony for her support and maintenance", and was to be paid in monthly installments instead of in a lump sum, does not alter the fact that the payments were made pursuant to the agreement approved and adopted by the court in the interlocutory decree, and not merely as alimony awarded by the court. A careful reading of the agreement indicates clearly that it was the intention of the parties to definitely, fully and permanently adjust all of their property rights, and the title to the paragraph providing for the payment of the $2,400, "Payment of Money to First Party by Second Party", clearly shows it to be an integral part of the agreement. The further clause that "said (monthly) payments to continue even in the event of remarriage" indicates also that it was the intention of the parties that respondent should receive the full $2,400. To sustain appellant's contention would in our opinion deprive respondent of what may well have been an important part of the consideration which induced her to execute the agreement. The property settlement agreement having been approved by the court and incorporated in the interlocutory decree, is now binding upon the parties, and cannot now be avoided.

In view of the foregoing, we conclude the motion to modify the interlocutory decree was properly denied, and that the order denying said motion should be, and is hereby, affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

44 Cal.App.2d 414

MUNDT et al. v. NOWLIN et al.

Civ. 12992.

District Court of Appeal, Second District, Division 2, California.

April 23, 1941.

1. Landlord and tenant 🔑167(7)

Even if lessees who operated property upon which there was a polo field and swimming pool to which the general public was invited were chargeable with negligence with respect to maintenance of pool, such negligence could not be imputed to lessor so as to render lessor liable for death of plaintiffs' six-year old child who was drowned in pool.

2. Landlord and tenant 🔑167(7), 170(1)

A landlord is not liable for negligence of his tenants and neither is he liable to others for a nuisance created upon his premises by tenants, who acquired leasehold for lawful and proper purposes, where there was no nuisance or illegal structure upon land at time of letting.

3. Landlord and tenant 🔑169(3)

A complaint alleging that defendant owned premises upon which codefendants, as lessees, operated a polo field and swimming pool to which the general public was invited and paid admission, and that plaintiffs' six-year old child was drowned by reason of negligence of defendants with respect to maintenance of pool, failed to state a cause of action as to defendant, especially where there was no allegation that alleged defective condition obtained, or that pool existed, at date of leasing, and defendant had no control over premises.

4. Pleading ⚷34(3)

Upon a general demurrer by defendant, the most favorable construction must be given to facts set forth in plaintiff's pleadings.

◆

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Lorraine Claudia Mundt and another against George W. Nowlin and others for the death of plaintiffs' minor child. From a judgment for defendant George W. Nowlin after an order sustaining a demurrer to the third amended complaint without leave to amend, plaintiffs appeal.

Affirmed.

Edward C. Purpus and Reece Depew, both of Los Angeles, for appellants.

J. Howard Corvin, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiffs appeal "from a judgment for defendant, George W. Nowlin, after order sustaining demurrer to the third amended complaint without leave to amend".

The sole question for determination is whether the landlord is liable for damages resulting from the death of a six-year old child drowned in a pool upon the premises operated by Nowlin's lessees.

After three successive pleadings had fallen before general demurrers, in their third amended complaint plaintiffs allege that on April 27, 1939, defendant George W. Nowlin and others were owners of three certain lots in tract 1693, in the county of Los Angeles, upon which the co-defendants as lessees operated an enterprise known as "Green Acres" consisting of a polo field, riding stables, swimming pool and adjuncts to which the general public was invited to come and pay admission; that the defendants negligently maintained a "pool of water" one-half full of mud and filth; that defendants wantonly permitted said "pool" to fall in disrepair and to become in a defective condition without any guard to separate it from the public street and negligently caused the fence around the pool to fall in such disrepair and removed a portion of the fence enclosing the pool so that the premises were accessible to the general public; that by reason of such negligence plaintiffs' minor child, aged 6½ years, without fault of plaintiffs, fell into the pool, and was drowned.

[1-4] Plaintiffs contend that even though the demurring defendant had no control over the pool by virtue of the extant lease the latter is liable. Such is not the rule. Assuming that the lessees who operated the property were chargeable with negligence, such negligence cannot be imputed to the landlord. Higgins v. Los Angeles Gas & Electric Co., 159 Cal. 651, 661, 115 P. 313, 34 L.R.A.,N.S., 717. The landlord is not liable for the negligence of his tenants. O'Leary v. Herbert, 5 Cal.2d 416, 418, 55 P.2d 834. Neither is he liable to others for a nuisance created upon his premises by his tenants who have acquired the leasehold for lawful and proper purposes, where there was no nuisance or illegal structure upon his land at the time of the letting. Meloy v. City of Santa Monica, 124 Cal.App. 622, 12 P.2d 1072. There is no allegation that, at the date of the leasing the pool, its alleged defective condition obtained or that the pool itself existed. Conceding that upon the trial of a general demurrer, the most favorable construction must be given to the facts set forth in the pleadings, yet in the instant case, the three elements essential to a cause of action, namely, duty, the breach thereof and damages logically flowing therefrom, are wanting. It is impossible legally to allege any duty owed by the demurring defendant to the unhappy parents or to their deceased child. Mr. Nowlin had no control over Green Acres.

The authorities cited by plaintiffs are not in point. They fall within two classes: (1) where a municipality is made liable under a special statute when the existence of a defect in a public property or highway is known to certain officers of the municipality; (2) where defendant himself had control of the defective premises or the agency which caused the damage.

In Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825, the defendant was liable because he had left mixed lime in an unguarded receptacle on the sidewalk. The mixture was used by a small child who threw it upon plaintiff, who was a passenger on a street car, causing her to be injured. In such a case the defendant was negligent in not foreseeing and preventing such an occurrence. Likewise, in all the other cases cited by appellants (Sanchez v. Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060; Melandez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971; Magnuson v. City of Stockton, 116 Cal.App. 532, 3 P.2d 30; Wright v. Southern Counties Gas Co., 102 Cal.App. 656, 283 P. 823; Malloy v. Hibernia Savings & Loan Society, 3 Cal. Unrep. 76, 21 P. 525) the defendants therein came within the two classifications above named.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

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44 Cal.App.2d Supp. 945

GRANT v. SEGAWA et al.

No. 103058.

Appellate Department, Superior Court,
San Diego County, California.
April 18, 1941.

1. Execution 🔑200

A motion for new trial does not lie in proceeding under statute to determine title to property claimed by third party. Code Civ.Proc. § 689.

2. Appeal and error 🔑110, 782

An attempted appeal from order denying new trial must be dismissed, since statute provides for no appeal from such order.

3. Fraudulent conveyances 🔑96(1)

Where alleged transfers of judgment debtor's property to his son were made without fair consideration, such transfers were fraudulent as to creditors. Civ.Code, § 3439.06.

4. Execution 🔑194(1)

Under statute providing for proceedings to determine title to property claimed by third party, a third party claimant is in the position of a plaintiff charged with burden of proof to establish rights that he claims. Code Civ.Proc. § 689.

5. Appeal and error 🔑842(3)
Fraud 🔑50

Fraud is never presumed, and whether a fraudulent intent exists is a question of fact for trial court rather than of law for an appellate tribunal.

6. Fraudulent conveyances 🔑300(3)

Evidence that all family earnings were pooled and applied for living expenses of judgment debtor, his wife and children and only consideration that son claimed to have given for transfers to him of truck, tractor and other property was the payment of hospital and doctors' bills incurred by the father which payments were made from proceeds of ranch operations by the family, showed that transfers to son were fraudulent as to father's creditors and hence judgment creditor could recover the property transferred. Code Civ.Proc. § 689; Civ.Code, §§ 3439.06, 3440.

7. Exemptions 🔑118

In proceeding to determine title to property claimed by third party, judgment debtor's son who made claim to the property as transferee was in no position to raise question that a tractor was exempt from execution under statute as an implement of husbandry. Code Civ.Proc. §§ 689, 690.3.

◆

Appeal from Municipal Court, San Diego County; Dean Sherry, Judge.

Action by L. B. Grant who had obtained a judgment on a note executed by K. Segawa to determine title to property of K. Segawa and claimed by George Segawa. From a judgment in favor of third party claimant, and from an order denying a new trial, plaintiff appeals.

Attempted appeal from order denying new trial dismissed, and judgment reversed.

George A. Westover, of San Diego, for appellant.

Dempster McKee, of San Diego, for appellees.

PER CURIAM.

In May of 1938 one K. Segawa executed to Frank Naruto & Co. Ltd., a promissory note in the principal sum of $1,100.72. The said K. Segawa was also at that time indebted in the sum of $229 to Fred C. Silverthorn & Sons, Inc., for certain fertilizer purchased. Both the Naruto note and the Silverthorn account having been assigned to the plaintiff, L. B. Grant, he, on December 3, 1940, obtained judgment in the Municipal Court of the City of San Diego against the said Segawa for the said sums with interest, attorney's fees provided for in the note, and costs. This judgment has become final.

Grant proceeded under it to levy on certain personal property, including a Ford 1939 8-stake truck, and a Case Model "R" tractor, as to each of which one George Segawa, a minor son of the said K. Segawa, filed a third party claim. Upon the application of the plaintiff, Grant, hearings were had in the Municipal Court to determine title to the Ford truck and the tractor, and on January 24, 1941, that Court entered its judgment to the effect that the minor, George Segawa, was the absolute owner of the truck, and the owner of the equitable interest in the tractor, and entitled to the possession thereof, determined that neither was subject to levy by the plaintiff, and directed that the officer making the levy deliver them to the minor.

[1, 2] Apparently the plaintiff undertook to move the Municipal Court for a new trial in this proceeding, for the record contains a notice of appeal both from this judgment on the third party claims, and from a denial of such motion for new trial. Nothing else appears in the record before us respecting this motion for new trial or the grounds upon which it may have been based, but since it has been expressly decided in Spiegelman v. Bowlus, 15 Cal.App.2d Supp. 765, 59 P.2d 225, that no motion for new trial lies in this type of proceeding, and since, furthermore, the statute provides for no appeal from an order denying a new trial, such attempted appeal must be dismissed. Accordingly we have to consider only the Appeal from the judgment.

It appears from the evidence that in the Spring of 1938, K. Segawa was operating what was known as the Perry ranch under some arrangement with one Higuchi, for whom it is claimed he was foreman. The Segawa family consisted of father, mother, and several children, of whom George was the oldest. The family lived at the ranch, working together and raising crops there. George, then 17 years of age, was graduated from the Sweetwater Union High School that Spring. In August of that year the father, K. Segawa, sustained an injury to his hand, in consequence of which he was incapacitated, at least until the early part of 1939, from active ranch work. During a portion of the interim he was in a hospital suffering from blood poisoning. Meanwhile, George assumed general charge of the ranch operations, opening in his own name a bank account at Chula Vista where his father formerly had an account, and thereafter drew the checks for the operating expenses and the support of the family against the account so opened by him. These family expenses he describes as "all the usual expenses of keeping a house." He and his father both testified that while the latter was in the hospital in August or September of 1938, the father verbally turned over the operations and ranch effects to his son George, telling George that all his earnings from then on would be his own. This is the principal evidence in the record urged as supporting the theory of a valid transfer. The father, after six weeks more or less in the hospital, returned to his family and has been reasonably well since, though claiming still to have some trouble with his hand.

Shortly after the father returned from the hospital, George, who was born in America, took in his own name a sub-lease from his aunt on another and different ranch, known as the "George" ranch, and the family moved thither, and have, ever since, operated this second ranch, the father himself being more or less active in and about the work, doing some of it himself, and the younger children participating in what has been done; and there is no question but that the whole family has gained its living entirely from the proceeds of these operations. George, in referring to what was turned over to him in August or September, 1938, asserts that his father gave him the father's equity in a tractor and in a truck; also gave him two plows, a disc, a chisel, a rebuilt Fresno, and a rebuilt leveller. He also mentions a horse. The father testified that he gave George the horse and miscellaneous farming equipment. George says that the father later gave him an equity in a touring car. The only consideration that George claims to have given for any of these asserted transfers was the payment of $400 more or less of hospital and doctor's bills incurred by his father, which payments were made from the proceeds of the ranch operations. None of these alleged transfers were accomplished by such change of possession as would conform to the requirements of Section 3440 of the Civil Code, and each of them appears to have been fraudulent as against creditors under that statute. George claims the Ford 1939 8-stake truck now in controversy by virtue of a transaction whereby he turned in at a valuation of $418 or thereabouts the old truck gotten from his father and bought in his father's name the new truck. George signed an order sheet in connection with this purchase, but according to the evidence, including his testimony, the salesman took the contract to the father, who signed it himself. The deferred payments on this new truck have since been made by George from the proceeds of the ranch. As respects the Case Model "R" tractor, George claims to be its equitable owner under a conditional sales contract made to him about November 15, 1940. According to his testimony he bought it for $875, turning in thereon, at a valuation of $550, the old tractor, the equity in which he claims his father relinquished to him, and on which he had completed the payments from monies derived from the ranch operations. It is undisputed that the Segawa family, as a whole, has been dependent at all times since the Spring of 1938 upon the operation of the respective ranches referred to, and it is too clear for argument that the income therefrom has been the result of the labor of the whole family and has, to all intents and purposes, been treated as that of the family for the benefit of all its members.

[3-6] Looking at the foregoing showing as a whole, George's continued relations with the family, including not only his continued residence at home, but the circumstance that all the family earnings continued to be pooled and applied so far as needed for the living expenses of father, mother, and the children, are hard to reconcile with any theory that he had been emancipated by his father under the conditions contemplated by Section 211 of the Civil Code. The contention, however, which he makes here, goes far beyond any assertion of such emancipation and amounts to a claim that his father, disregarding for the most part his own debts, relinquished practically all his property to him, his son, on no other consideration than that the son, from the proceeds of the labor of the family as a whole, should meet only certain arbitrarily selected obligations of the father. Not only are the claims now made by George Segawa obnoxious to Section 3440 of the Civil Code above referred to, but the asserted transfers of the father's property were, as it appears without substantial conflict of the evidence, made without fair consideration and were, therefore, fraudulent as to the father's creditors under the provisions of Section 3439.06 of that Code. Furthermore, it must be borne in mind that under Section 3439.07 of the Civil Code, if the father and son actually entertained the idea of defeating creditors by what, according to their testimony, transpired between them at the hospital, even if it be assumed that this really occurred at all, such intent would of itself render the transaction void for actual fraud as to such creditors, and that under Section 689 of the Code of Civil Procedure a third party claimant is in the position of a plaintiff charged with the burden of proof to establish the rights that he claims. To be sure fraud is never presumed, and whether a fraudulent intent exists is said to be a question of fact for a trial court rather than of law for an appellate tribunal. Abbey v. Zimmerman, 12 Cal.App.2d 311, 316, 55 P.2d 903. For this latter reason we forbear to rest our decision on the assumption of an actual intent to defraud on the part of the Segawas, however strongly the evidence might seem to point in that direction. It is enough that in view of the above mentioned Sections 3440 and 3439.06 of the Civil Code, the purported transfers to the son cannot be upheld, nor does the evidence sustain the trial court in having treated George Segawa as entitled to the proceeds of what, in fact, the work of the family as a whole produced upon the two ranches.

[7] The respondent asserts that the Case Model "R" tractor is exempt from execution under the provision of Section 690.3 of the Code of Civil Procedure as an implement of husbandry. Since, however, he is not the judgment debtor, he is in no position to raise that question.

The attempted appeal from the order denying the motion for new trial is dismissed.

The judgment rendered on the third party claims is reversed.

18 Cal.2d 56

PRIME v. STATE BAR OF CALIFORNIA.

S. F. 16541.

Supreme Court of California.
May 2, 1941.

1. Attorney and client ⇨53(2)

In disciplinary proceedings where attorney was charged with appropriating to his own use money which had been given to attorney by client to pay premiums on fire policy on client's property, client's testimony could not be disregarded, under the circumstances, on ground that client was a "confessed liar" because when examined respecting where client obtained money client admitted that he had told a lie because of certain reasons. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

2. Attorney and client ⇨53(2)

Evidence sustained local administrative committee's finding that attorney appropriated to his own use money which had been given to attorney by client for purpose of paying premium on a fire policy on client's property, as against attorney's contention that client consented that money should be applied on client's indebtedness to attorney for professional services and that at client's request receipts showing that money was for premium were given to client so that client could exhibit receipts to client's stepdaughter and collect certain rents. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

3. Attorney and client ⇨58

An attorney who appropriated to his own use money which had been given to attorney by client to pay premium on fire policy on client's property would not be disbarred but would be suspended from practice for one year in view of mitigating circumstances. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

4. Attorney and client ⇨54

In disciplinary proceedings against an attorney, the board of governors of the state bar may consider attorney's past conduct, as well as that which is directly under investigation, for whatever weight it may have in determining question whether attorney is imbued with essential qualities of integrity and honesty, or for any bearing it may have upon attorney's motive or otherwise upon question of measure of discipline to be applied. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

5. Attorney and client ⇨54

In disciplinary proceedings where board of governors of the state bar considers an attorney's acts of misconduct other than those acts directly under investigation, the time that such other acts of misconduct occurred with relation to time of occurrence of particular offense under consideration is immaterial except to extent that remoteness may lessen its weight and significance. St. 1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

6. Attorney and client ⇨58

If it appears in disciplinary proceedings that attorney has been guilty of conduct indicating a lack of those qualities essential to maintenance of dignity and integrity of the profession and protection of the public, before or after misconduct presently involved, such factors are pertinent on issue of what disciplinary measures will be necessary to accomplish end in view. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

7. Attorney and client ⇨49

A disciplinary proceeding against an attorney is not a "criminal proceeding".

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Proceeding".

8. Attorney and client ⇨38

The important factor in disciplinary proceedings against an attorney was whether attorney lacked necessary and proper moral qualifications to continue in practice. St. 1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

9. Attorney and client ⇨54

In determining penalty to be imposed in disciplinary proceedings against an attorney, the board of governors of the state bar could consider attorney's misconduct which had resulted in a previous order of suspension from practice, notwithstanding that such misconduct occurred a month or two after misconduct under investigation in instant proceedings. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

In Bank.

Proceeding by Spencer G. Prime against the State Bar of California to review a recommendation of the Board of Governors of the State Bar that petitioner be disbarred from the practice of law.

Petitioner suspended from practicing law for one year commencing at expiration of a suspension previously ordered.

Ernest Spagnoli, of San Francisco, for petitioner.

Hartley Peart and Claude Minard, both of San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of the State Bar of California made on October 25, 1940, that petitioner be disbarred. On April 15, 1940, a notice to show cause was issued by Local Administrative Committee No. 5 for the city and county of San Francisco, charging petitioner with professional misconduct in violating his oath and duties as an attorney at law as prescribed by sections 6067, 6068 and 6103, St.1939, pp. 354, 355, 357, of the Business and Professions Code, rule 9 of the Rules of Professional Conduct (commingling of clients' funds with his own), and in the commission of acts involving moral turpitude and dishonesty as mentioned in section 6106 of the Business and Professions Code. The gist of the charge was that petitioner appropriated to his own use $21.87 which had been given to him by his client for the alleged purpose of paying the premium on a fire insurance policy on his client's property. The local administrative committee found the charge to be true and recommended suspension for one year. The Board of Governors of the State Bar adopted the findings of the committee, but because of prior disciplinary proceedings against petitioner, recommended his disbarment. Petitioner claims in his petition that the evidence is insufficient to support the findings, that the penalty imposed is unduly harsh, and that the Board of Governors should not have considered the prior disciplinary proceedings against him in fixing the penalty.

Petitioner was admitted to practice in California on February 24, 1919. The complaining witness, E. Vellis, had been petitioner's client for some time prior to the commencement of this proceeding. He owned property which was encumbered, the security being held by the Home Owners' Loan Corporation, and upon which there was fire insurance coverage. The premium on the policy was $26.87. On May 23, 1939, the policy being about to expire, Vellis gave $10 to petitioner, for which petitioner gave him a receipt acknowledging that it was received on account of premium on Dubuque Fire & Marine Insurance Company fire insurance policy and stating that there was a balance of $16.87 due thereon. On July 14, 1939, Vellis gave said sum of $16.87 to petitioner for which he received a receipt from petitioner acknowledging that it was "In Re: Home Owners' Loan Corporation Acct. bill Insurance—Fire." Petitioner paid $5 of the above-mentioned sums to the insurance company, and appropriated the balance thereof to his own use. He has not repaid the same to his client. Petitioner obtained policies of fire insurance for Vellis from the Liverpool & London & Globe Insurance Company, and Pearl Assurance Company, Ltd., but both of these policies and the original policy with the Dubuque Company were cancelled for nonpayment of premium. Petitioner had rendered quite extensive professional services for Vellis at the time the above-mentioned sums were received, and he testified that he had not been paid for his said services. Vellis' testimony to the contrary was evasive and not convincing. There is no substantial conflict in the evidence supporting the above-mentioned facts. Petitioner in his answer to the notice to show cause admitted that he received the sum of $10 from Vellis, and that it was to be used to pay an insurance premium for him, but claimed the payment was not to be made at that time (May 23, 1939), but rather on July 24, 1939. Petitioner also admitted that he received from Vellis the sum of $16.87, but claimed that Vellis consented that said sums be applied on a fee for professional services rendered by petitioner. Petitioner testified that the receipts were given acknowledging the receipt of the money for insurance premium upon Vellis' request as he wished to use them to show his stepdaughter that the insurance premium was paid, and to obtain from her the rent she was alleged to have collected from Vellis' tenant; and that after they were given, Vellis agreed that petitioner could retain the funds on account of his fee. Vellis denied such an arrangement. During the time of and after receiving the sums petitioner was ill. He claimed he thought an attorney he had employed was handling the dispute with Vellis for him and would repay Vellis out of a fee to be received in a case he had turned over to said attorney. No fee was ever paid in the transferred case, and the attorney employed by petitioner failed to corroborate petitioner's testimony that said attorney had promised to pay Vellis any portion of the fee to be received by him. Half-hearted attempts were made by petitioner to settle with Vellis. Petitioner however denied that such attempts constituted an admission of any liability, but were made only to avoid trouble in view of his physical condition. Petitioner asserted that he agreed to arrange for the insurance coverage, and obtain time for the payment of the premium after the expiration of the initial period of time for which credit was extended in paying the premium, but he admits that no premium was ever paid except the sum of $5 on account thereof.

[1] Petitioner contends that Vellis is a "confessed liar" and therefore his testimony should be disregarded. As his basis for that contention he relies on the following portion of Vellis' testimony:

"The Examiner: Q. Where did you get the $16.87 (referring to the above-mentioned second payment)? A. From my pocket.

"Q. How did it get in your pocket? A. I no tell him (presumably referring to petitioner) I said 'That is last money, I have just carfare to go home. This money I get from my stepdaughter' * * * she don't give it to me. I tell a lie because he bother me so much for the whiskey."

This can hardly be said to make a "confessed liar" of Vellis. It does not support petitioner's testimony that the receipts were given to Vellis in order that he could exhibit them to his stepdaughter and obtain rents she had collected from his tenant. Rather, it may be said to show a complete disclosure by Vellis of what was said and done.

[2] The evidence is sharply conflicting on the main issues, and we would be inclined to accept the testimony of petitioner as controlling, if it were not for the delivery to Vellis of the receipts acknowledging the receipt of the money for an insurance premium coupled with the amounts in the two receipts being identical with the amount of the premium on the Dubuque policy of insurance. In the face of this evidence we are not inclined to upset the findings of the local administrative committee. Its members had the opportunity of observing the witnesses and were therefore in a better position to judge as to their credibility.

[3] However, there are mitigating circumstances. Vellis neither reads nor writes English well, and it appears from his testimony that in many instances he did not understand the questions put to him. Many of his answers were not responsive to the questions. There is a possibility that he also misunderstood the arrangement between petitioner and himself with relation to the ultimate disposal of the sum of $26.87 received by petitioner. If such were the case, we would have nothing more than a bona fide and honest mistake as to the nature of the transaction, which would not, of course, be a basis for disciplinary action. In view of such possibility, we believe that from the record standing alone, the recommendation of the local administrative committee for a one-year suspension from practice should have been adopted rather than disbarment as recommended by the Board of Governors.

[4-9] However, in making its recommendation as to the penalty to be imposed, the Board of Governors took into consideration the prior record of petitioner. A private reproval was administered to petitioner by the Board on April 21, 1939. With that proceeding this court had nothing to do and the nature of the charge on which it was based does not appear from the record now before us. On November 27, 1939, Local Administrative Committee No. 2 for the City and County of San Francisco notified petitioner of a charge against him of failing to use the funds of a client for the purpose received. That proceeding resulted in a recommendation of the Board of Governors for a one year's suspension from practice, which was approved by order of this court on June 27, 1940; no petition for review by this court was asked by petitioner in that proceeding. The one year's suspension last-mentioned was to commence at the termination of a suspension of petitioner ordered by this court on December 12, 1939, for nonpayment of state bar dues. The misappropriation of funds in the above-mentioned proceeding occurred between August 24, 1939, and October 23, 1939, this being a few months after the occurrence of the events here involved. On April 19, 1940, the Board of Governors made its recommendation for the suspension of petitioner for misconduct arising out of said charge of misappropriation of funds. Petitioner urges that inasmuch as the misconduct culminating in the order of suspension of June 27, 1940, occurred a month or two after the misconduct here involved, such is

not a prior record of conviction which may be considered in fixing the penalty in the instant proceeding. It is to be noted that just four days before the time the Board of Governors made its recommendation for the suspension above-mentioned, the citation was issued in the Vellis case by the local administrative committee. Undoubtedly the Board did not have that citation in mind when it made such recommendation for suspension. It could not have considered the Vellis' complaint as a part of the prior record of petitioner, but it did take into consideration the above-mentioned private reproval of April 21, 1939. The rule with respect to the consideration of other acts of misconduct of an attorney in fixing the penalty to be imposed was considered by this court in the recent case of Kennedy v. State Bar, 13 Cal.2d 236, 240, 88 P.2d 920, 921, where it was said: "The board is entitled to consider the past conduct as well as that which is directly under investigation, for whatever weight it may have in determining the question whether the attorney is imbued with the essential qualities of integrity and honesty, or for any bearing it may have upon his motive or otherwise upon the question of the measure of discipline to be applied." The essence of the rule is that note may be taken of other acts of misconduct of the attorney which bears upon the question of his integrity, honesty and moral fitness to practice law. That being the case, it seems clear that the time such other acts of misconduct occurred with relation to the time of occurrence of the particular offense under consideration, is immaterial except to the extent that remoteness may lessen its weight and significance. If it appears that the attorney has been guilty of conduct indicating a lack of those qualities essential to the maintenance of the dignity and integrity of the profession and the protection of the public, before or after the misconduct presently involved, such factors are certainly pertinent on the issue of what disciplinary measures will be necessary to accomplish the end in view. It is indicative of the probable future course of conduct of the attorney and the strength and stability of his moral concepts. Cases such as the one here involved would rarely arise for the reason that there would seldom be conviction of a later offense prior to a conviction for a former one. Petitioner relies upon authorities holding that in criminal proceedings the penalty may be made more severe only in cases in which the other offenses are committed before the offense for which the accused is being tried. 16 Corpus Juris, 1341; [24 C.J.S., Criminal Law, § 1960]. But this is not a criminal proceeding. The important factor is whether the attorney lacks the necessary and proper moral qualifications to continue in practice. Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403.

Nevertheless, in view of the possibility of a misunderstanding between Vellis and petitioner as to the ultimate disposal of the sums received, the illness and financial difficulties of petitioner, the smallness of the amount involved, the fact that the prior suspension of petitioner was for acts occurring in close proximity to the acts here involved, and the other circumstances of the case including the recommendation for a suspension of one year by the local administrative committee who had an opportunity to observe the petitioner and the witnesses, we believe that the end sought to be accomplished by disciplinary measures will be attained by the suspension of petitioner and he is hereby suspended from practicing law for the period of one year commencing at the expiration of the year's suspension ordered by this court on June 27, 1940.

18 Cal.2d 63

CONSOLIDATED PRINTING & PUBLISHING CO. v. ALLEN.

L. A. 17878.

Supreme Court of California.

May 12, 1941.

1. Mandamus 🔑68, 72

Mandamus will not issue to control exercise of discretion which law reposes in a public officer as part of his public function, but writ will issue where duty is one specifically enjoined by reason of an office, trust or station, or where law imposes upon such officer specific duties which he refuses to perform because of an erroneous conclusion as to his legal duties, or where a petitioner is entitled by law to a certain action. Code Civ.Proc. § 1085.

2. Statutes 🔑73(2), 76(6)

Where existing general laws provided for uniform method of publication of delin-

quent tax lists, an act setting up a special procedure for publication of delinquent tax lists in counties of the first class, of which Los Angeles County was the only one, was unconstitutional as violative of constitutional provision requiring that all laws of a general nature have a uniform operation, and of constitutional provision prohibiting Legislature from passing special laws for assessment or collection of taxes or in any case where a general law can be made applicable. St.1939, pp. 1321–1325, §§ 3356, 3391–3403; Const. art. 1, § 11; art. 4, § 25, subds. 10, 33.

◆

In Bank.

Original proceeding by Consolidated Printing & Publishing Company for a writ of mandate to compel Wayne Allen, purchasing agent of the County of Los Angeles, to award the contract for publication of the delinquent tax list, addenda and indices of the county in compliance with the requirement of Revenue and Taxation Code, § 3356, St.1939, p. 1321, § 3356.

Peremptory writ issued.

Frank P. Doherty, William R. Gallagher, Frank W. Doherty, Kenneth K. Wright, Hill, Morgan & Bledsoe, and A. J. Hill, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Roy W. Dowds, Asst. Co. Counsel, both of Los Angeles, for respondent.

Rollin L. McNitt, of Los Angeles (Edythe Jacobs, of Los Angeles, of counsel), amici curiæ for respondent; for Los Angeles Newspaper Service Bureau and Certain Newspapers.

PULLEN, Justice, pro tem.

Petitioner is a taxpayer and property owner in the county of Los Angeles, and is also the owner and publisher of The Los Angeles Daily Journal, a daily newspaper of general circulation, printed and published in that county. Respondent is the purchasing agent of the county of Los Angeles.

In February, 1941, as such purchasing agent, respondent prepared specifications for the publication of all notices and for all advertising of said county and its departments, including the publication of the delinquent tax list, addenda, and indices for the year 1940, and requested bids for the doing of such work from all newspapers of general circulation published in the county of Los Angeles. In accordance with such invitation petitioner submitted its offer to do the work, including a bid to print and publish the delinquent tax list, addenda, and indices for the year 1940.

After the time fixed for the submission of bids it became known to petitioner that respondent intended to award the work in accordance with the provisions of article 2, chapter 1, part 6, division 1 of the Revenue and Taxation Code, being sections 3391 to 3403, both inclusive of said code, St. 1939, pp. 1322–1324. Petitioner thereupon demanded that the contract for the publication of the delinquent tax list, addenda, and indices be awarded in compliance with the requirements of section 3356 of the Revenue and Taxation Code, St.1939, p. 1321, and that respondent reject all bids proposing to do such printing pursuant to the provisions of sections 3391 to 3403, contending these latter sections were special legislation and therefore unconstitutional. Upon the rejection by respondent of petitioner's demand, this proceeding in mandamus was instituted.

The right of petitioner to seek a writ of mandate is based upon two grounds: First, upon its status as a taxpayer and property owner of the county of Los Angeles, and, second, upon the fact that it is a corporation with principal place of business in the city of Los Angeles, engaged as owner in the printing and publishing of a newspaper of general circulation in the city of Los Angeles, known as the Los Angeles Daily Journal, and that it is the low bidder for the specified printing if section 3356 is to be used as the basis for awarding such work.

With reference to the printing of the delinquent tax list, which the tax collector of each county is required by law to publish annually, section 3356 of the Revenue and Taxation Code, a general provision, requires that such publication shall be made once a week for three successive weeks in a newspaper of general circulation, published in the county, and if there is no such newspaper published in the county, then the publication shall be by posting. The cost of such publication, it is provided, shall not exceed the rate fixed by the board of supervisors for other county advertising.

Sections 3391 to 3403 also pertain to the printing of the delinquent tax lists but are applicable to counties of the first class exclusively, and Los Angeles county is the only county of that class in California. These sections provide that there shall be published, in a newspaper at the county seat, the delinquent tax list, the addenda, and the indices covering property which is located in the county seat, in unincorporated territory, in municipalities in which there is no newspaper published at least once a week, and in municipalities in which such a newspaper is published, when it will not publish except at a rate in excess of the official rate. For the publication of that portion of the delinquent list affecting property located in a city other than the county seat, in which a newspaper of general circulation is published at least once a week which will make the publication at a rate not in excess of the rate for official publication for the city, it is provided that the publication shall be made in such city, and further that preference shall be given to a daily newspaper; if none, then to a semi-weekly; or if neither, then to a weekly newspaper.

It is the contention of petitioner that section 3356 is a general law, that the requirements of sections 3391 to 3403 prevent the uniform operation of section 3356, and that those sections are therefore unconstitutional, being contrary to article I, section 11 of the Constitution of the state, which provides that all laws of a general nature shall have a uniform operation. It is further contended that such sections are special provisions affecting the assessment and collection of taxes, and as such violate article IV, section 25, subdivision 10, which prohibits the passage of local or special laws for the assessment or collection of taxes, and that they are also contrary to subdivision 33 of the same section which prohibits the passage of local or special laws, when a general law can be made applicable. It is also claimed that the sections violate article XI, section 5 of the Constitution in that they attempt to classify counties for purposes other than regulation of the compensation of certain county officers.

[1] The first point to be considered is whether mandamus is the proper remedy under the facts here presented. It is true that mandamus will not issue to control the exercise of the judgment and discretion which the law reposes in a public officer as a part of his official function (Pacific Palisades Association v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782), but the writ will issue where the duty is one specifically enjoined by reason of an office, trust, or station (Code Civ. Proc., section 1085), or where the law imposes upon such officer specific duties which he refuses to perform because of an erroneous conclusion as to his legal duties (Hartsock v. Merritt, 94 Cal.App. 431, 271 P. 381), or where petitioner is entitled by law to a certain action. Inglin v. Hoppin, 156 Cal. 483, 105 P. 582.

The question of classification of counties has been considered by our courts on numerous occasions, and is not without its difficulties. Prior to 1933, section 4 of article XI, provided that "the legislature shall establish a system of county governments, which shall be uniform throughout the state * * *". This in effect practically prohibited the classification of counties for any purpose. However, an exception was stated in the succeeding section (art. XI, sec. 5), wherein authority was granted to classify for the purpose of fixing compensation. It is there provided: "It [the legislature] shall regulate the compensation * * * and for this purpose may classify the counties by population * * *." In the earlier cases there are statements that under article XI, section 5, or under that section considered with article XI, section 4, the legislature was empowered only to classify counties for compensation fixing purposes and none other.

For example, in County of San Luis Obispo v. Graves, 84 Cal. 71, 76, 23 P. 1032, 1034, it was said: "Except for the sole purpose of fixing the compensation of county officers in proportion to their duties, the duty of the legislature was and is to 'establish a system of county governments which shall be uniform throughout the state.' Article 11, § 4."

In Turner v. County of Siskiyou, 109 Cal. 332, 42 P. 434, is found the following: "The difficulty is not removed by the fact that the counties are classified, and that the provision applies to all counties of a certain class; because, under section 5 of article 11, counties may be classified only for the purposes of regulating the compensation of certain public officers therein enumerated. Dougherty v. Austin [94 Cal. 601, 28 P. 834, 29 P. 1092, 16 L.R.A. 161]; Welsh v. Bramlet, 98 Cal. 219, 33 P. 66."

In Pratt v. Browne, 135 Cal. 649, 67 P. 1082, 1083, it is said: "It is plain that the legislature is, by the terms of the above section, given the power to classify only for the purpose of regulating the compensation of 'such officers'; that is, of the county officers therein named, or such other county, township, and municipal officers as may have been provided for by the legislature. The sole purpose of the classification provided for in the section is the regulation of the compensation of the officers in proportion to their duties. County of San Luis Obispo v. Graves, 84 Cal. [71] 75, 23 P. 1032; Turner v. County of Siskiyou, 109 Cal. [332] 334, 42 P. 434; San Francisco v. Broderick, 125 Cal. [188] 193, 57 P. 887."

Likewise in Sanchez v. Fordyce, 141 Cal. 427, 75 P. 56, 57, citing Pratt v. Browne, supra, it is said: "The additional point is here made that, as section 5, art. 11, of the Constitution authorizes the Legislature to 'regulate the compensation of all such officers (county officers) in proportion to duties, and for this purpose may classify the counties by population,' therefore it cannot directly or indirectly classify the counties for any other purpose than the one purpose of regulating the compensation of county officers. We agree with appellants' counsel that under this provision of the Constitution the Legislature can classify counties but for the one purpose, of regulating the compensation of county officers. It has been so held by this court. Pratt v. Browne, 135 Cal. [649] 650, 67 P. 1082." See, also, Bloss v. Lewis, 109 Cal. 493, 41 P. 1081; Marsh v. Hanley et al., Supervisors, 111 Cal. 368, 43 P. 975; Rauer v. Williams, 118 Cal. 401, 405, 50 P. 691; In re Brady, 65 Cal.App. 345, 224 P. 252; Coulter v. Pool, 187 Cal. 181, 201 P. 120.

All of these cases were decided prior to the repeal in 1933 of article XI, section 4 of the Constitution, which left section 5 of article XI, which merely states that the legislature "may" classify counties for the purpose of fixing the compensation of certain officers. An examination of the argument to the voters at the election held June 27, 1933, where the matter of the repeal of sections 4 and 9 of article XI and the amendment of section 5 of article XI was discussed, indicates that it was the purpose of the proposed constitutional amendment to vest more power in the board of supervisors and to make the government of the county more responsive to local demands.

Section 4006 of the Political Code, evidently enacted to carry out article XI, section 5 of the Constitution, divides the counties of the state into 58 classes, stating, "For the purpose of regulating the compensation of all officers herein provided for, the several counties of this state are hereby classified, according to their population * * * as follows, to wit: First class. Counties containing a population of nine hundred thousand and over shall belong to and be known as counties of the first class. * * *"

Section 3391 of the Revenue and Taxation Code here under consideration reads, "In each county of the first class and no other, the published delinquent tax list and all items required to be published * * * shall be published as provided in this article. * * *" It is evident, therefore, that the legislature attempted to adopt and apply the classification described in section 4006 of the Political Code, enacted expressly for the purpose of classifying counties for regulation of the compensation of certain officers, to an entirely different matter, namely, one pertaining to a matter of taxation.

[2] The contention of petitioner that the legislature, in enacting sections 3391 to 3403 attempted to set up a special procedure to control a matter which was already governed by an effective general statute (section 3356), and that sections 3391–3403 were therefore violative of the Constitution (art. I, sec. 11, art. IV, sec. 25, sub. 33), appears sound.

In Ventura County Harbor District v. Board of Supervisors, 211 Cal. 271, 295 P. 6, 8, where the legislature had attempted to create the Ventura County Harbor District by a special act (Stats.1927, p. 1819), the act was held to be invalid and violative of the foregoing sections of the Constitution because there was then in effect a general act under which the proposed improvement could be carried out, and the general statute controlled over the special statute. This court there said: "It seems clear to us that, if the Legislature itself defines, declares, and puts in operation a general law upon a subject, the courts can do nothing less than apply the constitutional provisions quoted and declare the special act invalid under the mandatory provisions of the Constitution." Referring to article I, section 11, of the Constitution providing that all laws of a general nature shall have a uniform operation, and article IV, section 25, subdivision 33, providing that special laws shall not be passed where a general law can be made applicable, this court further stated: "We realize also that in the first instance the question as to whether or not a special act can be made applicable is addressed to the Legislature, and that, unless we can see from the face of the act or from facts of which we take judicial cognizance that the case is one in which a special act may not be passed, we will uphold the validity of such legislation. But these presumptions do not aid us where, as here, the Legislature itself has by its own solemn act, declared that a general act may be passed covering the subject-matter contained in the special act. We then have the Legislature itself deciding that a general statute is applicable to the subject covered by the special act."

The opinion distinguishes the case of People v. Mullender, 132 Cal. 217, 64 P. 299, relied upon here by respondent, on the ground that at the time the special act there under review was passed, there was no general law in existence on the subject, and therefore the courts presumed the legislature had before it facts showing the impracticability of a general law and the necessity for a special law, but, the opinion further says, "where the Legislature has spoken, the matter does not rest upon presumption but upon the open facts which show that the general law is valid and the special act is therefore invalid."

In the instant case, prior to the enactment of the special provisions, section 3766 of the Political Code, now 3356 of the Revenue and Taxation Code, had provided for a uniform method of publication in all of the counties of the state, indicating that such a general law was both applicable and workable, and the courts are not now called upon to dispute that fact.

Respondent attempts to point out various natural and intrinsic differences existing in Los Angeles County and to show that a different classification by the legislature in reference to the publication of the delinquent tax lists may be sustained as to that county. As one reason for the special method of publishing the delinquent tax lists in counties of the first class, i. e., Los Angeles County, it is said that the area of that county is over 4,000 square miles with a population of approximately 2,785,000, being over one-third of the population of the entire state. It is also cited as a fact that within the county of Los Angeles there are forty-four municipal corporations in addition to the city of Los Angeles, some of which have a substantial population and others are a considerable distance from the seat of the county government.

These facts as to the size, population, and number of separate municipalities, however, cannot be accepted as such distinguishing features as to override the constitutional mandate. Regardless of these differences the position of the delinquent taxpayer with relation to the taxing agent is not changed, and while Los Angeles County has the largest population of any county in the state, it is not the largest geographically. Other counties have municipalities farther removed from the county seat, and many have a seat of government more inaccessible and with less opportunity of intercommunication between the county seat and outlying incorporated cities than is found in the county of Los Angeles.

If it is an advantage to the taxpayer of counties of the first class, as urged by respondent, that is, to Los Angeles County taxpayers, to have the delinquent list published in the municipality where the property is situated, it must be equally beneficial to taxpayers of other counties which have municipalities other than the county seat within their boundaries. If perchance the method set forth in sections 3391 to 3403 may be a burden imposed upon the taxpayers of counties of the first class, then they should not suffer under a load that is not inflicted upon counties of other classifications. The distinction seems to be directed to the size of the county and not to the size of the cities in which the publication is required. It does not appear that the delinquencies in the county of Los Angeles are larger than in cities of other counties, nor that the general statute has failed in any way to accomplish the purpose for which it was enacted, when Los Angeles County is compared with the counties of the state as a whole. Furthermore, the special statutes obviously attempt to deal with the collection of taxes, a matter which the Constitution specifically enjoins shall be governed by general statute. Constitution, art. IV, sec. 25, sub. 10.

We can find no natural, intrinsic, or constitutional ground of distinction between the county of Los Angeles and other counties which would justify the application of a special procedure with reference to the sale of delinquent property.

Let the peremptory writ issue.

We concur: TRAYNOR, J.; SHENK, J.; CURTIS, J.

44 Cal.App.2d 635

COOK v. HUNTLEY et al.

Civ. 2641.

District Court of Appeal, Fourth District, California.

May 2, 1941.

Hearing Denied June 30, 1941.

1. Fraudulent conveyances 🔑295(1)

In action to quiet title by execution purchaser's grantee on ground that grantee's title was superior to title of defendant who claimed through deed executed by judgment debtor, because the judgment debtor and others had conspired to defraud creditors, evidence sustained finding against claims of fraud.

2. Appeal and error 🔑996

Where inferences drawn from evidence by trial judge were reasonable, they were controlling on appeal.

3. Execution 🔑264

The purchaser at an execution sale only acquired such interest in the property sold as judgment debtor had at the time of sale.

4. Mortgages 🔑157

Where lender in good faith took trust deed as security for loan without notice of any defect in her trustors' title, the lender was an "innocent encumbrancer for value" and without notice, and her security was a valid and binding obligation not subject to collateral attack by creditors of the trustors.

See Words and Phrases, Permanent Edition, for all other definitions of "Innocent Encumbrancer for Value".

5. Fraudulent conveyances 🔑166

Where the only infirmity that could properly be urged in connection with execution of note and trust deed securing the note was claimed fraud on part of trustors of which the beneficiary had no notice, the fraud of the trustors did not affect the trust deed.

6. Mortgages 🔑261

Where lender in good faith took trust deed as security for loan without notice of any defect in trustors' title, and lender's assignees were not parties to claimed fraud, which had for its alleged purpose the defrauding of trustors' creditors, and assignees had no knowledge of the fraud, in taking assignment of the trust deed, they succeeded to all the rights of the lender and succeeded to her rights as an "innocent holder for value". Civ.Code, § 3139.

See Words and Phrases, Permanent Edition, for all other definitions of "Innocent Holder for Value".

7. Mortgages 🔑372(1), 378

The purchaser at sale under trust deed obtained title to property which dated back to date of the trust deed and all subsequent liens were destroyed by the sale.

8. Appeal and error 🔑1010(1)

Trial court's findings supported by evidence are conclusive on appeal.

9. Execution 🔑264

Where lender in good faith took trust deed as security for loan, without notice of any defect in trustors' title, based on claim that trustors were acting for purpose of defrauding creditors, the trustors had no interest in the property after trustee's sale under trust deed and trustee's deed to purchaser at the sale almost two years before judgment was rendered against the trustors on which execution was issued and over three years before the execution was issued and sale had, and therefore no interest in the property was passed to the purchaser by the execution sale.

10. Mortgages 🔑378

Lien, if any, arising from recordation of abstracts of judgment was destroyed by trustee's sale under trust deed which antedated both of the judgments several years.

11. Judgment 🔑780(1)

The lien of a judgment only attaches to real property in which the judgment debtor has a vested legal interest. Code Civ. Proc. § 674.

12. Judgment 🔑780(1, 2)

The lien of a judgment will not attach to mere equitable interest of the judgment debtor in real property nor to an estate for years. Code Civ.Proc. § 674.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Quiet title action by Margaret G. Cook against Marie T. Huntley and others. Judgment for defendants and plaintiff appeals.

Affirmed.

George P. Cook and L. E. Dadmun, both of Los Angeles, for appellant.

Wendell P. Hubbard, of Los Angeles, for respondents.

MARKS, Justice.

Plaintiff brought this action to quiet her title to property in Los Angeles county and to cancel certain instruments under which Marie T. Huntley (hereinafter called defendant) claims title to the property. The trial court found against plaintiff on all material issues and rendered judgment for defendant. This appeal followed.

The interest which plaintiff claimed in the property grew out of the following:

Record title to the property in controversy stood in the name of Thelma H. Davis in 1924. On August 14, 1924, F. E. Davis and Thelma H. Davis had executed promissory notes aggregating $1,030.48 payable to C. E. Ulrich. On May 3, 1929, Ulrich recovered judgment against F. E. and Thelma H. Davis on these notes in the sum of $1,500.47. An abstract of this judgment was recorded on May 13, 1929. On October 20, 1934, Ulrich filed suit on this judgment and on November 10, 1934, recovered judgment against F. E. Davis and Thelma H. Davis in the sum of $2,113.62. An abstract of this judgment was recorded on November 20, 1934. On April 20, 1936, an execution was issued on this judgment and a levy was made on the real property in question. The interest of F. E. and Thelma H. Davis was sold under the execution to George P. Cook. On October 29, 1936, George P. Cook, by quitclaim deed, conveyed his interest in the property to Margaret G. Cook, the plaintiff. On May 18, 1937, a marshall's certificate of sale was issued to Margaret G. Cook. The amended complaint on which this action was tried was filed on February 6, 1937, before the judgment debtors' equity of redemption had expired.

Defendant traces her title through the following instruments:

On June 27, 1927, F. E. and Thelma H. Davis conveyed the property to Amanda E. Lesher, sister of Mrs. Davis. Mr. and Mrs. Davis were indebted to a number of people at the time. It is probable that this transfer was made without consideration and to defraud creditors in so far as the three parties to the deed were concerned. As there is no finding to the contrary we will assume fraud and lack of consideration in this transaction.

On September 16, 1927, F. E. and Thelma H. Davis and Amanda E. Lesher obtained a loan of $8,500 from Ethel L. Purwin. They executed a promissory note for that amount payable in three years, secured by a deed of trust on the property. She was an innocent party in this transaction without notice of any fraud or failure of consideration in the preceding transaction. She actually paid the trustors, or one or more of them, the $8,500. There is no evidence that she was not a bona fide lender for value.

On June 30, 1930, Mrs. Purwin started proceedings to foreclose the deed of trust. The trustee's sale was fixed for October 15, 1930.

F. E. Davis was an attorney at law and R. W. Huntley was his client. Fred J. Eddy was a business associate of Huntley.

Davis represented to Huntley that if given additional time he could secure the money with which to pay the Purwin note and repay Huntley any money he might pay Mrs. Purwin to secure the extension.

On October 9, 1930, Huntley paid Mrs. Purwin $2,500 for an extension of the date of sale to November 15, 1930, and an option to purchase the note and deed of trust for $7,527.04, plus accruing interest. The date of the sale was continued to November 15, 1930.

Davis notified Huntley that he could not raise the money to pay the Purwin note. On November 12, 1930, Huntley paid Mrs. Purwin $7,589.76, and the note and deed of trust were assigned to Eddy at the request of Huntley. The sale was held on November 15, 1930. Eddy purchased the property for $10,496, the amount of principal and interest due on the note, plus costs of sale. He received the trustee's deed to the property which was promptly recorded. The sale was conducted according to all legal requirements. On November 15, 1930, Eddy executed his promissory note for $17,000, payable to Huntley, which note was secured by a deed of trust on the property.

On December 4, 1931, Eddy and Huntley gave Amanda E. Lesher an option to purchase the property for $13,000. This option was never exercised and was permitted to expire. See, California Trust Co. v. Kerckhoff-Cuzner Mill & Lumber Co., 5 Cal.2d 628, 55 P.2d 865.

On December 5, 1931, Eddy and his wife conveyed the property to Maude Kibbe who reconveyed it to Eddy on February 5, 1932.

Huntley died on February 11, 1932, and his will was duly probated. On September 15, 1932, the probate court authorized the executor to accept a deed to the property from Eddy in cancellation of the note and deed of trust from Eddy to Huntley. On September 23, 1932, Eddy and his wife conveyed the property to the heirs and devisees of R. W. Huntley. It was finally distributed to his widow, Marie T. Huntley, the defendant in this action.

[1, 2] Plaintiff argues at great length, and vociferously, that Mr. and Mrs. Davis, Amanda E. Lesher, Huntley and Eddy conspired together to defraud the creditors of Mr. and Mrs. Davis through all these transactions. It should be unnecessary for us to consider the various arguments pointing to fraud, as the trial court found against these claims and there is ample evidence to support these findings. The claimed fraud is based largely on inferences drawn by plaintiff from the evidence we have outlined. Contrary inferences were drawn by the trial judge and as they were reasonable inferences they are controlling here. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123. Also, there is testimony in the record negativing fraud which further supports the findings.

[3] The only interest plaintiff can claim in the property is through Mr. and Mrs. Davis. If they had no interest in it in November, 1934, when C. E. Ulrich recovered his judgment against Mr. and Mrs. Davis on which the execution was issued and when the abstract of that judgment was recorded, and on April 20, 1936, when George P. Cook, plaintiff's grantor, bought the property at execution sale under that judgment, then plaintiff acquired no interest in the property, for the purchaser at an execution sale only acquires such interest in the property sold as the judgment debtor may have had at that time. McAlvay v. Consumers' Salt Co., 112 Cal.App. 383, 297 P. 135; North v. Evans, 1 Cal.App.2d 64, 36 P.2d 133; Anglo-California Trust Co. v. Oakland Ry., 193 Cal. 451, 225 P. 452.

The important question for decision is: Did F. E. and Thelma H. Davis, the judgment debtors, have any interest in the property after the trustee's sale and deed to Eddy on November 15, 1930, almost two years before the judgment was rendered on which the execution was issued and over three years before the execution was issued and the sale had through which plaintiff claims?

[4] As we have already indicated, Mrs. Purwin actually loaned $8,500 to F. E. and Thelma H. Davis and Amanda E. Lesher, or one or more of them, and in good faith took the trust deed as security for the loan. As she had no notice of any defect in her trustors' title she must be held to have been an innocent encumbrancer for value and without notice. It follows that her security was a valid and binding obligation not subject to later attack by the creditors of the trustors.

It is true that Huntley bought the note and deed of trust after maturity, but it is equally true that he paid Mrs. Purwin in full its principal, accrued interest and all costs incurred in the foreclosure proceedings. It is also true that Huntley had the note and deed of trust assigned to Eddy who was named as grantee in the trustee's deed. Thus Eddy held the title to the property as trustee for Huntley.

[5, 6] The only infirmity that could properly be urged in connection with the execution of the note and deed of trust was the claimed fraud on the part of the trustors of which the beneficiary had no notice so that the fraud of the trustors did not affect the instrument. Neither Huntley nor Eddy were parties to this fraud and there is nothing to show that they had any knowledge of it. Therefore, when they took the instruments they succeeded to all of the rights of the prior holder (§ 3139, Civ.Code) and succeeded to her rights as an innocent holder for value. Havens v. Foskett, 81 Cal.App. 653, 254 P. 642; North Hollywood Mtg. Co. v. North American, etc., Co., 137 Cal.App. 180, 30 P.2d 446.

[7] There is no intimation that the trustee failed to take, with legal precision, all of the steps necessary to constitute a valid and lawful sale of the property under the terms of the deed of trust. The purchaser at the sale obtained title to the property which dated back to the date of the deed of trust and all subsequent liens were destroyed by the sale. Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 142 Cal. 643, 76 P. 484, 100 Am.St.Rep. 150; Carpenter v. Smallpage, 220 Cal. 129, 29 P.2d 841, 30 P.2d 995.

[8-12] Plaintiff argues at considerable length that the various transactions involving the property after the foreclosure sale are indicative of fraud. The trial court found these transactions free from fraud, which finding is conclusive here. Further, it is clear that Mr. and Mrs. Davis, the judgment debtors, had no interest in the

property either at the time that Ulrich recovered his judgment in November, 1934, or at the time of the execution sale in April, 1936, so no interest in the property was passed to the purchaser by that sale. North v. Evans, supra. It is also true that any possible lien on the property arising from either of the abstracts of judgment was destroyed by the trustee's sale under a deed of trust which deed of trust antedated both of them several years. The lien of a judgment only attaches to real property in which the judgment debtor has a vested legal interest. § 674, Code Civ. Proc.; People v. Irwin, 14 Cal. 428. It will not attach to a mere equitable interest of the judgment debtor in real property (Belieu v. Power, 54 Cal.App. 244, 201 P. 620; Poindexter v. Los Angeles Stone Co., 60 Cal.App. 686, 214 P. 241), nor to an estate for years. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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44 Cal.App.2d 670

In re PEOPLE on Behalf of JONES et al.

Civ. 11448.

District Court of Appeal, First District, Division 1, California.

May 7, 1941.

Rehearing Denied June 6, 1941.

Hearing Denied June 30, 1941.

1. Infants 🔑16

Juvenile proceedings involving dependent children, while instituted in the name of the people, are not "criminal" in nature.

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Proceeding".

2. Infants 🔑16

Where infant orphans' guardian, who had excellent reputation, was steadily employed, and was properly caring for orphans, instituted juvenile proceedings only to settle controversy as to which of two counties should contribute to orphans' support, and did not intend to put custody of orphans in issue, but was willing to give up right to aid rather than give up orphans' custody, juvenile court erred in refusing to permit guardian to dismiss proceedings.

3. Infants 🔑16

Evidence that infant orphans' guardian, who had excellent reputation, was steadily employed, and was properly caring for orphans, instituted juvenile proceedings only to settle controversy as to which of two counties should contribute to orphans' support, and did not intend to put custody of orphans in issue, but was willing to give up right to aid rather than give up orphans' custody, did not support finding that orphans were destitute and without means of support so as to authorize juvenile court to declare orphans wards of court and to remove them from guardian's custody.

4. Courts 🔑472(4)

The question of whether custody of infant orphans should be taken from guardian, who was not related to orphans, so that orphans could be sent to relatives in England, was within jurisdiction of probate court, and not within jurisdiction of juvenile court.

WARD, J., dissenting.

Appeal from Juvenile Department of Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Juvenile proceedings by the People, on behalf of Dorothy Jones and another. From an adverse judgment, John Savage appeals.

Reversed, with directions.

Rehearing denied; WARD, J., dissenting.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for appellant.

Matthew Brady, Dist. Atty., and Edward M. Leonard, Asst. Dist. Atty., both of San Francisco, for respondent.

KNIGHT, Justice.

This appeal was taken by John Savage, guardian of the persons and estates of Dorothy and Bernard Jones, from a judgment of the juvenile court. The children are full orphans, and at the time of the rendition of the judgment were respectively 14 and 11 years of age. At that time also they were and for nearly two years prior thereto had been living with and being cared for by appellant and his wife at their home in San Francisco. Under the terms of the judgment, which was entered on March 29, 1939, the children were declared wards of the court, removed from the Savage home, and placed in the custody of the probation officer until they attained the age of 21 years or until further order of court; and the treasurer of the city and county was directed to pay to the probation officer $40 a month for their support and maintenance.

As stated by the court at the time the judgment was rendered, it was the intention to transport the children to London, England, to live permanently with their paternal relatives as soon as arrangements could be made therefor. As shown by the bill of exceptions upon which the appeal was taken, at none of the hearings was any sworn testimony taken. The judgment is based entirely on written and verbal reports made by the probation officers and statements made by the interested parties, not made under oath; and a private interview with the children. The factual background of the case and a summary of the proceedings leading up to the rendition of the judgment as disclosed by the bill of exceptions may be stated as follows: James and Elizabeth Jones, the parents of the children, lived in Contra Costa county. The father died in 1935, and in May, 1937, the mother was the victim of a homicide. Prior to his death the father had been in poor health and the family was receiving aid from the county. He was a native of Ireland, and was survived by a sister, Mrs. Lewis Oliver, living in Los Angeles, and several brothers and sisters in England. Mrs. Jones was born in Ireland, and among the relatives surviving her in this country was an uncle, Peter Benson, residing in Alameda county. For many years appellant and his wife maintained their home in San Francisco. By occupation appellant is a stationary engineer, and is employed steadily at the San Francisco Hospital; and all of the reports of the probation officer show that the Savages have always enjoyed an excellent reputation. Appellant had been a close friend of the father of the children for many years, and the two families were intimate in their social relations. Upon the death of the mother the Savages went immediately to Contra Costa county and with the permission of the authorities brought the children to San Francisco to live with them, with the understanding that said county would continue aid for the children in the Savage home. Mrs. Jones left a small estate consisting of money, and Peter Benson applied for and was granted letters of guardianship of the children. At this time Mrs. Oliver was in England, and upon her return in November, 1937, she applied to the court in Contra Costa county to be appointed guardian in the place of Benson, with the view of taking the children to England to live with their father's relatives. Soon after Benson's appointment as guardian he was stricken with illness and died; whereupon appellant filed an application to be appointed guardian in opposition to the pending petition of Mrs. Oliver; and his petition was granted. All except $226 of the guardianship funds were expended under court order, the Savages having received only $180 to reimburse them for the money they had expended in behalf of the children during the time they had been caring for them. Meanwhile Contra Costa county had been threatening to discontinue the aid, claiming that it should be taken care of by San Francisco, and later in 1938 appellant applied to the social welfare department in San Francisco for the $20 a month allowance for each child provided by law for the care of full orphans. The department referred him to a senior probation officer, and appellant was advised that it would be necessary for him to file a petition in the juvenile court. Thereafter he was furnished with printed forms of two petitions with the blank spaces filled in with typing, one of which was an application for state and county aid, and the other a petition addressed to the juvenile court. He signed and verified both, and the petition addressed to the juvenile court was filed on January 24, 1939. The petition contained the allegation that the children were destitute and that there were no means of support through appellant or the relatives. But the record shows beyond question that appellant's only purpose in signing and filing the petition was to obtain state and county aid, and that he and his wife had no thought whatever of surrendering the custody of the children. At the hearings which followed, however, the probation officer recommended the plan to deliver the custody of the children to Mrs. Oliver with the understanding that she would transport them to London to reside permanently with her brothers and sisters in that city; and the court agreed to the plan and expressed its intention of having it carried out. Appellant vigorously protested against such action, and it was made perfectly plain by appellant and his wife that they would forego the aid rather than give up the custody of the children, and when it became apparent that their protest was unavailing, appellant moved through his attorney to dismiss the proceeding he had instituted. The motion was denied, the court saying that "the Savages had no place in the planning for these children since there were relatives who had prior right even though Mr. Savage was their legal guardian". Thereupon and "without any trial", so the bill of exceptions recites, the court granted the motion made by the probation officer that the children were declared wards of the court, and they were delivered into the custody of the probation officer to await completion of the arrangements to send them to London.

Shortly after the entry of the judgment appellant applied to this court for a writ of habeas corpus, and after a hearing it was held that from the record then presented it appeared that the juvenile court acquired jurisdiction to hear and determine the proceeding; that its judgment was valid on its face, that on habeas corpus it was beyond the power of this court to review the evidence or any errors or irregularities which were alleged to have occurred before the juvenile court, that the law afforded appellant an adequate remedy for such purpose by way of appeal from the judgment. In re Jones, 34 Cal.App.2d 77, 93 P.2d 185. The cause again came before this court on appellant's application for a writ of mandate to require the settlement of a bill of exceptions; and the writ was granted. Savage v. Superior Court, 36 Cal.App.2d 521, 97 P.2d 990. Meanwhile, under the direction of the probation officer, the children were placed and they have since remained in separate private homes in different localities; and within a few months after the rendition of the judgment the European war started, which has made it impossible to carry out the plan to send them to London.

Disregarding all questions of alleged irregularity or error in the hearing of the proceeding, and conceding for all purposes of the appeal that the trial court acquired jurisdiction to hear and determine the proceeding, we are of the opinion that under the circumstances appearing in the record, appellant, as a matter of legal right, was entitled to a dismissal of the proceeding; and that in any event, treating the reports of the probation officers and the unsworn statements of the interested parties as competent evidence, the controlling finding upon which the judgment rests, namely, that the children were destitute and that there were no means of support through the guardian or the relatives, is contrary to the undisputed facts of the case.

[1, 2] With respect to the question of the right of dismissal, while juvenile proceedings are instituted in the name of the people of the state, it has been definitely held that such proceedings in dealing with cases of dependent children are not of a criminal nature and should not be treated as such. In re Edwards, 99 Cal.App. 541, 278 P. 910, 290 P. 591. Here the proceeding was not instituted by anyone connected with the administration of the juvenile law. It was filed by appellant solely at the instance and under the advice of the probation officer as a means of settling the controversy which had been carried on between Contra Costa county and the city and county of San Francisco over the payment of aid. In this regard it is stated in the report of the probation officer: "The Probation Officer feels that Contra Costa county was not fair in shipping the children to this community without aid, nor was the State Department consistent in their advising Mr. Savage that he could secure State aid only until August, 1939. However, Mr. Savage's application has been presented to the court for decision regarding eligibility of the children to receive aid." And again in the report it is stated that from the very beginning, when the children came to San Francisco in 1937, the probation officer was very reluctant to go ahead with the application for state aid because it was felt that the responsibility belonged to Contra Costa county. Furthermore, throughout the reports that were filed it is expressly stated that the Savages were devoted to the children and that the children were devoted to them; that the children were never in want and were in excellent health, and very happy in their surroundings; that they were Catholic and were being educated and trained in Catholic schools; that the Savages were sincerely desirous of giving the children a permanent home and had stated on several occasions that they would give up the right to aid rather than give up the custody of the children. It is repeatedly so stated in the reports; for example, in one place it is stated: "As Mr. Savage was granted guardianship of the persons and estate of the Jones children, he is very reluctant to have this set aside or have any plan made for the children, other than to have them remain in his home." The report also states in substance and quotes

figures to show that without the aid the Savages were amply able to provide for the children. Therefore, when it became apparent to appellant that it was the custody of the children and not the matter of aid that was being made the issue and that he was about to be deprived of the custody of the children, it was his legal right, in our opinion, to cause a dismissal of the proceeding. We find nothing in the juvenile law which may be construed as preventing him from so doing; being the duly appointed guardian he stood in the same position and was entitled to the same rights as a parent.

An entirely different situation would arise if such a petition as this were filed by someone in authority or by a third party; also in a case where filed by a parent or guardian and there was evidence before the court to show that the dependent child was in fact destitute or that it was being neglected either as to proper maintenance, training or education. But no such claim is here made, and the facts show to the contrary. Respondent calls attention to certain language used in deciding the proceeding in habeas corpus to the effect that since it affirmatively appeared that the juvenile court acquired jurisdiction of the proceeding it was within the discretion of the trial court to deny petitioner's request for permission "to withdraw" his petition. But it is also stated therein that the facts of the case were not at that time before the court and that even if they were they would not be subject to review in a proceeding of that kind; whereas now the record of the entire proceeding, including all factual matters, is now before the court.

[3, 4] What has been said with respect to the matter of dismissal applies with equal force to the question of the sufficiency of the facts to sustain the finding that the children were destitute and without means of support from the guardian or the relatives. As will appear from the record, the underlying reason for the recommendation of the probation officer and the holding of the trial court that the Savages be deprived of the custody of the children was not that the children were destitute or could not be provided for by the Savages, but because of the belief that the children should be with the kinsfolk. In this connection the probation officer stated to the court: "I know there is no question of the kind of care they [the Savages] are giving the children but there is a question as to whether or not the children don't belong to the relatives and whether the relatives cannot provide for them." And in accord therewith the court in addition to the remarks above referred to stated (quoting from the bill of exceptions) "that he felt the children should be sent to their relatives in England and that they should be with their blood kin and that arrangements should be made as soon as possible to send them there and that they were going to England". It would seem, however, that a question of that kind was one to be heard and determined in the probate court in the exercise of its jurisdiction in dealing with guardianship matters and that the process of the juvenile court may not be invoked for such purpose. As above pointed out, the contested issue as to whether the paternal relatives were entitled to the custody of the children in preference to the Savages was determined in the guardianship proceeding in Contra Costa county, and such adjudication has never been set aside. It may be conceded that even in that situation the jurisdiction of the juvenile court may be invoked where there is destitution and neglect, but as already shown there is no factual basis for such a finding in the present proceeding.

For the reasons and upon the grounds stated it is ordered that the judgment be reversed with instructions to grant appellant's motion to dismiss the proceeding.

PETERS, Presiding Justice (concurring).

I concur with the reasoning and conclusions contained in the opinion prepared by Justice KNIGHT.

We are faced in this case with a situation where the Juvenile Court has seen fit to take the custody of these two children from their lawfully appointed guardian in a most informal proceeding "without any trial", and to place their custody in the probation officer, for the sole purpose of sending the children to England, without any showing of unfitness of the guardian or inability to support the children, and over the protests of the guardian that he desired to dismiss his petition, and over the protests of the children that they desired to remain with the guardian. Although it may be conceded that the Juvenile Court may thus modify the decree of the Probate Court appointing a guardian, under no theory has the Juvenile Court the power to thus collaterally attack and set aside the decree of the

Probate Court in the absence of some showing so as to bring the case within the provisions of section 700 of the Welfare and Institutions Code, St.1937, p. 1030.

There are certain factors mentioned but not emphasized in the opinion of Justice KNIGHT that, in my opinion, conclusively answer every contention contained in the dissenting opinion of Justice WARD.

1. In the first place, the record conclusively demonstrates that the sole reason why the trial court determined to take the custody of these children from their lawfully appointed and acting guardian was that, in his opinion, the children would be better off with their paternal relatives in England. The bill of exceptions recites that near the close of the informal proceedings in which the order here appealed from was made "Judge Dunne stated that he felt the children should be sent to their relatives in England and that they should be with their blood kin and that arrangements should be made as soon as possible to send them there and that they were going to England". The matter was then continued for the sole purpose of awaiting the report of the American Consul in London on the financial ability of the relatives there to support the children. Thereafter, the guardian moved to dismiss the petition. The record states: "Judge Dunne then stated that the matter had been gone into and that there were relatives who had come forward offering the children a home and that the motion should be denied, and that the Savages had no place in the planning for these children since there were relatives who had a prior right even though Mr. Savage was the legal guardian." The probation officer then moved that the children be declared wards of the Juvenile Court "committed to the care of the Chief Probation officer, and held for placement with relatives".

It is quite obvious from a reading of the record, and no other inference or conclusion is possible, that the trial court was of the opinion that the children would be better off in England and that it was for this reason alone that their custody was taken from their guardian. The Juvenile Court has no jurisdiction to modify the decree of the Probate Court for such a reason. Section 700 of the Welfare and Institutions Code, under which this proceeding was instituted, contains no such ground for exercising jurisdiction. That might well be a factor in a contest to modify the guardianship decree but it has no place in this Juvenile Court proceeding.

Moreover, even if such a factor were relevant in this proceeding, it is now impossible, because of the present war, to send the children to England. At the oral argument it was admitted by counsel for the respondent (although he contended such facts should not be considered) that since the entry of this decree in March of 1939 the children have been placed in foster homes, have been separated from each other, and have frequently expressed a desire to return to the Savages. Certainly it was never contemplated by the trial court at the time of this hearing that these children should be separated and placed in foster homes. As already pointed out, the factor that motivated the trial court was that the children would be better off in England with the paternal relatives. It having become impossible to carry out the decree as intended, the decree must fall.

2. In the second place, there is no evidence in the record that the Savages are unfit to have custody of these children, or unable to support them. Quite to the contrary, the evidence, without conflict, shows that they have given these children a fine home and loving care. The children obviously love the Savages and want to be with them. The dissenting opinion makes much of the fact that Mr. Savage verified a petition alleging that the children were destitute. That is true. But it is also true that the record, without conflict, shows the circumstances under which that petition was filed. Mr. Savage had discussed many times with the probation officer, and other employees of the Juvenile Court, the question of securing state and county aid for the children. He had also discussed the matter with the County Welfare Board of San Francisco. The San Francisco authorities quite obviously felt that the Contra Costa authorities and the State Welfare Department had acted improperly in the matter. There is not one word of testimony that Mr. Savage ever contemplated putting in issue the question of the custody of the children. The sole question involved was state and county aid. He was told that to secure such aid he must sign certain petitions. These were handed to him already filled in with typewriting. He believed, and reasonably so, that the only question involved was whether he was entitled to state and county aid. Apparently the Juvenile Court authorities mistakenly

believed that aid could be granted only to wards of the court. When the hearing developed into a hearing relative to custody, Savage immediately sought to dismiss that petition. This he should have been permitted to do. The evidence demonstrates that the petition was filed as a result of mistake and error. Although Savage had stated in the petition that the children were destitute, before the end of the hearing both he and his wife stated that they wanted the children regardless of aid. That being so, there is no evidence to support the finding of destitution.

The dissenting opinion quotes almost in its entirety the prior opinion of this court in the habeas corpus proceeding. That proceeding involved the pleadings and not the evidence. The evidence could not properly be, and was not, considered in that proceeding. None of the facts above-mentioned, based on the evidence, were involved in that proceeding. For these reasons I concur in the order contained in Justice KNIGHT'S opinion.

WARD, Justice (dissenting).

I dissent. The majority opinion directs a reversal of the judgment with instructions to grant appellant's motion to dismiss. The conclusion is based upon two grounds: that as a matter of legal right appellant was entitled to a dismissal, and that the finding that the children were destitute is contrary to undisputed facts.

It is not held that the motion to dismiss should be granted as a matter of law, except as stated, "that under the circumstances appearing in the record, appellant, as a matter of legal right was entitled to a dismissal". The only "circumstances" referred to in the opinion are the record itself and the inferences drawn from certain acts, statements and reports. Considering the right of dismissal, it must be borne in mind that the petition to declare the children wards of the juvenile court had been filed and the matter had proceeded by way of several hearings before appellant's attorney, who had been present at such hearings, presented a motion to dismiss the petition. The record in fact shows that no suggestion of dismissal was made until the court indicated that the custody of the children would not be given appellant.

In a hearing on habeas corpus upon this same matter, it was determined that "In thus disposing of the proceeding the juvenile court conformed to all procedural requirements of the juvenile court law; and admittedly the judgment itself is in legal form", also that "the record reveals no ground upon which it may be held that petitioner was deprived of any legal right granted by the juvenile law; and since it affirmatively appears that the court acquired jurisdiction of the proceeding and of the parties in conformity with the requirements of the statute, it was entirely within the discretion of the court to deny petitioner's request for permission to withdraw his petition." In re Jones, 34 Cal. App.2d 77, 81, 83, 93 P.2d 185, 188.

On the question presented—custody of the children—the habeas corpus decision In re Jones, supra, is res judicata on the matter covered by the above quotation (In re Holt, 34 Cal.App. 290, 167 P. 184; In re Stratton, 133 Cal.App. 738, 24 P.2d 832) so long as the facts, the welfare of the child and the rights of all parties are the same (In re Gille, 65 Cal.App. 617, 224 P. 784), as they are in this proceeding.

In re Jones, supra, 34 Cal.App.2d at pages 78-79, 80, 93 P.2d at page 186, contains the following lengthy recital of the facts:

"Two hearings were had before the juvenile court; petitioner and his attorney were personally present at both, and at the final hearing petitioner requested permission to withdraw the petition. His request was denied, and at the conclusion of the hearing the court found that the status of the children fell within the provisions of subdivision c of section 700 of the Welfare and Institutions Code, St.1937, p. 1030, and accordingly adjudged them to be wards of the court and committed them to the custody of the probation officer. Shortly afterwards they were placed temporarily in private homes, it being the intention of the court ultimately, as expressed at the final hearing, to award permanent custody to relatives in England.

* * * * * *

"The writ of habeas corpus was issued upon the strength of certain allegations in the petition to the effect that no evidence whatever was taken at any time 'in behalf of any person'; that petitioner sought to introduce testimony at the final hearing of the matter but was not permitted to do so; that consequently the judgment is without evidentiary support. But the record produced at the hearing in support of the return to the writ clearly negatives such allegations and shows a substantial compliance with all necessary jurisdictional requirements. It appears therefrom that when petitioner made application to have the children adjudged wards of the court the probation officer, in conformity with the provisions of sections 638 and 639 of the Welfare and Institutions Code St.1937, pp. 1026, 1027, caused a full and complete investigation to be made of the case, including an inquiry into the antecedents, character, family history and environment of said children, and made a written report thereof to the judge of the juvenile court. This written report was presented to the court in accordance with section 640 of said code at the first hearing of the matter, held on January 25, 1939, and was at all times open to the inspection of petitioner and his attorney. Present at said hearing were Miss Leete, the children, petitioner and his wife and their attorney, and Mrs. Oliver. * * * the court interrogated all interested parties, especially as to the family history, the chief question at issue being whether it would be to the best interests of the children to place them with their relatives in England as requested by Mrs. Oliver, or to allow them to remain with petitioner and his wife."

Regarding a hearing on a supplemental report, the same opinion states (34 Cal. App.2d at page 81, 93 P.2d at page 187): "* * * that petitioner had informed the probation officer it would not be possible for him to take care of the children without state and county aid * * *. Thereupon, and after the court had expressed the conviction that the children should be reared by their kinsfolk, petitioner asked permission to withdraw his petition; but the judge replied that inasmuch as the relatives had come forward and offered the children a permanent home, he felt that petitioner's request to withdraw the petition should be denied."

It is further stated in 34 Cal.App.2d at page 82, 93 P.2d at page 188: "It is true the hearing was not conducted with all the strict formality of a criminal proceeding; but it was not necessary to do so because as frequently pointed out by the courts, proceedings of the juvenile court in dealing with cases of dependent children are not of a criminal nature. In re Edwards, 99 Cal. App. 541, 278 P. 910, 290 P. 591, citing earlier cases. Such court operates under special powers, in conformity with procedure prescribed therefor by the juvenile court law, which authorize the consideration by the juvenile court, in cases of this kind, of the written reports and recommendations of the probation officer, which under said law are open to inspection of the interested parties. Secs. 638, 639 and 640, Welf. & Inst. Code. In other words, from its very nature and because of necessary qualifications for doing the work for which it is intended, the juvenile court was not designed as a trial court in the ordinary sense; and its method of operation is very different from the one governing in the trial of criminal cases, mainly because technicalities and formalities are largely eliminated." However, it was also stated in the opinion on the habeas corpus proceeding that there was an adequate remedy on appeal. It may be concluded, therefore, that if any reason appears to hold that "appellant, as a matter of legal right, was entitled to a dismissal", it must be found in the inferences that may be drawn from the written reports of the probation officers and the evidence and statements of all parties at the several informal hearings.

The majority opinion seems to hold that because the judge of the juvenile court stated "he felt the children should be sent to their relatives in England", the matter was one to be heard in probate court. The children have not been sent to England, but if that contingency should arise and it should then be determined that such is the proper course to pursue, having in mind the welfare of the children, there will be time enough to invoke the jurisdiction of the probate court to vacate the order appointing appellant as guardian, which appointment should play but a small part in the consideration of this appeal. The facts in relation thereto are set forth in the opinion In re Jones, supra, wherein it was held that the juvenile court in San Francisco had obtained jurisdiction in the present matter.

The majority opinion also holds that, irrespective of the guardianship proceeding in Contra Costa county, and that the adjudication thereon has never been set aside, "It may be conceded that even in that situation the jurisdiction of the juvenile court may be invoked where there is destitution and neglect, but as already shown there is no factual basis for such a finding in the present proceeding." There was no direct finding of neglect. It was not an issue except in so far as it may be presumed as a possibility under the sworn allegation of the petition "that there is no means of support through himself [appellant] or relatives".

The appellant as guardian, appearing before the juvenile court on a petition to have that court assume custody of the children, did not stand in a more favorable light than a parent. When a child becomes a charge upon the state, the state, with due regard to the child's welfare, should determine the selection of the child's home. This duty has been imposed upon the judge of the juvenile court by statute. "* * * from its very nature and because of necessary qualifications for doing the work for which it is intended" (In re Jones, supra, 34 Cal.App.2d at page 82, 93 P.2d at page 188), the social problems involved should be left to the sound discretion of the juvenile court.

The majority opinion holds that there is "nothing in the juvenile law which may be construed as preventing" appellant from causing a dismissal of the proceeding. There is nothing in the law which requires such action by the court; the matter is purely one of discretion.

The majority opinion does not hold that the judgment was rendered "without any trial", but mention is made that the bill of exceptions so recites. If any question arises upon this point, there is a proper remedy for correcting the record. Certainly it was an inadvertence on the part of the trial judge to sign the document in which some one had inserted that statement. Such a statement is in conflict with the decision of In re Jones, supra, which is the law of this case.

The majority opinion mentions that under the direction of the probation officer the children "have since remained in separate private homes in different localities". I find no mention of this in the transcript on appeal. If true, it must have been upon order made after judgment and should play no part in the determination of this appeal. However, its mention in the majority opinion requires comment. Whatever the reason, I am willing to presume, until the record shows to the contrary, that it is sound and good. I am willing to assume that the probation officers, who specialize in child welfare problems, are better informed on matters of this kind than the average layman. It may have been deemed advisable to separate these children for the time being; it may have been thought to their best interests, considering the past bitter prejudices of their mother, as well as appellant with whom they were residing, for their father's family, that their further exchange of ideas in that regard, as well as perhaps the mulling over of the details of the murder of their mother, was an unhealthy condition. It may have been thought there would be less antagonism toward their father's people if the children were separated for a time. According to the record on appeal "After Mr. Jones' death, Mr. Savage continued as a very close friend of Mrs. Jones, and both he and his wife were in close touch with the family when Mrs. Jones met her death. They immediately went to Contra Costa county and took the children with the understanding that Contra Costa county would continue aid for the children in the Savage home. There were two children born to Mr. and Mrs. Jones, Dorothy, born January, 1925, in Oakland, and Bernard, born August 28, 1928, in Richmond. The children had lived with their mother up to the time of her death. At present they are attending St. Peter's School in San Francisco and have made a very good adjustment in the home of Mr. and Mrs. Savage. There is no question but that the friction between the family of their father and that of their mother has left quite an impression on them, in that we believe that Mrs. Jones constantly prejudiced the children against their father's people and Mrs. Savage has added to this feeling until at present time both children feel that they do not care to go to any of their relatives." The only relative on the father's side living in California was on a trip to England at the time of the death of the mother of the children and she is able and willing to support them; also they should be eligible to part of the paternal grandmother's estate in Ireland upon her death. Upon the return of this relative to this country, she sought to be appointed guardian. The record shows: "She evidently felt that the matter was not worth fighting over after the children had been turned over to Mr. and Mrs. Savage, and she felt that the children had been so prejudiced against her that it would be difficult for them to adjust in her home. However, after Mr. Savage obtained guardianship she started corresponding with this office and definitely stated she would be willing to give the children a home or would take them to Ireland where their relatives could help provide for them." This matter is mentioned only because of the reference in the majority opinion to the separation of the children, also to indicate the social problem presented to the juvenile judge.

The main question considered in the majority opinion—the sufficiency of the record—is a factual one; namely, are there any inferences that may be drawn from the facts presented to substantiate the finding of the trial court?

The evidence shows appellant took an oath that the children were destitute. Was that in fact true, or was the oath false? The record discloses that while no duty devolved upon appellant to support the children, he could have done so. The record also shows, and the majority opinion holds, that in filing the petition alleging destitution his "only purpose" was to obtain state and county aid. The motion to dismiss was not based upon the fact that appellant had not read or did not know the contents of the petition he had signed, but that he "was not aware of its legal effect". Appellant was represented at the various hearings on this matter by able counsel.

The judgment declaring the children wards of the juvenile court contains the following: "The above-named minor children Dorothy Jones and Bernard Jones having been regularly brought before the above entitled court on the 29th day of March, 1939, upon the verified petition of John Savage, their guardian; said children being present and duly represented in court and the court having fully examined and considered all of the evidence presented, both in support of, and in opposition to said petition and all and singular facts and matters appertaining thereto having been fully considered by the court, the court now makes its findings of facts as follows:" The court found that "John Savage, the guardian of said children not able to pay toward the cost of the support and maintenance of said children" and that "all of the statements of fact contained in said petition are true and supported by competent evidence". In the petition sworn to by appellant it was claimed that "the children are destitute". Referring to a report of the juvenile court officer, the majority opinion recites "that without the aid the Savages were amply able to provide for the children". It seems that the conclusion in the majority opinion that the children were not destitute is based upon this report. There was no legal or moral obligation resting upon appellant to support the children. In the sense that the children were at least subject to the charity of appellant, they were destitute. The estate of their mother, with the exception of a small amount remaining under the control of appellant, has been used in part for the expenses of the children. The girl "was left some insurance and a small savings account by her mother, amounting to about $1,400. After an elaborate funeral, which cost around $600, and various attorneys' fees which were paid out of the insurance, there is now in this fund approximately $250". These facts, together with the sworn statement of appellant that the children were destitute, his statement appearing in the record that "he cannot care for the Jones children without State and County aid for their support", also that portion of the report in which it appears that he was unable to support the children entirely and that he claimed that "they are eligible to State and County aid regardless of what his income is and what their relatives may be able to do" were sufficient upon which to base the finding of destitution, and in my judgment negatives the statement in the majority opinion that "there is no factual basis for such a finding in the present proceeding". The probation officer "shall make such investigation as he deems necessary". Welfare and Institutions Code, sec. 721, St.1937, p. 1034. At the times "petitioner with said children appeared in open court", no objections were offered to the filing or the consideration of the reports or statements of the probation officers. The court in its discretion had a right to privately (Welfare and Institutions Code, sec. 733, St.1937, p. 1037) consider the future, to determine whether the guardian should exercise any control over the ward, to "define the extent of control permitted" and whether the guardian is capable "of providing * * * proper maintenance, training, and education for the person" (Welfare and Institutions Code, sec. 739, St.1937, p. 1038) "with due regard to the rights and claims of the parents of such person, and to any and all ties of blood or affection, but with the dominant purpose of serving the best interests of such person". (Welfare and Institutions Code, sec. 784, St.1937, p. 1043.)

The whole controversy being factual, from which conflicting inferences may be drawn, I am of the opinion that this court is bound by the judgment.

Since preparation of the above dissent, Presiding Justice PETERS has written an opinion concurring in the views expressed by Justice KNIGHT. In addition, the concurring opinion appears to be a reply to my dissent relative to factual matters. My only comment is that "its [the evidence] weight was for the juvenile court, and not for us". In re Stein, 86 Cal.App. 226, 229, 260 P. 566, 568.

44 Cal.App.2d 688

STATE FINANCE CO. v. SMITH.

Civ. 11464.

District Court of Appeal, First District, Division 1, California.

May 7, 1941.

1. Chattel mortgages 🔑79

Where repossessed truck belonging to finance company was sold by dealer to truck operator who executed note and chattel mortgage covering repossessed truck and another truck which operator already owned, evidence that dealer impliedly represented that repossessed truck was usable, and sold the truck for over $300, though he knew it was fit only for junk, sustained finding that note and mortgage were executed upon false representations which would preclude finance company from recovering deficiency judgment.

2. Contracts 🔑53, 99(3)

Inadequacy of consideration alone is no defense to the enforcement of a contract voluntarily made, but inadequacy of consideration which is so gross as to shock the conscience and common sense of all men may amount both at law and in equity to proof of fraud, oppression, and undue influence.

3. Principal and agent 🔑23(1)

A provision in loan agreement by which truck operator purported to appoint dealer his agent to negotiate for loan from finance company was merely evidence of the relationship between the parties, and would not bar truck operator from showing that in fact dealer was agent of the finance company.

4. Principal and agent 🔑23(5)

Where repossessed truck belonging to finance company was sold to truck operator by dealer who had guaranteed payment of balance due finance company from defaulting purchaser, evidence that transaction involved a sale of legal title by finance company and sale of registered title by dealer, supported implied finding that dealer was acting as "agent" of finance company in sense which would make fraudulent representations of dealer imputable to finance company, notwithstanding provision in loan agreement by which truck operator purported to appoint dealer as his agent to negotiate loan.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent".

5. Chattel mortgages 🔑79

Where repossessed truck belonging to finance company was sold by dealer to truck operator who executed note and chattel mortgage covering repossessed truck and another truck which he already owned, and finance company thereafter repossessed both trucks and sold them, but truck operator resisted recovery of deficiency judgment on ground that note and mortgage were procured by fraudulent representations of finance company, evidence established that truck operator had relied on misrepresentation of dealer regarding condition of purchased truck.

6. Chattel mortgages 🔑264

Where repossessed truck belonging to finance company was sold by dealer to truck operator who executed note and chattel mortgage covering repossessed truck and another truck which he already owned, but execution of note and mortgage was procured by fraud regarding condition of truck, and for an inadequate consideration, finance company was barred from recovering deficiency judgment after it had repossessed both trucks.

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by the State Finance Company against Floyd N. Smith to recover a deficiency judgment. Judgment for defendant, and plaintiff appeals.

Affirmed.

Carl H. Allen, of San Francisco, for appellant.

Harry L. Noland, of Salinas, and Murray Draper, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment for defendant in an action brought to recover a deficiency judgment in the amount of $251.38. Defendant admitted executing a promissory note in favor of plaintiff in the amount of $468.72. The note was secured by a chattel mortgage on two trucks, one a Reo and one a Dodge. After repossessing these trucks and selling them there was a balance of $251.38 owing plaintiff, which was reduced by the sum of $40.79 during trial. The trial court found that at the time defendant executed the note and mortgage he received no consideration; that the note and mortgage were given by defendant without consideration; that defendant executed the note and mortgage upon the false and fraudulent representations of plaintiff.

One Pugh, who died prior to trial, was a dealer in used cars. The plaintiff finance company was the legal owner and Pugh the registered owner of a Reo truck. This truck had been repossessed by the plaintiff and had been placed on Pugh's lot for resale. Pugh had guaranteed payment of the balance due the finance company from the defaulting purchaser. Defendant was a truck operator. He owned a Dodge truck but was unable to operate it because he was unable to pay the license and taxes due on it, totaling over $70. He discussed the matter with Pugh, and the latter suggested that defendant buy the Reo truck, and in addition, borrow enough from the plaintiff to pay the license and taxes due on the Dodge. Defendant testified that in this conversation Pugh stated that he would take the matter up with Murphy, credit manager of plaintiff, and see if the transaction could be worked out; that two or three days later Pugh told him he had a letter from Murphy; that the letter stated "something to the effect they would sell me the truck for the $50.00 down but to put both trucks on the contract". As a result of these negotiations defendant executed the note in the sum of $468.72 on January 9, 1937. The note provided for installment payments monthly including interest at the rate of 12 per cent. Although the note was for $468.72, defendant actually received from plaintiff but $124 in cash. According to a statement rendered to defendant, the computations are as follows:

$124.00	—advanced to defendant in cash
40.00	—insurance premium
42.72	—interest deducted in advance
$ 10.89	—expenses
251.11	—apparently for purchase price of Reo
$468.72	

Of the $124 received by defendant, he immediately paid Pugh $50 on the Reo and used the balance to pay the license and taxes on the Dodge. The result is that he actually paid $301.11 for the Reo. ($251.11 plus $50.) To secure the promissory note defendant gave a chattel mortgage on both the Reo and the Dodge. The evidence shows that the Reo truck was valueless except for junk. It was towed to defendant's residence. It could not be operated because it had no usable tires and the engine could not be started. The evidence shows that prior to the sale to defendant Pugh suggested to a Mr. D. Dockery that the latter operate the truck. Dockery testified that he examined the truck "and it was in such bad shape I threw it back together and would not fool with it"; that Pugh told him "to throw it back together so we patched it up". The evidence also shows that the cylinder head was cracked; that the pistons were full of water, and that the transmission was defective and had been welded to hold it together.

After signing the contract defendant made about $80 in installment payments and then defaulted. About June of 1937 plaintiff repossessed both trucks and sold them, receiving $225 for the Dodge and $25 for the Reo, the latter being sold as junk to a wrecking company. It is for the balance due on the note that this action was brought.

We are faced with a situation where defendant actually received $74 from the transaction and a practically worthless truck. Plaintiff advanced $124 in cash to defendant, of which $50 was paid to Pugh. Plaintiff has received on the note some $80 in payments, plus $250 on the sale of the two trucks. Plaintiff now contends that it is entitled to a deficiency judgment of over $200. Its position is untenable.

[1, 2] As already pointed out, the trial court found that defendant received "no consideration" for the note and mortgage and that they were given by defendant to plaintiff "without any consideration". That finding is plainly unsupported by the evidence. Without regard for the Reo truck, defendant did receive from plaintiff the sum of $124 in cash. However, the court also found that the note and mortgage were

executed upon the false and fraudulent representations of plaintiff. This finding is supported by the evidence. Pugh represented that usable tires would be placed on the truck. This promise was never performed and the circumstances demonstrate that when it was made there was no intent to perform it. Moreover, Pugh impliedly represented that the truck was usable. As a matter of fact, the truck was not only not in a usable condition, but Pugh knew that it was fit only for junk. Nevertheless, he sold the truck for over $300. There is another factor which tends to show fraud. Although inadequacy of consideration alone is no defense to the enforcement of a contract voluntarily made (Whelan v. Swain, 132 Cal. 389, 64 P. 560; Tatterson v. Kehrlein, 88 Cal.App. 34, 263 P. 285), it is also true that gross inadequacy of consideration is some evidence of fraud. The rule, supported by cases from many states, is stated as follows in 17 C.J.S., Contracts, page 475, § 128: "Where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount both at law and in equity to proof of fraud, oppression and undue influence." This rule was cited with approval and followed in Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220. The rule is clearly applicable to the facts of this case.

[3, 4] Appellant urges, however, that, conceding the evidence shows that Pugh made fraudulent representations, there is no evidence to show that Pugh was the agent of plaintiff. This contention is based upon the fact that as part of the loan agreement defendant signed a document purporting to appoint Pugh his agent to negotiate the loan. This document is dated January 9, 1937, the same date as the note and chattel mortgage. It recites that defendant employs Pugh as his broker to arrange the loan; that Pugh is appointed agent of defendant to "collect" the loan from the plaintiff; that it is distinctly understood that Pugh is the agent of defendant "and shall not at any time be the agent of the lender"; that Pugh is acting "solely as the agent of" defendant and "is not acting for the lender in any manner". When this agreement was read into the record the trial court stated, "It all goes to show there are tricks in all trades * * *".

A reading of this instrument, and a consideration of the surrounding circumstances, demonstrates that the agreement was drawn with the object of protecting plaintiff rather than for the purpose of describing the true relationship. If the relationship between plaintiff and Pugh was in fact one of agency, the provisions of the above-described agreement between Pugh and defendant would not bar defendant from showing the true fact. The so-called agreement is merely evidence of the relationship between the parties, it is not conclusive on that point. As opposed to the terms of this agreement, the evidence shows that plaintiff was the legal owner of the Reo truck, and that Pugh was the registered owner. The truck had been repossessed by plaintiff for default of a prior purchaser on his obligation to plaintiff, which had been guaranteed by Pugh. Defendant testified that when Pugh suggested he buy the Reo truck, Pugh told him that "The State Finance has eleven more trucks down there"; that "I will take it up with Murphy" (credit manager of plaintiff); that two or three days later Pugh showed him a letter from Murphy which stated that "they" would sell him the truck for $50 down, but both the Reo and the Dodge would have to be put on the contract. The evidence also shows that plaintiff sold its legal title to the Reo truck to defendant for $251.11, and that Pugh sold his registered title for $50. The evidence is clearly sufficient to support the implied finding that plaintiff and Pugh were jointly interested in the sale of the repossessed truck to defendant, and that in negotiating that sale Pugh was acting as the agent of plaintiff. The trial court obviously believed that the agreement above referred to was a mere subterfuge to protect plaintiff. The evidence shows that this belief was justified.

[5] Plaintiff also urges that there is no evidence that defendant relied on any fraud or misrepresentation of Pugh, inasmuch as the evidence shows that defendant inspected the truck. Defendant, in response to a question as to whether he had inspected the truck, stated "No, I didn't". He also testified that in checking a used truck, "You can't check anything without checking it piece by piece. All you can do is to go down to a man you figure is reliable and ask if it is O. K. and you have his word for it." Plaintiff also relies on the fact that the application for the loan attached to the agreement signed by Pugh and defendant lists the various major parts of the truck, and that opposite each named part are the words "New—Good—Fair—

Old—Damaged". A check mark in the "Good" column appears as to each part. Defendant testified that he did not make those check marks, and that he did not see them on the agreement when he signed it. The evidence supports the inference that they were added after the agreement was signed.

[6] The transaction disclosed by the record is an inequitable and unconscionable one. The law would indeed be impotent if it was powerless to grant relief from such a transaction. Fortunately, the power is not lacking to do justice in this case.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

44 Cal.App.2d 641

SIEMENS et al. v. MECONI.

Civ. 11669.

District Court of Appeal, First District, Division 2, California.

May 5, 1941.

1. Mechanics' liens 🔑277(2)

One seeking to foreclose mechanic's lien was required under statute to plead and prove that he was a duly licensed contractor during performance of the contract, which was basis for his mechanic's lien. Gen.Laws 1937, Act 1660, § 12.

2. Appeal and error 🔑1178(6)

In action to quiet title, wherein defendant set up cross-action to foreclose mechanic's lien, amount of defendant's claim was small, and objection to judgment for defendant on counterclaim that defendant failed to prove that he was a duly licensed contractor was raised for first time on appeal appellate court would order judgment reversed and cause remanded for limited purpose of permitting defendant to amend cross-complaint, the taking of evidence upon existence of the required license, and, if evidence was found sufficient to meet the statute, the modification of the findings in such respect to support a judgment in accord with original judgment. Gen.Laws 1937, Act 1660, § 12.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by John Siemens and another against Joseph Meconi to quiet title to certain real property, wherein defendant filed a cross-complaint setting up a cause of action to foreclose a mechanic's lien upon the property. From a judgment in favor of defendant upon his cross-complaint, the plaintiffs appeal.

Reversed, and remanded for purpose of permitting amendment of cross-complaint and taking of evidence.

Joseph E. Isaacs and Alan H. Critcher, both of San Francisco, for appellants.

Larrouy & Macdonald, of Redwood City, for respondent.

NOURSE, Presiding Justice.

Plaintiffs sued to quiet title to certain real property; the defendant filed an answer and cross-complaint setting up a cause of action to foreclose a mechanic's lien upon the property; the defendant had judgment upon the cross-complaint for $223.40 with interest from date of the judgment.

[1] The sole ground urged on the appeal from the judgment is that the defendant failed to plead and prove that he was a duly licensed contractor during the performance of the contract. Section 12 of the Contractor's License Law, Deering General Laws, Act 1660, as it read when the action was commenced and tried, provided that pleading and proof of such fact was essential to the maintenance of any action by a contractor for the collection of compensation for the performance of any work for which a license was required under the act. The action here is one of that nature and the pleadings and proof are deficient to that extent.

[2] Since the cause is one in equity the mutual rights of the respective parties should be given consideration. The cross-complaint alleges that work under the contract was completed in November, 1936; the cross-complaint was filed in March, 1937; the judgment was entered May 5, 1938; the appeal was taken to the Supreme Court on June 22, 1938; appellants' brief was filed in that court on September 16, 1938, and the cause was transferred to this court for hearing and decision on February 10, 1941. The amount involved in the litigation is small, and, though the objection raised on the appeal is legally sound, the

whole matter could have been cured in the trial court without the useless delay and expense which has been occasioned by the appeal.

For these reasons it is ordered that the judgment be reversed and the cause remanded to the trial court for the limited purpose of permitting respondent to amend the cross-complaint, the taking of evidence upon the existence of the required license, and, if the evidence is found sufficient to meet the statute, the modification of the findings in that respect to support a judgment in accord with the original judgment with interest from that date as therein provided.

Each party will bear his own costs on this appeal.

The judgment is reversed subject to the limitations hereinabove stated.

We concur: STURTEVANT, J.; SPENCE, J.

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44 Cal.App.2d 702

GALLI v. SCHLOBOHM.

Civ. 11682.

District Court of Appeal, First District, Division 2, California.

May 7, 1941.

1. Frauds, statute of 🔑118(1)
Specific performance 🔑64

Where defendant made a written offer to buy a market from third parties and agreed to sublease vegetable department to plaintiff for two years, as desired by third parties, and later oral negotiations resulted in execution of lease and contract under which defendant bought market and took possession thereof, and terms of offer and final contract were nearly the same, transaction was not within the statute of frauds and plaintiff, as a "third party beneficiary", could demand specific performance of contract to sublease.

See Words and Phrases, Permanent Edition, for all other definitions of "Third Party Beneficiary".

2. Estoppel 🔑93(1)

Where defendant, both before and after the leasing of a market to defendant under agreement between defendant and third parties whereby defendant was to sublease vegetable department to plaintiff for two years at an agreed monthly rental, led plaintiff to believe that defendant would give plaintiff a sublease in accordance with agreement, and defendant permitted plaintiff to occupy premises at agreed rental for approximately one year and accepted stipulated rental each month without notice to plaintiff that defendant intended to repudiate agreement, and plaintiff expended large sums of money in improvement of business, defendant was "estopped" from denying that he had agreed to sublease to plaintiff. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Suit by Angelo Galli against Henry Schlobohm for an injunction and specific performance of a written contract wherein defendant agreed to execute a written lease for certain premises. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hilary H. Crawford, of San Francisco, for appellant.

Albert Picard, of San Francisco (Francis McCarty, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

The plaintiff sued for an injunction and for the specific performance of a written contract made by other parties wherein the defendant agreed to execute a written lease of two years for certain premises. The plaintiff had judgment upon findings that all the allegations of his complaint were true and that all the allegations of the answer were untrue.

One Stelling owned the real property upon which the Serve-All Market was operated by von der Mehden under a long-term lease. The plaintiff operated a vegetable stand in the market under a lease from von der Mehden. The latter went through bankruptcy, and the sum of $500 which he held from the plaintiff as security for his sublease was forfeited by the discharge in bankruptcy. The Serve-All Market was sold by the Board of Trade and became the property of the New Fillmore Grocery Company. Other facts material to the inquiry on this appeal are fairly and truly stated in respondent's brief from which we quote: "Appellant Schlobohm desired to buy said market from the New Fillmore Grocery Company and to obtain the cancellation of the existing lease and a new lease from Stelling to himself. Stelling, however, refused to enter into any agreement unless it was acceptable to the New Fillmore Grocery Company. The New Fillmore Grocery Company was willing to sell its business to Schlobohm, to obtain a cancellation of its existing lease with Stelling, and to induce Stelling to execute a new lease from himself to Schlobohm if Schlobohm would agree to sublease the vegetable department to respondent Galli for two years at a rental of one hundred forty (140) dollars a month, and if Schlobohm would further agree to sublease the butcher department of said market to one George Puccini for five (5) years at a monthly rental of one hundred twenty-five (125) dollars. If Schlobohm would not agree to execute said subleases, the New Fillmore Grocery Company would not sell its business to him nor would it induce Stelling to execute a new lease to him in the place and stead of the existing lease. This was made clear to Schlobohm. As a result Schlobohm sent a letter to the New Fillmore Grocery Company offering to buy the business providing he could get a lease from Stelling, and also agreeing to sublease to Puccini and to respondent Galli on the terms hereinbefore set forth. The letter held the offer open to and including June 21, 1937. The time for acceptance was thereafter in writing extended to July 22, 1937. The offer was accepted on July 15, 1937. Negotiations then proceeded back and forth between the parties involved for a period of months until finally all parties agreed to certain terms. These terms included the promise on the part of Schlobohm as evidenced by the letter of May 24, 1937, to the effect that he would make the sublease to respondent Galli. It was understood by all parties that this promise as evidenced by such writing was one of the terms of the agreement, and that subsequent to the payment of the purchase price by appellant, the giving of the bill of sale to appellant by the New Fillmore Grocery Company on cancellation of the lease between Stelling and the New Fillmore Grocery Company, and the execution of a new lease from Stelling to appellant, appellant would execute a written lease to respondent of the vegetable stand for two years at one hundred forty (140) dollars per month. Thereafter the contract was fully executed by the New Fillmore Grocery Company and Stelling. Appellant, however, did not execute a written lease to respondent on the agreed terms or at all. He did, however, permit respondent to retain the vegetable department and accepted from respondent the monthly rentals of one hundred forty (140) dollars per month. Appellant then on the 25th day of April, 1938, notified respondent that he was terminating his month to month tenancy. Appellant subsequently on the 17th day of May, 1938, notified respondent that on and after the 10th day of July, 1938, respondent's rent for the vegetable stand would be four hundred (400) dollars per month."

Appellant does not contravert the respondent's right to sue as the third party for whose benefit the contract was executed. His contention is that the written offer made by him on May 24, 1937, was not accepted in writing, that the final contract was consummated on a different basis from that contained in the written proposal, and that the agreement for the sale of the market was part oral and the entire contract therefore void under the statute of frauds.

The written offer of May 24, 1937, was fully executed through the written lease of August 2, 1937, under which the appellant took possession of the premises and still holds. The evidence without conflict disclosed that a primary consideration of that lease was the written undertaking contained in appellant's original offer that he would permit respondent to remain in the premises and would give him a lease for that purpose.

There was no material difference between the terms of the written proposal and of the final contract. The stipulations covering the terms of rental and the security to be tendered were mere details common to all such transactions and had no bearing upon appellant's obligations to respondent.

[1] The question whether a contract of this nature which is partly oral and partly in writing is void under the statute of frauds does not come into the case. Respondent relies upon the written proposal of May 24, 1937. He does not rely upon any oral negotiations preceding the execution of the lease of August 2, 1937. The

sufficiency of this proposal to take the case out of the statute of frauds is fully sustained in Derrick v. C. W. R. Ford Co., 27 Cal.App. 456, 150 P. 396.

[2] But there is an equitable principle which governs the decision, and that is found in subdivision 3 of section 1962 of the Code of Civil Procedure declaring that one is estopped to deny that which he has deliberately led another to believe to be true. The admitted facts are that at all times, both before and after the execution of the lease to appellant, he led the respondent to believe that a sublease would be given him according to the terms of the original agreement—that he was expressly told that the lease would not be given to him unless he agreed to abide by those terms. He permitted respondent to occupy the premises at the agreed rental from May 24, 1937, until April 25, 1938, accepting the stipulated rental each month, without any notice to respondent that he intended to repudiate his agreement. That respondent "has expended large sums of money in the improvement of the business therein and has operated and conducted said business to the benefit of said plaintiff and said defendant". This is a clear case for the application of the principle of the code section.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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44 Cal.App.2d 694

HARRIS et al. v. SMITH et al.

Civ. 11518.

District Court of Appeal, First District, Division 2, California.

May 7, 1941.

Hearing Denied June 30, 1941.

1. Carriers 🔑318(3)

Where prospective tenant stepped from heavily carpeted lobby floor onto linoleum floor of elevator, fell, and sustained injuries, in action for personal injuries, evidence supported finding that surface of linoleum was waxed and polished, that no rubber mat or carpet or any other form of safety appliance was superimposed on the linoleum, and that the use thereof would have afforded greater degree of safety to passengers.

2. Carriers 🔑346(1)

In prospective tenant's action for personal injuries sustained when she stepped from heavily carpeted lobby floor onto waxed and polished linoleum floor of elevator which was poorly lighted, evidence sustained finding that prospective tenant was free from contributory negligence.

3. Carriers 🔑280(4)

Where prospective tenant sustained injuries when she slipped and fell on stepping from heavily carpeted lobby floor onto waxed and polished linoleum floor of elevator, operator of elevator was required to use the highest degree of care in operation of elevator for purpose of showing rooms to prospective tenant.

4. Carriers 🔑318(3)

Evidence that elevator was poorly lighted, that the linoleum on elevator floor had been waxed and polished by a new employee three days prior to time prospective tenant slipped and fell thereon, that there was no rubber mat or carpeting or any form of safety appliance on the floor, and that the condition of the floor was such that the danger was not apparent, sustained finding that operator of elevator was negligent.

5. Carriers 🔑280(4)

Where plaintiff contemplated the renting of an apartment from operator of apartment who was availing herself of the opportunity of showing apartment for purpose of rental, and prospective tenant fell and sustained injuries when she stepped from heavily carpeted lobby floor onto waxed and polished linoleum floor of elevator, there was sufficient "reward" within statute requiring a carrier for reward to use utmost care for safe carriage of passenger. Civ. Code, § 2100.

See Words and Phrases, Permanent Edition, for all other definitions of "Reward".

6. Carriers 🔑280(4)

Under statute providing that a carrier for reward must use utmost care for safe carriage of passengers, an elevator need not be moving in order that such degree of care should be applied. Civ.Code, § 2100.

7. Carriers ⚷280(4)

Where plaintiff contemplated the renting of an apartment from apartment house operator who was availing herself of opportunity of showing apartment for purpose of rental, and plaintiff sustained injuries on stepping from heavily carpeted lobby floor onto waxed and polished linoleum floor of elevator, the plaintiff was an "invitee" to whom apartment house operator was liable for injuries sustained.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

8. Appeal and error ⚷1028

Where prospective tenant fell and sustained injuries on stepping from heavily carpeted lobby floor onto waxed and polished linoleum floor of elevator used by apartment house operator for purpose of showing room to prospective tenant, even if trial court committed error in holding apartment house owner to highest degree of care, as a carrier, the judgment for prospective tenant was required to be affirmed in view of the settled rule of liability between owner and invitee. Civ.Code, § 2100.

9. Negligence ⚷32(1)

An owner or occupant of land who by invitation induces others to go upon the premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches if such condition was known to him and not to them.

◆

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Personal injury action by Hilda Heide Harris and others against Amelia L. Smith and others. Judgment for plaintiffs, and the named defendant appeals.

Affirmed.

George M. Naus and Donald Seibert, both of San Francisco, for appellant.

Letitia R. Farber and Gardiner Johnson, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

In a trial by the court without a jury the plaintiffs had a judgment for $1,500, in addition to special damages, for injuries incurred by Hilda Harris when she fell upon the floor of an elevator operated by defendant Smith. The appeal is taken by this defendant alone.

The facts are without material dispute and are fairly stated by respondents as follows: "Between 5:30 and 6:00 o'clock P. M. on Tuesday, March 14, 1939, the respondents, husband and wife, desiring to rent an apartment, called on appellant, who operated an apartment house, to look at an apartment which was for rent and which the husband had seen earlier in the afternoon. They met the appellant in the lobby which was heavily carpeted and over which the three approached the elevator for the purpose of being carried to an upper floor on which the apartment was located. The appellant summoned the elevator, opened the door thereof, and stepped back to one side to enable respondents to enter. The elevator floor was covered with linoleum which had been waxed and polished by a new employee on Saturday, the 11th, three days prior to the accident. The elevator was lighted with a 25 watt electric light placed in a globe and set high in the dome of the elevator. The floor of the elevator was even with that of the lobby. The moment the door was opened the respondent, Hilda Heide Harris, stepped at once from the said heavily carpeted lobby floor onto the said waxed and polished linoleum floor of the elevator, taking a normal step with her right foot. She wore walking shoes with rubber tipped heels. Upon so stepping in and upon said floor her right foot shot out from under her and she skidded diagonally across the cage and crashed her knee against the metal on the far side of the cage and sustained injury."

The trial court found: "That the said floor of said elevator was then and there on said 14th day of March, 1939, covered by linoleum, of the kind commonly known as battleship linoleum; that the surface thereof was waxed and polished; that said surface was left bare and without any covering up to and including the said 14th day of March, 1939; that no rubber or leather mat or carpet or any other form of safety appliance or application, was superimposed upon said waxed and polished linoleum for the purpose of preventing passengers from slipping and falling thereon; that rubber and leather mats and other appliances have been devised and used upon linoleum and other coverings of elevator floors and that the use of same affords a greater degree of safety to passengers in such elevators in preventing them from slipping and falling on such floors."

[1, 2] Ample evidence was offered to support the finding, and evidence was also offered to show that the elevator was poorly and improperly lighted, and that the linoleum floor had been polished with a dry paste wax, which was more dangerous than the liquid wax, lacquer or shellac which is commonly used because less slippery. There is no dispute in the evidence that the appellant was familiar with the condition of the elevator floor, and it must be conceded that its dangerous condition was not known to respondents and could not have been observed by them with use of ordinary care. These facts follow from the evidence that appellant was in possession, knew that the floor of the elevator was waxed a few days before the accident, had frequently used it since the floor was polished, and the condition of the floor was such that the danger was not apparent. All these circumstances support the finding that the respondents were free from contributory negligence.

[3, 4] Much of the argument in the briefs relates to the degree of care required of the owner or tenant in the operation of an elevator for purposes of showing rooms to a prospective tenant. The trial court found that in the operation and maintenance of said elevator the defendant was required to use the highest degree of care and that she was negligent in this instance for having failed to exercise such degree of care. The appellant attacks this finding and argues that, since the respondents had not rented an apartment in the premises and were not "paying guests" at the time of the accident, the appellant owed them no more than ordinary care. The finding and conclusions of the trial court were concededly based upon the ruling in Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 454, 85 P.2d 152, 157, where it was said: "There is no question about the rule in California that the owner of an elevator is responsible for injury occasioned by the slightest neglect which human care and foresight might have guarded, and that, though not insurers of the absolute safety of passengers, they are bound to utmost care and diligence of very cautious persons."

[5] But the appellant criticizes the application of this rule to the facts of the instant case because the respondent injured was not a paying passenger and because the elevator was not in motion at the time of her injury. The respondents contemplated the renting of an apartment from the appellant, who, at the time of the accident, was availing herself of the opportunity of showing the apartment for the purpose of rental. This would seem to be a sufficient "reward" under the meaning of section 2100 of the Civil Code which provides that a carrier for reward must use the utmost care for their safe carriage.

[6] We find no authority holding that an elevator must be moving in order that this degree of care should be applied. The cases cited by appellant relating to the degree of care required of railways in the maintenance of passenger stations and platforms are not helpful. More closely in point are those cases which might be cited relating to the maintenance of car steps, aisles, and equipment. Here the respondent injured was a passenger as soon as she entered the elevator, which was not the case in many of the platform cases cited.

[7-9] But, if the trial court were in error in imposing too high a degree of care upon the appellant, the judgment must nevertheless be affirmed in view of the settled rule of liability between owner and invitee—and that respondents herein were invitees is not open to controversy. This rule is stated in 20 Ruling Case Law, pages 56 and 57 as follows: "The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them. * * * The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. * * * And, hence, there is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." California cases in accord with this rule are Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 560, 296 P. 76; Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 512, 50 P.2d 801; Alexander v. Wong Yick, 25 Cal.App.2d 265, 267, 77 P.2d 476; Kessler v. Cudahy Packing

Company, 38 Cal.App.2d 607, 608, 609, 102 P.2d 362; and Morton v. Manhattan Lunch Co., 41 Cal.App.2d 70, 106 P.2d 212.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

44 Cal.App.2d 643

MOFFATT et al. v. TIGHT et al.

Civ. 11683.

District Court of Appeal, First District, Division 2, California.

May 5, 1941.

Rehearing Denied June 4, 1941.

Hearing Denied June 30, 1941.

1. Easements 🔑36(3)

In quiet title action, evidence established that vendor had conveyed to defendant each of the several lots claimed by him together with the right to use and travel roads and driveways in subdivision as asserted by the defendant.

2. Easements 🔑17(4)

A purchaser of a lot in a subdivision is entitled to an easement over the streets shown on the subdivision map unless the deed itself and attending circumstances negative implication of an easement, but the deed and attending circumstances will not negative such implication if any inferences or presumptions that may have existed are dispelled by direct evidence.

3. Appeal and error 🔑842(8)

Where evidence in quiet title action was uncontradicted, the District Court of Appeal was not required to accept holding of trial court on theory that issue involved interpretation of a written instrument, but, there being no conflict in the evidence, question presented was solely a "question of law", and a court of review was bound to determine it accordingly.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

4. Easements 🔑36(3)

In quiet title action, evidence established prescriptive right in roadways which owner of lots was entitled to enjoy as an easement appurtenant to all lots in subdivision.

5. Easements 🔑36(2)

In quiet title action involving roadways in subdivision, where there was nothing in letter showing or tending to show that an easement theretofore conveyed to any of grantees was to be abandoned, letter was not pertinent to issues presented.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Quiet title action by Walter L. Moffatt and others against D. J. Tight and others. Judgment for plaintiffs, and defendant Edward F. Treadwell appeals.

Reversed.

Treadwell & Laughlin, of San Francisco (Russell E. Barnes, of San Francisco, of counsel), for appellant.

Keyes & Erskine, of San Francisco, for respondents.

STURTEVANT, Justice.

This is an appeal from a judgment in favor of the plaintiffs in an action brought to quiet title. The plaintiffs named a large number of defendants but the defendant E. F. Treadwell only has taken an appeal.

All parties to this action claim under the Woodside Country Club, a corporation. The map of subdivision 1 of the Woodside Country Club properties was recorded December 1, 1926, in Liber 14 of Maps at pages 57 and 58. This map was in three sheets, composing sheets 1, 2 and 3 of the subdivision. The map of subdivision 2 was recorded March 7, 1928, in volume 16 of Maps, page 22. This, as well as all other subdivisions, is shown on defendants' Exhibit 5. It will be noted that the map subdivided the land into lots with the exception of certain reservations obviously for the common benefit of the subdivision, among others including "Club Reserve". The property fronted on the Portola-Woodside road on the east, which was referred to on the map as a county road, and went up to the ridge of the mountain on the west and abutted on the La Honda road, which was likewise designated as a county road. The principal other roads on the map were the Corte Madera road and the Home road and their branches, which were stated on the map to be actually existing roadways. The Corte Madera road was connected with the Woodside-Portola road by a "driveway" going through the Club Reserve for a certain distance and then branching, one branch, hereafter referred to as the Exit road, going directly to the Woodside-Portola road, and the other branch, hereafter referred to as the Entrance road, continuing through the Club Reserve and connecting the Home road, which in turn connected with the Woodside-Portola road. Some of the appellant's properties fronted on the Corte Madera road and some of them on the Home road.

The title of the appellant was obtained by a deed from a Woodside Country Club to Reginald S. Laughlin, dated July, 1929, describing all of the land with reference to the maps in question, with the exception of one and one-half lots which were obtained by deed from California Pacific Title Insurance Company to Reginald S. Laughlin on May 27, 1929. While this deed was to Laughlin, it was acquired as an asset of the firm of Treadwell, Van Fleet & Laughlin. Reginald S. Laughlin conveyed the property to appellant on July 13, 1933, by the same descriptions.

[1] The evidence shows the conveyance of numerous lots by Woodside Country Club by reference to these maps. There are 311 lots described in the answer of the Halsey defendants, and there are some thirteen separate defendants to whom those lots were conveyed. Most of these conveyances were made before 1929.

The Woodside Country Club made a deed of trust on February 26, 1932, of the Club Reserve, describing it with reference to the maps in question. This deed of trust was foreclosed and the trustees deeded the property, on March 5, 1935, to one Lillian Wray Hunt, the original plaintiff in this action. It will be noted that the plaintiff's title accrued long after the map in question was recorded and long after the sales to the defendants with reference to such map.

The map above mentioned showed the lot owned by the plaintiffs, Club Reserve, and showed its boundary lines as extending across what are called "Entrance Road" and "Exit Road". On the map at the points where each boundary line intersects said roads the names are changed. In other words, commencing inside of the property subdivided and attempting to go out the Exit gate, one would travel along Corte Madera road until he came to the boundary line and at that point, although the road continues, the name is changed to "Driveway". If one leaves the Club Reserve he travels along a road marked Driveway to the Entrance gate, and at that point the name of the road is changed to "Home Road". The evidence is all one way that the appellant Treadwell never saw the map. In 1926 when the properties were being subdivided, Mr. Lyon, who had charge of the sales, caused a sales map to be prepared known as defendants' Exhibit 5. He delivered a copy to appellant Treadwell and drove him over the driveways and roads. To other purchasers he delivered other copies. That map does not disclose the said boundary line intersecting said roads, nor does it disclose any changes of names from Driveway to Home road, or otherwise. There was also evidence that as an inducement to the purchasers to buy lots the vendor set forth plans that when the lots were sold and the blanket mortgage was paid out of the receipts, then the Club Reserve was to become a high class country club, to be owned largely by the purchasers as members, and to be an adjunct of the tract so subdivided. After making purchases all of the grantees, including the appellant, commenced to use and continued to use, without let or hindrance, the Home road and the Corte Madera road, and so much of the Driveway as was necessary to go to and from Entrance gate and Exit gate to their respective properties.

Additional use of the roads having shown the necessity therefor, the vendor, at an early date, constructed in the Club Reserve a cut-off which greatly tended to the safer travel on the driveway near the Exit gate. The management at all times permitted the free use of both the roads and driveways, but sought to have the Entrance gate used to enter and the Exit gate used for the purpose of leaving the tract. Other facts will be set forth in appropriate places.

The appellant contends the recording of the map of the subdivision showing streets, roads, driveways, alleys or other highways, and the sale of lots by reference to such a map, creates a private easement in the grantee to use the streets, roads, driveways, alleys or other highways delineated on the map. Danielson v. Sykes, 157 Cal. 686, 689, 109 P. 87, 28 L.R.A.,N.S., 1024, and cases there cited. In reply the plaintiffs contend the map which was recorded did not grant any easement to the Entrance and Exit driveways, or roads because the Club Reserve was bounded by a line which ran across those driveways at the intersection thereof with Woodside-Portola road, Corte Madera road and Home road. The appellant replies that the argument of the plaintiffs would destroy any use of those roads, because if the lines mentioned were intended to indicate that no one should drive over them then no one could get onto those driveways from Woodside-Portola road; that the lines are obviously imaginary, not existing on the ground, and not representing anything physical as a barrier; that the intent of the parties was made clear by the sales map used by the grantor and given to the purchasers which showed the roads open at both intersections; that the intent was further shown by the acts of the vendor and vendees immediately after the deeds were executed relative to the use of both the roads and driveways down to the date this action was commenced; and again it was further shown by the act of the vendor in making the use of the driveways more satisfactory to the purchasers by straightening out the driveways leading to the Exit gate; that at the time the deeds were executed the use of said gates by the purchasers was the only practical method of reaching their properties and any other construction of the contract would have created an absolute obstacle to the making of any sales by the vendor. The foregoing suggestions are given further force when it is noted that on the map filed of record there was endorsed, "The land delineated and designated hereon as Home Road, Corte Madera Road, and Meadow Road is intended and is hereby offered for dedication as streets for highways for public use. *All other roads and highways outlined exist now as such.*" The contention of the plaintiffs gives no force or effect whatever to the sentence last quoted. Because, except in the Club Reserve, there are no "* * * other roads and highways outlined * * *" on the map. Furthermore, bearing in mind that the map showed Club Reserve as one lot, and upwards of five hundred other lots, it is clear that the vendor was considering the rights of the purchasers of lots as much as the rights of the holder of the Club Reserve, that by reason of the intended creation of a country club the Club Reserve was to be a benefit to the other lots and the use of the other lots was expected to be a benefit to the country club. In the light of these circumstances, it is quite clear the vendor conveyed to the appellant each of the several lots claimed by the latter and the right to use and travel the roads and driveways as contended by him.

[2,3] Speaking of the rule that a purchaser of a lot in a subdivision is entitled to an easement over the streets shown on the subdivision map, the plaintiffs contend that such rule does not apply where the deed itself and the attending circumstances, the "res gestae of the transaction", negatives the implication of an easement. 19 C.J. 930. We do not question the correctness of that rule. However, after all of the facts had been introduced in evidence in the instant case, there was no circumstance supporting the contention made by the plaintiffs. Any inferences or presumption that may have existed in their favor had been met and dispelled by direct evidence. In that connection it should be added that there is no contradiction whatever in the evidence. The plaintiffs further contend that the issue being an interpretation of a written instrument the holding of the trial court must be accepted by this court. Adams v. Petroleum Midways Co., Ltd., 205 Cal. 221, 224, 270 P. 668; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34. True it is that the cases cited involve the construction of a written instrument. However those cases and others cited by the plaintiffs each rested on the particular facts introduced in evidence for the purpose of aiding the court in determining the intention of the parties. But where, as here, there is no conflict in the evidence, the question presented is solely a question of law and a court of review is bound to determine it accordingly. 6 Cal.Jur 326-328.

[4] The appellant contends a prescriptive right was acquired to enjoy an easement as appurtenant to all of the lots and that a contrary finding is unsupported by the evidence. The plaintiffs reply that the appellant was not entitled to a finding establishing a prescriptive right unless he introduced proof showing (1) the user must be open and notorious, not clandestine; (2) it must be continuous and uninterrupted for a period of five years prior to the commencement of the action; and (3) it must be adverse and hostile to the rights of the owner of the fee, and neither ex-

pressly or tacitly permissible. 1 Cal.Jur. 608. However they do not quote the record showing wherein the proof introduced at the trial did not meet all of the provisions of said rule. Considering the numerous facts hereinabove recited, which we have quoted directly from the record, the proof introduced showed a complete case in favor of the appellant establishing his prescriptive right. Myers v. Berven, 166 Cal. 484, 490, 137 P. 260.

[5] After the sales had been made to the numerous purchasers and on or about February 1, 1929, Mr. Laughlin, one of the grantees, wrote a letter to Mr. C. S. Crary. At that time the project was in financial difficulty and an effort was to be made to refinance it. The letter was written on that subject. There was nothing in it showing or tending to show that an easement theretofore conveyed to any one of the grantees was to be abandoned. The plaintiffs earnestly stress the force and effect of the letter as against the appellant. We think it is sufficient to state that we see nothing in the letter that is at all pertinent to the issues presented in the instant case.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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44 Cal.App.2d 698

MAIER v. BOYLE et al.

Civ. 11677.

District Court of Appeal, First District, Division 2, California.

May 7, 1941.

Hearing Denied June 30, 1941.

1. Partition 🔑63(3)

In partition suit by grantee of divorced wife's half-interest in realty conveyed to spouses by grant, bargain, and sale deed, defendants' assumption that such deed conveyed only life estate to wife, so that plaintiff had no sufficient interest on which to base action, was erroneous as in direct conflict with trial court's findings, supported by evidence, that deed conveyed undivided half-interest to wife, that she conveyed such interest to plaintiff, and that plaintiff was tenant in common with defendants.

2. Appeal and error 🔑1009(1)

In partition suit by grantee of divorced wife's half-interest in realty conveyed to spouses, where all questions as to fraud on defendant husband were presented to trial court, which received all evidence of both parties and made findings against husband, interlocutory judgment for plaintiff will not be reversed on ground of constructive fraud because of gift by husband to wife.

3. Partition 🔑16

In partition suit by grantee of divorced wife's half-interest in realty conveyed to spouses, where plaintiff based no claim on title flowing from divorce decree, facts in divorce case were not pertinent to rights of either party.

4. Partition 🔑63(3)

In partition suit by grantee of divorced wife's half-interest in realty conveyed to spouses, defendants' point that plaintiff was not a purchaser was without merit as in direct conflict with trial court's specific findings and uncontradicted evidence that wife's deed to plaintiff was made in consideration of plaintiff's agreement to nurse and care and provide for wife during remainder of her life and that such agreement was fully carried out, though deed recited that it was a gift.

5. Wills 🔑88(2)

In partition suit by one to whom divorced wife conveyed her half-interest in spouses' realty by deed, made, executed, and delivered over a year before grantor's death in consideration of grantee's agreement to nurse and care and provide for grantor during remainder of her life, without any attached conditions, defendants' point that deed to take effect on grantor's death, if not executed with formality of will, passes no title, was without merit.

◆

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

Action for partition by Grace Maier against Mrs. Millie Boyle, Albert Hornlein, and others, in which defendant Hornlein filed a cross-complaint. From an interlocutory judgment for plaintiff, defendants appeal.

Affirmed.

Fred B. Hart, of Oakland, for appellants.

A. D. Schaffer, of San Francisco., for respondent.

STURTEVANT, Justice.

In an action for partition the trial court made findings in favor of the plaintiff and entered an interlocutory decree. From that decree the defendants have appealed and have brought up a typewritten record.

The defendants have so many grievances that they depart from all rules of briefing and present what they claim to be groups 1 to 10 of alleged errors. They argue most earnestly. To fully understand we have read the entire record. We find not a particle of error therein.

Prior to January 5, 1920, Julia Hornlein was a widow and had children. Albert Hornlein was a widower and also had children. On the date last mentioned they married. At the date of their marriage the wife had no separate property but the husband had accumulated some property, real, personal, and mixed. He owned one or more pieces of real estate and was proprietor of a gambling house located at Sixth and Mission streets in San Francisco. It was known as a club and, from the business conducted, there was evidence, his income was as much as $3,000 a month.

The First Bank of Savings of Fort Bragg was the owner of a lot and building near the corner of Telegraph avenue and Forty-third street in the city of Oakland. The building consisted of stores on the ground floor and several flats above. After certain negotiations the bank, by a grant, bargain and sale deed, conveyed said property to Albert Hornlein and Julia Hornlein, his wife. That deed has never been reformed in any respect whatsoever. The deed recited a consideration of $10, but the evidence shows the actual consideration was $15,000. Albert Hornlein paid down $10,000 and the property was mortgaged for $5,000 which was subsequently paid by the husband out of his separate property. From the time the Hornleins took title they followed the system of collecting the rents, paying taxes, insurance, and repairs, out of those sums and thereafter dividing the balance equally between them.

The evidence discloses they were never happily married and, as they grew older, quarrels ensued. In September, 1935, they separated. Later Mrs. Hornlein filed an action in separate maintenance. The husband appeared, filed a cross-complaint, and asked for a divorce. Such proceedings were had that a property settlement was made between the spouses and an interlocutory decree of divorce was awarded the husband. Based on that decree, at a later date, a final decree of divorce was entered. The interlocutory decree recited the execution and approval of the property settlement made by the parties. The final decree approved such provisions of the interlocutory decree. Said decrees have never been appealed from and are final.

After the separation of the Hornleins in September, 1935, the wife went to live with her daughter, the plaintiff in the above-entitled action. On the 2nd day of March, 1936, she executed a deed conveying her one-half interest in the above-mentioned real estate. The consideration mentioned was a gift. The deed was made the 2nd of March, 1936. On the same date it was acknowledged, delivered to the grantee, and was by her held until after her mother's death. Mrs. Hornlein died March 19, 1937. Six days later the plaintiff filed the deed for record. The system of making collections and payments hereinabove recited was continued by Mr. and Mrs. Hornlein, or their representatives, down to the date this action was commenced.

On or about the 4th day of February, 1938, the plaintiff filed her complaint in partition. It appears to be sufficient in every respect. On March 14, 1938, Albert Hornlein filed an answer and cross-complaint. In the first paragraph he stated that the plaintiff's complaint did not state facts sufficient. At no place in the record does he attempt to show in what respect it was insufficient. He also interposed denials in which he denied that the plaintiff was the owner in fee simple as tenant in common with him, denied that she had any right, title or interest in the property, and denied that she had an estate of inheritance to the extent of an undivided one-half interest in fee simple or otherwise. Continuing he set forth a count to quiet title. Then, by way of cross-complaint, he set forth (1) a count purporting to allege that the deed to the plaintiff was made by her mother when incompetent; (2) a count alleging that the conveyance to Julia Hornlein was made on the promise of conditions subsequent and that the grantee had wholly failed to perform them; and (3) a count that the deed to Albert Hornlein and Julia Hornlein was made in consideration of certain promises of Julia, that said promises were made without any intention of performing them, and that such conveyance was therefore a fraud on him. The plaintiff filed an answer in which she denied nearly all of the affirmative allegations in the cross-complaint and set forth many affirmative allegations. The trial court, with meticulous care, made specific findings in favor of the plaintiff and against the defendant Albert Hornlein on the issues presented by the pleadings. On some of the issues there was a conflict in the evidence, but we find no single finding of which it may be said that it was not supported by the evidence, nor did the court fail to find on any material issue.

[1] Both in their first point and their last point the defendants assume the deed to Albert and Julia Hornlein conveyed to the latter only a life estate and therefore the plaintiff has no interest sufficient on which to base this action. The vice in that contention is that the defendants' assumption is in direct conflict with numerous findings made by the trial court. Those findings were clearly to the point that the said deed conveyed to Julia Hornlein an undivided one-half interest in the property and that she conveyed such interest to this plaintiff and that this plaintiff is a tenant in common with the defendants.

[2] In their next point the defendants contend that because a gift was made by the defendant Albert Hornlein to Julia Hornlein the case presents a question of constructive fraud. Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189. That case was a ruling on demurrer. In the instant case all questions regarding fraud were presented to the trial court, it received all of the evidence of both parties, and made findings against the defendant Albert Hornlein. All of the facts being considered, this court is not at all inclined to question any of these findings. Tillaux v. Tillaux, 115 Cal. 663, 47 P. 691.

[3] In the next two points the defendants present the divorce case in all of its aspects, together with letters passing between counsel. The plaintiff based no claim on any title flowing from the decree in divorce. That whole subject-matter was brought forward by the defendants. We find no fact or facts therein at all pertinent to the rights of either party in the instant case.

[4] In their next point the defendants state Grace Maier is not a purchaser. That statement is in direct conflict with specific findings of the trial court and is in direct conflict with the evidence introduced at the trial. True it is that the deed to her recited that it was a gift, but the uncontradicted evidence is that it was made in consideration of the grantee's agreement to nurse and care and provide for the grantor during the remainder of her life and that such agreement was fully carried out.

[5] In their next point the defendants assert that a deed to take effect on death, not executed with the formality of a will, passes no title. It is a sufficient comment on that statement to state there are no such facts contained in the record. The deed to this plaintiff was made, executed and delivered on March 2, 1936. No conditions whatever were attached thereto.

We find no error in the record. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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44 Cal.App.2d 629

O'HARE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6542.

District Court of Appeal, Third District, California.

May 2, 1941.

1. Workmen's compensation ⚷1496, 1545

Evidence relating to cause of linotype operator's disability rendering him incapable of continuing his work and to cause of his subsequent death was insufficient to establish that he incurred lead poisoning in course of his employment or that his employment aggravated that disease. St.1937, p. 284, § 4700.

2. Workmen's compensation ⚷1496

The assignment in death certificate of arteriosclerosis as one of causes of employee's death did not indicate existence of lead poisoning incurred in course of employment as a cause of death.

3. Workmen's compensation ⚷1365, 1366

In proceeding to recover compensation for death of employee as result of lead poisoning, claimant had burden of proving that employee died from lead poisoning incurred in course of his employment, or that his work substantially aggravated that ailment.

4. Workmen's compensation ⚷1935

It is not ground for reversal of order of Industrial Accident Commission that portions of evidence upon which judgment is founded were adduced before different referees, since court must assume that commissioners familiarized themselves with all of evidence and based their decision thereon.

5. Workmen's compensation ⚷1730

The Industrial Accident Commission is authorized to refer matters arising out of same workmen's compensation proceeding to different referees. St.1937, p. 293, § 5310.

6. Workmen's compensation ⚷1332

An employee's claim of total disability incurred in course of employment from lead poisoning was not conceded by failure of employer or insurer to file written answers to his demand. St.1937, p. 297, §§ 5505, 5506.

7. Workmen's compensation ⚷1327

The filing of a simple and concise written answer to compensation claim by employer or insurer is desirable, but it is not mandatory. St.1937, p. 297, §§ 5505, 5506.

◆

Proceeding under the Workmen's Compensation Act by Alva O'Hare, claimant, to obtain compensation on account of the death of her husband as the result of lead poisoning allegedly incurred in the course of his employment with the McClatchy Publishing Company. To review an order of the Industrial Accident Commission denying compensation, the claimant brings certiorari.

Order affirmed.

A. J. Harder and J. L. Missall, both of Sacramento, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

THOMPSON, Justice.

By means of certiorari, Alva O'Hare, the widow of James Matthias O'Hare, deceased, seeks to review the order of the Industrial Accident Commission, denying her application for compensation on account of the death of her husband as a result of lead poisoning alleged to have been incurred in the course of his employment with the McClatchy Publishing Company as a linotype operator in the plant of the "Sacramento Bee".

[1] The Commission adopted findings to the effect that the workman did not incur the disability of lead poisoning in the course of his employment, nor did his employment aggravate or exacerbate that disease. The only question which is involved on this proceeding is whether there is substantial evidence to support the findings and the order refusing to allow compensation.

For many years prior to 1938, James Matthias O'Hare was employed by the McClatchy Publishing Company in the newspaper plant of the Sacramento Bee at Sacramento as a linotype operator. He became totally incapacitated to perform his work on and after August 10, 1938. He filed his claim for compensation therefor with the Industrial Accident Commission on October 8th of that year, alleging that his disability resulted from lead poisoning which was incurred in the course of his employment. Elaborate hearings upon that application were had before three different referees. While the foregoing proceedings were being conducted, Mr. O'Hare became a patient in the Union Printers Home at Colorado Springs, where he died January 29, 1940. His widow then filed with the Commission her claim under section 4700 of the Labor Code, St.1937, p. 284, on account of total disability of her husband sustained from lead poisoning alleged to have been incurred in the course of his employment. Upon the hearing of the last-mentioned claim the proof adduced on the former proceeding was received in evidence, including the reports of several physicians and laboratory investigations, together with further medical and scientific evidence on the part of the chief physician in charge of the Union Printers Home of Colorado Springs and of other experts. Several local physicians were again called and thoroughly examined. The death certificate which was filed with the Bureau of Vital Statistics in Colorado, January 30, 1940, assigned the cause of death as "cerebral hemorrhage", with contributing causes of "Bronchopneumonia;

Arteriosclerosis". Upon that evidence the Commission adopted findings holding that the claimant failed to prove the disability from which James M. O'Hare died was incurred in the course of his employment, or that his ailment was aggravated or exacerbated by his work. Compensation was thereupon denied. A petition for rehearing was subsequently denied. This petition for a writ of review was then filed in this court.

We are of the opinion the order denying compensation is adequately supported by the evidence. The testimony of medical expert witnesses is conflicting as to whether the workman was afflicted with lead poisoning to the extent of incapacitating him for work on that account. Dr. A. Lee Briskman, chief physician of the Union Printers Home at Colorado Springs, stated that a report from the examination of Mr. O'Hare's urine on May 25, 1939, received from the chemistry department of Colorado College, indicated that it contained 0.604925 mg. of lead per liter. The patient was treated "for deleading". Later tests by the same college indicate that on August 14th of the same year the urine contained 0.0595 mg. of lead per liter. On the 22d of August, an analysis showed the presence of 0.0892 mg. of lead per liter. There is evidence from fellow employees that Mr. O'Hare had other symptoms of lead poisoning before he was incapacitated for work, including a perceptible "wrist-drop" and "blue-gum lines". Unquestionably that proof furnishes substantial evidence of lead poisoning in the system of the workman.

[2] It does not appear that the medical reports from the Printers Home at Colorado Springs contain any reference to "wrist-drop" or "blue-gum lines". Nor does the death certificate include lead poisoning as a contributing cause of his death. The petitioner argues that the treatment and diet of the patient at that institution would have effectively eliminated all evidence of the presence of lead poisoning symptoms. It is also asserted the term "arteriosclerosis", which is used in the death certificate, includes lead poisoning which may have caused the hardening of arteries. It is possible that lead poisoning may contribute to the condition resulting in arteriosclerosis, but that contingency is too remote and uncertain to furnish substantial proof that it actually caused hardening of the arteries. The use of the scientific term "arteriosclerosis" conveys no intimation of the existence of lead poisoning as a cause of death. Chambers' Technical Dictionary defines that commonly-used word as follows: "Hardening or stiffening of the arteries due to increase of muscular, elastic, or fibrous tissue in the middle coat of the vessel; loosely, any degenerative change in the arteries."

We conclude that the use of that term carries with it no indication that it necessarily includes lead poisoning as an inciting cause of the hardening of arteries.

In opposition to the foregoing enumerated symptoms of the presence of lead poisoning, and in support of the findings and decision of the Commission, we find the testimony of at least two reputable physicians, together with a scientific analysis of the air and surrounding conditions in the linotype room of the Sacramento Bee office, where the deceased was employed for many years, refutes the theory that Mr. O'Hare died as a result of lead poisoning incurred in the course of his employment, or otherwise.

Dr. Charles E. von Geldern, a reputable physician of Sacramento, examined Mr. O'Hare in January, 1939, and reported that he was afflicted with syphilis and arteriosclerosis. Three different blood tests were made by Dr. Guttman, known as the Wasserman, Kahn and Kline analyses, each of which disclosed evidence of the presence of syphilis germs of the uniform percentage of "four plus". With relation to the cause of disability, Dr. von Geldern said:

> "Without direct examination of the tissues it is not possible to be absolutely certain that syphilis is the cause but it is certainly infinitely more reasonable to assume that his disability is due to syphilis, which is shown beyond question to be present, than to lead poisoning, the presence of which there is not one iota of proof. * * *
>
> "It is my opinion based on the findings that this patient has a total disability resulting from a well-advanced tertiary syphilis and that this is not related to his occupation."

He was treated at the Union Printers Home for syphilis. The physicians of that institution evidently recognized the fact that he was afflicted with syphilis.

Dr. Burden of Sacramento met the deceased in August, 1938. He did not examine him to determine whether he had lead poisoning. He took the history of his case for the purpose of certifying to his application for admission to the Colorado Springs Home. He did, however, say that "He had no lead line on the gums, * * I did examine his teeth." Dr. Kemper, of Denver, Colorado, examined the record of the physical condition of Mr. O'Hare, and reported that he had coronary thrombosis. He said:

> "There seems to be no doubt in the minds of the physicians of the Union Printers Home that he did have syphilis. * * * Syphilis may have been a contributing factor leading to his cerebral accident of death. Because of his occupation there seemed to be a question of lead poisoning. I have searched the records but have been unable to find conclusive proof that he was suffering from lead poisoning. At least, he did not have the typical symptoms and findings. I find no record of his having had a lead line, although it seems to me that in discussion with the doctors I learned that he had artificial dentures. He had no wrist drop according to the records. * * *
>
> "My conclusion is that the clinical symptoms, the blood counts, and the urine tests for lead are inconclusive evidence that Mr. O'Hare's illness and death were due primarily to lead."

[**3**] There is much evidence in the record in support of the findings of the Commission that the claimant failed to prove that Mr. O'Hare was either disabled or died from the effect of lead poisoning. The burden was on the claimant to prove that the workman died from the disability which he incurred in the course of his employment, or that his work substantially aggravated or exacerbated the ailment which caused his disability. Berzin v. Industrial Acc. Comm., 125 Cal.App. 522, 14 P.2d 97; Newton v. Industrial Acc. Comm., 204 Cal. 185, 267 P. 542, 60 A.L.R. 1279; 27 Cal.Jur. 486, sec. 156.

[**4, 5**] It is not ground for reversal of the order of the Industrial Accident Commission that portions of the evidence upon which the judgment is founded were adduced before different referees. We must assume that, in the performance of their quasi judicial duties, the Commissioners familiarized themselves with all of the evidence produced and that they based their decision thereon. The Commission is authorized to refer matters arising out of the same proceeding to different referees. Sec. 5310, Labor Code, St.1937, p. 293.

The petitioner contends that the failure of the employer and the insurer to answer in writing the demand of the workman for compensation constitutes an acknowledgment that he incurred total disability in the course of his employment from lead poisoning, as alleged in his verified claim; that the failure to deny those allegations is conclusive with respect to that issue and that a contrary finding in that regard by the Commission should be deemed to be without support of evidence and void. Neither the employer nor the insurer filed a written answer to the original claim of the workman, or to the subsequent claim which was filed by his widow. They did, however, appear and participate in the hearings before the Commission and opposed the demand for compensation at all stages of the proceedings. No objection was interposed for failure to file written answers. A scientific written answer to the claimant's petition for rehearing before the Commission was filed by the employer and the insurer.

[**6, 7**] There is no merit in the assertion that the workman's claim of total disability incurred in the course of his employment from lead poisoning is conceded by failure on the part of the employer or the insurer to file written answers to his demand. Sec. 18 (a) and (b), Workmen's Comp. Act, St.1917, p. 847; secs. 5505, 5506, Labor Code, St.1937, p. 297; 1 Campbell's Workmen's Comp., p. 908, sec. 1033; 18 I.A.C. 286; 71 C.J. p. 1051, sec. 833. The Workmen's Compensation Act was adopted with the object of expediting and simplifying proceedings for industrial compensation. There is no doubt the filing of a simple and concise written answer to a claim is desirable. However, it is not mandatory. It does not appear to be the usual practice to file written answers to claims for compensation before the Industrial Accident Commission. If a special defense, such as the bar of the statute of limitations, or other particular matters are relied upon, section 18 of the Act provides that they can be set forth in an answer which "may" be filed. That privilege is optional. Subdivision (b) of that section specifically provides that "If the defendant fails to appear or answer, no default shall be taken against him, but the commission shall proceed to the hearing of the matter upon such terms and conditions as it may deem proper". The act further provides that even when the defendant fails to either appear or answer, he may still apply to the Commission for relief from an award by means of which he is aggrieved. While it is good practice and commendable to file a written answer to the demand of a workman for compensation before the Industrial Accident Commission, particularly when some special defense is relied upon, it is not mandatory to do so, and the failure to file a written answer does not constitute an admission of the essential facts recited in the verified claim of the workman or his dependents.

The order of the Industrial Accident Commission is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

WESTPHAL et al. v. WESTPHAL et al.

Civ. 11673.

District Court of Appeal, First District, Division 2, California.

May 2, 1941.

Hearing Granted July 1, 1941.

1. Wills 🔑629

All testamentary dispositions will be presumed to "vest" at testator's death, a future interest will not be imposed unless intention to postpone is clearly manifested, and determining factor is what character of interest did testator intend to create. Probate Code, § 28; Civ.Code, § 694.

See Words and Phrases, Permanent Edition, for all other definitions of "Vest".

2. Remainders 🔑17(3)
Wills 🔑634(1)

Where will, as to half of property held in trust for testator's son for life, gave to widow and children vested remainder in fee after son's death, interest of widow and children was "vested", and limitation on their action to establish involuntary trust as to such property accrued before son's death. Code Civ.Proc. § 338, subd. 4; Probate Code, §§ 28, 123; Civ.Code, §§ 694, 863.

3. Wills 🔑634(17)

Where will clearly disclosed intention to vest interest in wife and children of testator's son on termination of son's life without other condition or limitation, it must be held to be a present gift to a class of persons then in existence, and "vesting" of the interest was not defeated by fact that other children were born to son after execution of will. Probate Code, §§ 28, 123; Civ.Code, § 694.

4. Trusts 🔑365(1)

Beneficiaries of trust had right to sue to protect their respective interests when trusts were repudiated and defeated through decree of distribution. Civ.Code, § 863.

5. Trusts 🔑371(2)

In action by widow and children of testator's son to establish involuntary trust as to property devised to them, cause of action which showed nothing more than that probate court had committed error at law in assuming that interest of beneficiaries had been forfeited by action of life tenants in filing contest of will, and contained no allegations of mistake of fact and none which would support claim that running of limitation had been suspended, was demurrable. Code Civ. Proc. § 338, subd. 4.

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Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Fritz Westphal and others against Theodore Westphal and others to establish an involuntary trust. From a judgment for defendants after their demurrer was sustained as to all but two plaintiffs, other plaintiffs appeal.

Affirmed.

Frank D. Parker, of King City, and James H. Boyer, of Oakland, for appellants.

Donahue, Richards & Hamlin, of Oakland, for respondents.

NOURSE, Presiding Justice.

In an action commenced by the widow and children of John C. Westphal, Jr., to establish an involuntary trust, the demurrer of defendants was sustained as to all but two plaintiffs, who were minors, and the other plaintiffs declined to amend.

J. C. Westphal died testate in 1912. He left surviving five sons, three of whom, Theodore, William and George, are the defendants herein. His other two sons were John C., Jr., and Fred. Theodore and William were named as executors in the will which divided the estate into five equal parts of which one part was devised to each of the three defendants, one part to Theodore and George in trust to pay the income to John C., Jr., for his life, the remainder to his widow and children. The fifth part was devised to the same defendants under a similar trust for the benefit of Fred, his wife and children. The one-fifth part of the estate devised in trust for the benefit of John C., Jr., his wife and children is all that is involved in this proceeding.

The plaintiffs' complaint is framed to state two causes of action; the first based upon the allegations that the defendants through fraud procured a distribution of the estate, contrary to the terms of the will; the second based upon the theory that the probate court by mistake made a decree of distribution contrary to the same terms of the will. It is alleged that, because of such fraud and mistake, no part of the estate was distributed to the plaintiffs, nor in trust for their benefit, but the entire estate was distributed in equal shares to the three defendants.

The theory of the first cause of action is that the five sons conspired among themselves to cheat and defraud these plaintiffs by entering into an oral and written agreement whereby Fred and John C., Jr., should institute a simulated contest of the will, but should dismiss the proceedings prior to any hearing upon the contest, and then the defendants herein should petition the court for distribution of the entire estate to them in equal shares and conceal from the court the terms of the will relating to the two trust estates. As a part of this conspiracy it is alleged that the parties agreed that the defendants should represent to the probate court that John C., Jr., and Fred had forfeited their interest in the estate by instituting the contest of the will. It is then alleged that a decree of distribution, entered July 24, 1913, distributed the entire estate to these three defendants pursuant to the alleged conspiracy.

The demurrer challenged the sufficiency of the allegations to plead a cause in equity to set aside the final decree, and also raised the question of the statute of limitations—subdivision 4 of section 338 of the Code of Civil Procedure. As the application of this statute is determinative of this appeal we will confine our discussion to that issue.

The decree was entered July 24, 1913, and became final. John C. Westphal, Jr., died January 29, 1935. This action was commenced August 31, 1937. All the appellants attained legal majority more than three years before the action was commenced. As to the two children who were minors the demurrer was not pressed, was overruled, and the judgment appealed from does not affect their interests. Since the appellants' attack upon the decree of distribution comes twenty-four years after its entry the material question involved is whether their cause of action accrued prior to the death of the husband and father in 1935.

This question must be determined by an examination of the character of the interest which the appellants seek to assert. All parties concede that if the remainder interest given by the will to the appellants was a vested remainder the action is barred by the statute.

The pertinent portions of the will relating to this question of the interest devised read: "Fifth—A: In the event of the death of my said son, John C. Westphal, Jr., after my death, I direct that one-half (½) of said fund and property so held in trust, as aforesaid, (the income of which is directed to be paid as aforesaid) immediately vest in, and I hereby give, devise and bequeath to the widow and children of said John C. Westphal, Jr., share and share alike, a vested remainder in fee in and to one-half (½) of said property so devised in trust, as aforesaid, and, if he leaves no wife surviving him, then said one-half (½) of said trust property shall vest in, and I hereby give, devise and bequeath to the children of said John C. Westphal, Jr., and to the children of any deceased child or children of said John C. Westphal, Jr., by right of representation, a vested remainder in fee in and to one-half (½) of said property so devised in trust as aforesaid. In the event that said John C. Westphal, Jr., should die leaving no wife surviving him and leaving no children and leaving no children of a deceased child or children, then I direct that said one-half (½) of the said trust property shall immediately vest in Theodore Westphal, William Westphal and George Westphal, named hereinabove, share and share alike, and to their heirs respectively, and, in that event, I do hereby give, devise and bequeath to said

Theodore Westphal, William Westphal and George Westphal, share and share alike, and to their heirs, respectively, a vested remainder in fee in and to said one-half (½) of said property so devised in trust, as aforesaid, to take effect in possession immediately upon the termination of said trust, as provided in paragraph four of this will."

Respondents direct attention to those portions of the paragraph quoted reading: "I hereby give, devise and bequeath to the widow and children of said John C. Westphal, Jr., share and share alike, a vested remainder in fee." "I hereby give, devise and bequeath to the children of said John C. Westphal, Jr., * * * a vested remainder in fee." It is argued that these portions of the will indicate a clear intention on the part of the testator to vest in those named a present remainder in fee—a present gift of which possession alone was deferred until the termination of the life estate of John C., Jr.

[1] It is a settled principle that all testamentary dispositions will be presumed to vest at the testator's death (section 28 of the Probate Code); that a future interest will not be imposed unless the intention to postpone is clearly manifested; (Williams v. Williams, 73 Cal. 99, 102, 14 P. 394; Estate of De Vries, 17 Cal.App. 184, 190, 119 P. 109; Miller v. Oliver, 54 Cal.App. 495, 498, 202 P. 168); and that the determining factor is what character of interest did the testator intend to create. Estate of De Vries, supra, 17 Cal.App. page 188, 119 P. 109. In section 694 of the Civil Code it is declared that: "A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest." In Oliver v. Sperry, 97 Cal.App. 27, 29, 274 P. 1030, the court, in construing a will which devised a life estate to Lydia Sperry with remainder to Frank Sperry and Harriet A. Miller, her children relied upon this Code section and upon Hall v. Wright, 17 Cal.App. 502, 120 P. 429, and Estate of De Vries, supra, in holding that the remainder vested in Frank Sperry and Harriet A. Miller, as of the time of the death of the testator—that "there were two persons in existence at the time of the entry of the decree * * * who would immediately succeed to the possession and enjoyment of the estate in which Lydia J. Sperry was given a life tenure".

It should not be assumed that the distinction between vested and contingent remainders is simple and well defined. In Estate of Washburn, 11 Cal.App. 735, 740, 106 P. 415, 417, the court said: "There is no subject of the law more abstruse, or in which greater refinement of learning has been displayed, than that of remainders. No definitions ever have been, or ever will be, given which will relieve all cases from doubt." In Gray "The Rule Against Perpetuities", sections 101 and 102, the author defines a vested remainder in this language: "Since contingent remainders have been recognized, the line between them and vested remainders is drawn as follows: A remainder is vested in A., when, throughout its continuance, A., or A. and his heirs, have the right to the immediate possession, whenever and however the preceding freehold estates may determine. A remainder is contingent if, in order for it to come into possession the fulfilment of some condition precedent other than the determination of the preceding freehold estates is necessary.

"Section 102. A remainder is none the less vested because it may terminate before the remainderman comes into possession; thus if land be given to A. for life, remainder to B. for life, B. may die before A., yet the remainder is vested, for during its continuance, namely, the life of B., it is ready to come into possession whenever and however A.'s estate determines. This result is not affected by the fact that the termination of the remainder is contingent; that is, that it is subject to a condition subsequent. For instance, if land is devised to A. for life, remainder to B. and his heirs, but if B. dies unmarried then to C. and his heirs, B.'s remainder is vested, although it is possible that he may die unmarried in A.'s lifetime." This definition has been criticized with as much vigor as it has been approved. See Vol. 29 C.L.R. No. 3, p. 290. But in general accord with the statement and illustration is the following language found in Restatement of the Law of Property (Future Interests) section 157, subd. "h": "When an otherwise effective conveyance of either land or a thing other than land creates one or more prior interests, the maximum duration of which is measured by lives or by years or by a combination of lives and years, and then provides, in substance, that upon the expiration of such prior limited interests, the ownership in fee simple absolute of the land, or the corresponding interest in the thing other than land, shall belong to a person who is presently identifiable (see Comment i), such person has an indefeasibly vested remainder." And in Estate of Washburn, supra, 11 Cal.App. page 740, 106 P. page 418, it is said: "if there are words of present gift to a class of persons in existence, the remainder is vested, though it cannot be ascertained until the determination of the particular estate which, if any, members of the class will ultimately take; but if futurity attaches to the gift so that it is not intended to take effect until the determination of the particular estate, the remainder is contingent."

[2, 3] Here the will clearly disclosed the testator's intention to vest the interest in the wife and children of John C., Jr., upon the termination of the life of the latter, without other condition or limitation. It must be held to be a present gift to a class of persons then in existence, and the vesting of the interest is not defeated by the fact that other children were born to John C., Jr., after the execution of the will. Section 123 of the Probate Code covers that situation in this manner: "A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed."

[4] It cannot be disputed that the beneficiaries of the trust had a right to sue to protect their respective interests when the trusts were repudiated and defeated through the decree of distribution. Section 863 of the Civil Code provides: "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

The terms of the section are plain and require no interpretation. Rhoda v. County of Alameda, 134 Cal.App. 726, 732, 26 P.2d 691, 694, upon which appellants rely, is not in conflict with the Code section. That was an action for damages to the remainder brought by the remaindermen after the termination of the life estate. The judgment was based upon the sole ground that the plaintiffs had failed to present a claim to the county before suit was filed. But, in the course of the opinion, the court held that plaintiffs' remainder was contingent and not vested, and for that reason it rejected the county's claim as to the time when plaintiffs' cause of action accrued, using the following language which is pertinent here: "However, it does not follow, as argued by appellant, that, because the remainder had not vested at the time the work complained of was completed, respondents have no cause of action. It is true that prior to the falling in of the life estate they could not sue for the damage done the property interest. Pavkovich v. Southern Pacific Ry. Co., 150 Cal. 39, 87 P. 1097; Chesapeake & O. R. Co. v. Bradford, 6 W.Va. 220. But, if a damage was done to the remainder interest, it would seem clear that the law should not be so powerless as to deny relief to the remaindermen when the remainder became vested in them. It is appellant's theory that, since the life tenant had the only vested interest at the time the tube was completed, she would have the only cause of action for damages. If this is so, then the property of the remaindermen would be damaged without compensation being made therefor as required by the Constitution. Article 1, § 14. It is plain that the life tenant could only recover for damage to her life estate, and if the remaindermen cannot recover for damage to the remainder when their estates vest, there can be no recovery by any one for the damage to the remainder. Such an inequitable rule should only be adopted under the compulsion of absolute necessity."

[5] Appellants make no special argument in defense of their second cause of action which is predicated upon the alleged mistake of the probate court in entering the decree of distribution. The inconsistencies between the two causes of action are apparent. The will contained a provision forfeiting the interest of any "child" of the testator who should contest it. If the decree of distribution was procured as alleged through the conspiracy and fraud of the testator's sons in representing to the court that John C., Jr., and Fred had contested the will, such representations might have affected the life estates of those two sons, but they would have no effect upon the interests of the remaindermen. Taking the allegations of this cause of action as a whole the trial court was confronted with a pleading which showed

nothing more than that the probate court had committed an error at law in assuming that the interest of the beneficiaries under the trusts had been forfeited by the action of the life tenants in filing a contest of the will. There are no allegations of a mistake of fact which would support a plea in equity, and there are none which would support a claim that the running of the statute of limitations had been suspended. For the reasons heretofore given in sustaining the demurrer to the first cause of action the demurrer to the second should be sustained.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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44 Cal.App.2d 602

SANDERS et al. v. CRABTREE et al.

Civ. 11311.

District Court of Appeal, First District, Division 1, California.

May 1, 1941.

Rehearing Denied May 29, 1941.

Hearing Denied June 26, 1941.

1. Wills 🔑58(1)

Antenuptial contract providing that separate property of each spouse should remain separate with full power of disposition and descend to his or her heirs in event of intestacy, that wife should have life interest in California realty, and will of husband leaving most of his property to son and delivery of such documents by husband to son and later promises by father to leave his property to son did not constitute a binding contract for son's benefit enforceable by son or his representatives, so as to constitute widow taking property under later will a "trustee" for benefit of son.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

2. Wills 🔑58(1)

Where alleged parol contract to leave property to another is sought to be enforced after death of promisor it will be scrutinized with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced, and proofs of contract should be clear and acts of claimant referable alone to the contract.

3. Contracts 🔑187(1)

To be enforceable, a contract for benefit of a third person must be made expressly for his benefit, and that third person is or may be incidentally or remotely benefited is not sufficient.

4. Husband and wife 🔑14(3)

Delivery to and acceptance by husband of instruments creating joint tenancies in husband and wife operated as a valid "delivery" to and "acceptance" by wife, even if she was without knowledge of the transactions.

See Words and Phrases, Permanent Edition, for all other definitions of "Acceptance" and "Delivery".

5. Executors and administrators 🔑59

In action by executors and decedent's son to have surviving widow account for, as property of estate, property claimed by her as surviving joint tenant, finding that property was not placed in joint tenancy by decedent while under insane delusion that decedent's son had defrauded decedent, and that decedent was competent was sustained by the evidence.

6. Appeal and error 🔑1010(1)

Where trial court's findings that deceased was not incompetent or acting under insane delusion were amply sustained by the evidence they could not be disturbed on appeal.

7. Wills 🔑82

Where evidence discloses that there were reasons present in testator's mind for discrimination against contestants, it is not for jurors or appellate court to say that reasons were good or bad.

8. Executors and administrators 🔑59

In action by executors and decedent's son to have surviving widow account for as property of estate property claimed by her as surviving joint tenant, finding that there was no undue influence by wife and that decedent acted freely in the matter was sustained by the evidence.

9. Compromise and settlement 🔑23(3)

Finding that compromise and settlement by surviving widow, son by first marriage and grandchildren of testator of claims to property, allegedly decedent's was a valid binding agreement supported by considera-

tion and fairly entered into without any concealment, fraud or misapprehension of material facts, was sustained by the evidence.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Ernest Sanders and another, as executors of the last will of William H. Sanders, deceased, against Margaret E. Sanders, widow of deceased, and her children by a former marriage to have property claimed by Margaret E. Sanders, as surviving joint tenant declared the property of the estate and subject to administration, wherein a complaint in intervention was filed by William P. Sanders, son of deceased, and father of the plaintiffs, asking for the same relief. From a judgment for defendants, the plaintiffs and intervener appeal, and Margaret E. Sanders, as administratrix of the estate of William P. Sanders, deceased, was substituted in the place and stead of William P. Sanders, plaintiff in intervention, and Effie Bruton Crabtree, Esma Bruton Johnson, and Margaret K. Hill, as executrices of the estate of Margaret E. Sanders, deceased, were substituted in the place and stead of Margaret E. Sanders as party defendants.

Judgment affirmed.

Tanner, Odell & Taft and S. W. Odell, all of Los Angeles, for appellants.

Fogel, Beman & Jones and Leonard A. Shelton, all of Santa Monica, for respondents.

KNIGHT, Justice.

Ernest and Perry Sanders, as executors of the last will of their grandfather, William H. Sanders, deceased, brought this suit in equity against Margaret E. Sanders, widow of the deceased, and her children by a former marriage, to have property claimed by Margaret E. Sanders as surviving joint tenant, declared the property of the estate and subject to administration. A complaint in intervention was filed by William P. Sanders, son of the deceased and father of the plaintiffs, asking for the same relief. The findings of the trial court were in favor of defendants on all issues; judgment was entered accordingly, and plaintiffs and the intervenor appeal. After the briefs were filed, Margaret G. Sanders, as administratrix of the estate of W. P. Sanders, deceased, was substituted in the place and stead of William P. Sanders, plaintiff in intervention; and Effie Bruton Crabtree, Esma Bruton Johnson, and Margaret K. Hill, as executrices of the estate of Margaret E. Sanders, deceased, were substituted in the place and stead of Margaret E. Sanders, as party defendant; but for convenience the parties will be referred to throughout as if there had been no substitution.

William H. Sanders, the deceased, and the defendant Margaret E. Sanders, were married in New Mexico in April, 1906. They were 51 and 49 years of age respectively at the time of their marriage, and each had been married before. William H. Sanders had one son by a former marriage, William P. Sanders, the plaintiff in intervention; and Margaret E. Sanders (Margaret E. Bruton before her marriage to Sanders) had four children, the three surviving being the other named defendants. Both William H. Sanders and Mrs. Bruton owned property in their own right; and prior to their marriage they entered into a marriage settlement agreement or ante-nuptial contract, by the terms of which each agreed that his or her separate property should remain separate; that neither should have any claim or right to the property of the other, before or after death; that each should have the right to dispose of his or her separate property by deed, will, or otherwise, and that in the event of death intestate the property of each should descend to his or her direct heirs. The contract further provided that after Sanders' death his widow was to have a life interest in property which Sanders intended purchasing in California as their residence; and that he would by will made after marriage fix an amount sufficient to maintain his widow. This contract was dated April 17, 1906; and two weeks later and after their marriage Sanders made a will, giving his widow a life estate in "all of the property which I may hereafter acquire in the State of California", and providing that she should be paid $50 a month until her death or remarriage. Cash legacies were left to two grandsons (the plaintiffs herein), and all the balance of the property was left to the son, William P. Sanders. The contract and will were delivered to the son; and soon thereafter, that same year, the elder Sanders moved to Santa Monica. The son remained in New Mexico, continuing to take care of his father's and his own interests there. About 1910 the son came to California, where he continued to act for his father, keeping books, collecting rents, assisting in making loans, and generally aiding his father in his business, up to 1920, when their friendly business and personal relations were broken as a result of a dispute over a Madera county ranch, and were never resumed up to the time of William H. Sanders' death. After his death (he committed suicide on June 8, 1934) it was found that during the ten years previous Sanders had created and caused to be created joint tenancies in himself and his wife, covering numerous pieces of property, stock, and bank accounts, valued at $174,172.45. These joint tenancies as to the property he had caused to be created in his own and Mrs. Sanders' names by having the grantors make the deeds, many of them through escrows. He had also created joint tenancies with his grandchildren, children of W. P. Sanders, of the value of $46,828.50; and he left a will dated February 15, 1930, disposing of the balance of his estate, valued at $12,160. In the will he left his widow a life estate in certain property in Santa Monica (including the residence); upon her death said property to be divided between his son and his four grandchildren, one-fifth each. The balance of his property he also willed to his son and his four grandchildren, one-fifth each; and the will provided that any person contesting or attacking it in any way forfeited any bequests thereunder and was bequeathed one dollar. By the last provision of the will all former wills were revoked, and Ernest and Perry Sanders, grandsons, were appointed executors without bond.

Immediately after the death of William H. Sanders, W. P. Sanders and his son Ernest consulted attorney Fogel. W. P. Sanders produced the ante-nuptial agreement and the will of 1906, and according to Sanders, Fogel told him the ante-nuptial agreement had no force and effect; that the joint tenancies were final and could not be set aside, and that the property was worth approximately $100,000. He also told Sanders he would help obtain a settlement between the parties, but he could not represent Sanders. A list of the properties was compiled, and efforts at settlement were made by the parties submitting propositions, one to the other, through attorney Fogel; and on June 28, 1934, W. P. Sanders, as party of the first part, the grandchildren, as parties of the second part, and Margaret E. Sanders, the widow, as party of the third part, executed an agreement of settlement and a release of their claims against each other. Sanders and his children were represented at this time by attorney Crawford. Thereafter all the properties covered by the agreement of settlement were delivered and paid over by the respective parties; and on June 29, 1934, the executors filed their petition to probate the will, which was admitted to probate on July 27, 1934. On June 18, 1935, a year after the settlement agreement was executed and more than four months after the order admitting the will to probate had become final, Sanders and his children served on Mrs. Sanders notice of rescission of the settlement and release agreement; and this action followed—the complaint being filed September 3, 1935.

[1] Appellants first contend that the ante-nuptial contract and will of 1906 and their delivery to W. P. Sanders, with the promise that the property should be his on the death of his father, constituted a binding contract made for the benefit of W. P. Sanders, the son, which could not be rescinded without the consent of the son, and that it was never rescinded; that therefore the widow holds the property as trustee for the son as beneficiary under that agreement. We are unable to sustain the contention made by appellants in this behalf.

The agreement provided that as the parties were about to be married they desired to make said contract with regard to the "holding, using and disposition of the property which is now owned by each of them in their individual right as the sole and separate property thereof, together with all of the increase which may accrue thereon during their marriage"; that all of the property of William H. Sanders which was then his separate property "shall, after the said marriage, continue to be used, managed, controlled, handled, mortgaged, transferred and disposed of by the said party as his sole and separate estate", together with all of the increase or after-acquired property, and regardless of any change in form, and shall be kept separate from that of Margaret E. Bruton; that Margaret E. Bruton during the life of or after the death of Sanders "shall have no claim, right or interest or demand of any kind, nature or character" except as thereafter stated; that Sanders "shall have the full right to acquire and dispose of either by deed, will or otherwise any and all of the said property", and in case of his death without a will, all the property shall go to his direct heirs, except to the extent thereafter mentioned; that as to the property which he intended to purchase in California as the residence of the parties, after his death his widow shall have a life interest therein, so long as she lives or remains his widow, and that she shall receive from his separate estate an amount sufficient to maintain her, the amount to be fixed by a will to be made after their marriage, and that such property in the event of her death or remarriage shall descend as the other portions of his estate. The contract then made provisions with regard to the separate property of Margaret E. Bruton similar to those made with regard to the separate property of William H. Sanders—that her separate property shall remain hers, and shall not be co-mingled with his, and shall be managed and controlled by her, and that Sanders shall have no claim of any kind thereon, and in case of her death without a will, shall go to her direct heirs. It concluded: "In order to fully effectuate this agreement, the parties hereto as above stated, do hereby mutually release any and all rights, interests, claims or demands of whatsoever kind or nature in and to the property held by either of them or to be acquired by either of them during their marriage."

[2, 3] The following are among the reasons why appellants' contention cannot be sustained. In the first place, it appears upon its face that the contract was not made for the benefit of a third party; and therefore it does not come within the rules relied on by appellants. As shown by its terms, it was simply a marriage settlement contract, intended to limit the parties' interests in each other's property; there is no provision requiring either party to do anything for the benefit of W. P. Sanders, or any third party. William H. Sanders did not indicate therein that he intended to leave his property to his son; he simply reserved the "full right to acquire and dispose of either by deed, will or otherwise any and all of the said property". This right he exercised first by making the will in favor of his son, and later by the subsequent will and the creation of the joint tenancies with his wife and grandchildren. The provision that in case of his death intestate, all the property shall go to his direct heirs (except the life estate reserved in the residence property to his wife), does not give his son any rights here, because the deceased did not die intestate. There is nothing in the actions or statements of William H. Sanders at the time the contract and will of 1906 were executed and delivered to W. P. Sanders indicating a binding contract with the latter that his father's property, with the exception of the life estate in the California property, should ultimately be his. The only testimony to the effect that the father promised the son that the property would be his on the father's death was given by the son, that "he told me many times that when he passed on what he had would be left to me"; but he did not say that his father so promised when he handed him the agreement and the will. And manifestly the promises made by the father to the son did not constitute such a contract as referred to in the cases cited by appellants. As said in one of those cases (Owens v. McNally, 113 Cal. 444, 45 P. 710, 712, 33 L.R.A. 369), "Where a contract such as this, resting in parol, and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract." Moreover, such a contract to be enforcible must be "made expressly for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as a result of such contract." Buckley v. Gray, 110 Cal. 339, 42 P. 900, 901, 31 L.R.A. 862, 52 Am.St.Rep. 88.

Nor is there any merit in appellants' contention that they are entitled to enforce the contract. This contention is based upon the theory that the contract was made for the benefit of the son, W. P. Sanders, and was never rescinded. There was a finding made to the effect that there was no cancellation of the contract other than by deceased conveying or causing to be conveyed to himself and his wife, to himself and his grandchildren, as joint tenants with the right of survivorship, to himself as trustee for the benefit of his grandchildren, and to his granddaughter, certain properties, real and personal. But as already pointed out, the contract shows that it was not made for the benefit of the son, and even if W. P. Sanders could enforce performance, there are not provisions to enforce which would give him any rights, nor has he pointed out any. The contract simply provided that William H. Sanders might by will or deed or otherwise do as he saw fit with his property; and his wife agreed that she would waive her community rights therein (she is not asserting any community rights here), and if he died intestate (he died testate) she would not share as one of his heirs at law. It was nowhere agreed or suggested other than the above that William H. Sanders was limited in what he should do with his property.

[4] Appellants further contend that said instruments creating the joint tenancies in the deceased and his wife were never delivered to Mrs. Sanders. It was admitted that the deeds were of record, but appellants contend that the ostensible record title is negatived by the testimony of Mrs. Sanders, which they claim showed she had no knowledge of the instruments, and that the ante-nuptial agreement intervenes and estops her from claiming a presumptive delivery or acceptance. In this regard she testified in substance that she knew some of the property was in joint tenancy, that "he told me about it" but she "didn't pay enough attention to know anything about it". However, there is no question but that the instruments were duly delivered to and accepted by William H. Sanders; and suffice it to say in this regard that the delivery to and acceptance by one grantee operated as a valid delivery to and acceptance by the other grantee. Eshleman **v.** Henrietta Vineyard Co., 102 Cal. 199, 36 P. 579, cited approvingly in Smith v. Lombard, 201 Cal. 518, 258 P. 55; 18 Cor.Jur., p. 212; 16 Am.Jur., p. 522.

The dispute which terminated the friendly relations between the deceased and his son arose in this manner: William H. Sanders, with his son and others, was interested in a trust of properties consisting of a large ranch in Madera county, title to which was in the Hellman Commercial Trust and Savings Bank as trustee. William H. Sanders owned a 640 acre (2135.5/2942) interest, and the son a 320 acre interest; and the son managed the ranch for the syndicate. On December 19, 1919, the father made an assignment of all his interest in this ranch to the son. About six months later the father approached the son with some buyers for the property, and the son refused to sell, reminding the father that he had assigned all his interest in that property to him. There was a heated discussion, and the son finally agreed to sell, and to give his father $11,000 of the $15,000 down payment, but refused to give him anything further. From that time on the relationship between the father and son was not at all friendly, the father, as found by the court, believing that he had given the property to his son to be held by the son for the use and benefit of the father, and accusing his son of cheating and defrauding him out of said property. The court found that "the belief of William H. Sanders was not an insane delusion", and also found: "Prior to his death, and particularly during the last fifteen years of his life, the deceased, William H. Sanders, had not become debilitated through old age and sickness, or otherwise, to a greater extent than was natural to a strong man of his years. He used intoxicating liquors, and on occasions used them to excess. He did not, during the time mentioned in the plaintiffs' complaint, or at any time, become weakened physically or mentally, or become incompetent to do business, and his mind did not become weakened or unsound. His mind at no time was in such a condition that he was subject to undue influence or persuasion in the transaction of his business, or otherwise."

[5] Appellants contend that the facts show without conflict that "when W. H. Sanders placed in joint tenancy with his wife the property involved in this action he was suffering from an insane delusion that his son, W. P. Sanders, had cheated and defrauded him out of property, and for that reason said W. H. Sanders attempted to dispose of his property in a way he would not otherwise have done", and that the trial court's findings that deceased was not incompetent or acting under an insane delusion, are contrary to the evidence. With this contention we cannot agree. The testimony of the son that at the time his father brought the buyers for the property to him, his father denied having made any assignment of his interest in the property, was contradicted by testimony to the effect that the deceased knew he had made the assignment to his son, but thought he "was to have all the income as long as he lived". And on the question of whether the deceased's mental condition was impaired by his drinking, the evidence is sharply conflicting; but there is considerable testimony to the ef-

fect that his mental condition was never impaired by his drinking, including that of his doctor, who had taken care of him professionally for many years, and who knew him intimately, on one occasion having been on the same boat with him for about three months on a trip around the world, and who testified that in his opinion the deceased was "never incompetent"; that he had positive opinions which could not be easily changed, but he was not suffering from any mental disease—on the contrary, "his mind was much keener than the average man of his age".

[6,7] In view of all the above, it is our opinion that the trial court's findings that deceased was not incompetent or acting under an insane delusion are amply sustained by the evidence, and cannot be disturbed on appeal. As said in Estate of Shay, 196 Cal. 355, 237 P. 1079, 1083, "The evidence discloses that there were reasons present in the mind of the testator for the discrimination against these contestants. Whether those reasons were good or bad was not for the jurors to say and is not for this court to determine. * * * There is nothing in the record to indicate that this belief of the testator mistaken though it may have been, was without reason or evidence, or that it was adhered to against reason or against evidence. The finding of testamentary incapacity is not sustained by the evidence."

[8] The court also found: "Margaret E. Sanders did not in any manner unduly influence her husband, William H. Sanders, or impose her will upon him; and he did not, relying upon any representation made by her, adopt or consent to a plan of having his properties placed in joint tenancy with his wife, to be held, if she survived him, for the use and benefit of his son and grandchildren and by her distributed to them, but, on the contrary, William H. Sanders placed, or caused said properties to be placed, in joint tenancy of his own free will and volition and with the full intent of vesting the entire fee title of said premises in Margaret E. Sanders at the date of his death, if she survived him." Appellants attack this finding, contending that there is evidence of undue influence, and in addition, that because of the relationship of the parties, it must be presumed that the properties were obtained without sufficient consideration or by undue influence. Suffice it to say on this point that all of the circumstances of the case, as developed by the evidence, including Mrs. Sanders' testimony that she did not urge her husband to make the joint tenancies, that in fact she only knew of them in a general way, and the evidence showing that deceased felt that his son had cheated him and he was determined that he should not get any more of his property, and that by the terms of the ante-nuptial agreement he reserved the right to dispose of his property in any way he desired, amply support the trial court's finding in this respect. Estate of Shay, supra.

[9] The disposition of the above questions would seem to establish without further discussion the validity of the joint tenancy deeds, and consequently Mrs. Sanders' right to the property involved therein; but respondents contend that in any event the compromise agreement, executed by the parties after W. H. Sanders' death, was a valid, binding agreement; and we are of the opinion that the trial court was justified in so holding. By the terms of this settlement, Mrs. Sanders agreed to give W. P. Sanders $5,000 in cash, 350 shares of Southern California Edison stock, $25 a share par value, and the "Barndollar" note and mortgage, balance due $10,000. She also agreed to pay the funeral expenses of her deceased husband and make no claim therefor against the estate; to waive any right to probate homestead; and not to contest the 1930 will or seek to have any former will probated in its place. W. P. Sanders and his children agreed to convey to Mrs. Sanders whatever interest they had in the "Wonder Market" property.

Appellants first contend that they received no consideration for the signing of the agreement because no part of the money paid over to W. P. Sanders or his children was the separate property of Mrs. Sanders, but all belonged to her deceased husband, and therefore they received only what already belonged to them. However, as held above, the joint tenancies under which Mrs. Sanders acquired the property were valid and cannot be set aside; therefore the property did not belong to appellants, but to Mrs. Sanders.

"Plaintiffs' Exhibit 10" contains a list of properties which they claim were not contained in the list of properties supplied by attorney Fogel on which the settlement agreement was based. The properties listed, and their appraised values as fixed by the estate tax return, which by stipulation was introduced as evidence of the value of said properties, are: 3 Mar Vista lots, $2,000, $2,500, and $3,000; Santa Monica property, $1,500; Wonder Market property, $15,000; Tower Bonds, $9,500; and 2 promissory notes (Warren, $2,069, and George, $1,280). Appellants admit that "There was some error in the descriptions of some of the properties which would reduce this amount considerably but when the notice of rescission was served, the intervenor and his children were laboring under the impression that a very large amount of property had been omitted." And respondents show that the Mar Vista lots were included in the list, and the Tower Bonds were listed as of the value of $18,500 (their face value was $19,000 but they were appraised at $9,500). Respondents admit the Santa Monica property and the Warren and George promissory notes were not included in Fogel's list, the Santa Monica property through inadvertence, and the two promissory notes because they were in escrow and none of the parties knew about them until later. Besides the Wonder Market (which will be discussed later), the total value of the items left off the list was $4,849. It would appear, therefore, as respondents contend, that this discrepancy in an estate valued at over $200,000 was not of such magnitude that had the parties known of these pieces of property they would not have executed the agreement.

The situation as to the Wonder Market was as follows: A note for $27,500 secured by a trust deed on the property was purchased and assigned to William H. Sanders and Perry Sanders as joint tenants. Some negotiations were had between the debtor on the note and W. H. Sanders, and the property was conveyed to Sanders and his wife, and a quiet title action was brought. The findings in the quiet title action, according to the briefs herein, refer to the deed by which the property was conveyed to Sanders and his wife "as joint tenants, with right of survivorship"; but the judgment based on these findings is to the effect that W. H. Sanders and wife were the owners of the property, without any reference to them as joint tenants.

Appellants claim that Perry Sanders had an interest in the property, growing out of the fact that he was once named as joint owner of the note secured by the deed of trust, and that had he known of his interest, he never would have signed the quitclaim deed, part of the settlement agreement. Respondents claim Perry Sanders did know he was joint owner of the note, and there is evidence supporting this claim. On the other hand, if Sanders and his wife be considered as tenants in common, in accordance with the judgment in the quiet title action, rather than as joint tenants as named in the deed conveying title to them, then upon Sanders' death his heirs acquired his half interest therein. But in any event, and regardless of the state of the title to the Wonder Market, it seems clear that by the terms of the settlement agreement all the plaintiffs relinquished whatever interest they or any of them may have had. They agreed therein to convey to Mrs. Sanders "any and all interest which they or any of them may or might have in or to the properties known as the Wonder Market * * * the intention being to convey to Third Party [Mrs. Sanders] all of the interest which they or any of them may or might have in said properties, whether arising through the estate or will of William H. Sanders, Deceased, or otherwise"; and they agreed to execute a quitclaim deed to said property. Thus it would seem that they effectively disposed of any interest they had in said property, however acquired; and in view of the above, obviously they were not unmindful of the Wonder Market property or their possible interest therein when they executed the agreement, even if it was not included in Mr. Fogel's list.

The court found in connection with the settlement agreement, and the evidence shows, that there had been no concealment of the extent and value of the properties involved; that said agreement was not signed under any mistake or misapprehension of material facts, and that the plaintiffs had full knowledge of the facts concerning the extent and values of the estate on November 3, 1934, but not until June 18, 1935, did they indicate any dissatisfaction with the settlement agreement; from which the court concluded that the plaintiffs were guilty of laches and had not effectively rescinded the agreement.

The other questions raised by the appeal are either incidental to those already decided, or do not require special mention.

After having fully examined the record and analyzed the points made and authorities cited by the respective parties, we are convinced that the trial court's findings are fully justified and should be upheld.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

NATURAL MILK PRODUCERS ASS'N OF CALIFORNIA et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11674.

District Court of Appeal, First District, Division 2, California.

May 1, 1941.

Hearing Granted June 26, 1941.

1. Injunction ⇨114(1)

As to a party, who subsequent to enactment of city and county milk ordinance disposed of all his dairy interests, a suit to enjoin the enforcement of such ordinance presented only a "moot question".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

2. Injunction ⇨85(2)

Parties, who had not applied for a permit to sell milk under an ordinance, were in no position to question validity of such ordinance in suit to enjoin the enforcement thereof, since if application for permit had been made and refused, the applicant had a remedy by mandamus, in which proceeding the validity of the ordinance could have been inquired into and all rights of the applicant protected.

3. Mandamus ⇨14(1, 3)

In suit to enjoin enforcement of milk ordinance, where under the pleadings it did not appear that any one of parties plaintiff had asked for a permit under the ordinance or that such permit had been denied, rule that court will not deny a party any relief because he has asked for the wrong relief could not be invoked to authorize the issuance of a writ of mandamus commanding the issuance of a permit to any party plaintiff. Code Civ.Proc. § 1085.

4. Municipal corporations ⇨592(1)

Where Agricultural Code, with which milk ordinance of San Francisco was claimed to be in conflict, was not enacted until after effective date of ordinance, there was no conflict alleged affecting validity of ordinance when enacted and any conflict raised by later general statute would not render invalid an ordinance which was valid when enacted, but conflicting provisions of the ordinance would be superseded by the general statutes. St.1933, p. 60; Const.Cal. art. 11, § 11.

5. Municipal corporations ⇨592(1)

Provisions of San Francisco milk ordinance, requiring that guaranteed milk, grade A milk, and grade B milk be pasteurized before sale in San Francisco for human consumption, were not in conflict with any provisions of Agricultural Code so as to be superseded by such general law. St.1933, p. 60.

6. Municipal corporations ⇨111(4), 591

San Francisco milk ordinance authorizing sale and distribution of certain grades of pasteurized milk and certified milk, and defining certified milk as that milk which conforms to the rules for production and distribution of certified milk adopted by the American Association of Medical Milk Commissions was not invalid because of unlawful "delegation of legislative powers", particularly where ordinance contained a broad and complete "saving clause", and the words "rules, regulations", if they expressed an invalid delegation of legislative powers, could be stricken without affecting the remainder of ordinance.

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Legislative Power".

7. Statutes ⇨64(1)

Where words, which render a statute invalid, may be stricken out without in any manner affecting the rest of the statute, such objectionable words will be ignored, and the rest of the legislative enactment will be given full effect.

8. Municipal corporations ⇨122(2)

A municipal ordinance is presumed to be valid, and a party who would question its validity must bear the burden of establishing his contention.

9. Food ⚷1

Parties who sought to enjoin the enforcement of San Francisco milk ordinance failed to establish contention that ordinance by prohibiting sale of any raw milk except certified milk created two classes between which there was no natural, constitutional, or intrinsic distinction, where record contained nothing which would warrant a finding that certified milk as defined in the ordinance was not as wholesome as any of the other grades of milk after pasteurization.

10. Constitutional law ⚷42

Where milk ordinance contained nothing which would have prevented anyone of the parties to suit seeking to enjoin enforcement of such ordinance from applying for a permit to sell any one of the grades of milk specified therein, such parties could not attack validity of ordinance on ground that "special privileges" had thereby been granted to others which had been denied to them. Const.Cal. art. 1, § 21; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Privilege".

11. Municipal corporations ⚷121, 122(2)

In suit to enjoin enforcement of certain provisions of milk ordinance, allegations that ordinance was unreasonable and therefore void presented an issue of fact, and the burden of sustaining their contention as to unreasonableness rested upon parties who relied thereon.

12. Appeal and error ⚷1011(1)

Trial court's finding of fact based upon conflicting evidence would not be disturbed on appeal.

◆

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Suit by the Natural Milk Producers Association of California and others against the City and County of San Francisco and others, to enjoin the enforcement of certain provisions of the milk ordinance of the County and City of San Francisco. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Philip S. Ehrlich and Albert A. Axelrod, both of San Francisco (Julien R. Bauer, of San Francisco, of counsel), for appellants.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondents.

Sullivan, Roche & Johnson and Eustace Cullinan, Jr., all of San Francisco, amici curiae for respondents.

STURTEVANT, Justice.

The plaintiffs sought a decree enjoining the defendants from executing subdivisions 1, 2, 3, 4, 7, and 12, of section 3 of ordinance No. 17,052 of the city and county of San Francisco which is known as the Milk Ordinance. The trial court refused to grant the decree, made findings in favor of the defendants, and from the judgment entered thereon the plaintiffs have appealed.

The plaintiffs contend that a party injured by a void ordinance may attack it to enjoin its enforcement. They cite and rely on Abbey Land, etc., Co. v. San Mateo, 167 Cal. 434, 139 P. 1068, 52 L.R.A.,N.S., 408, Ann.Cas.1915C, 804; Greenfield v. Board of City Plan. Com'rs, 6 Cal.App.2d 515, 45 P.2d 219; Wallace v. Currin, 4 Cir., 95 F.2d 856; Jellen v. O'Brien, 89 Cal.App. 505, 264 P. 1115. The defendants concede the rule but claim the authorities are not applicable to the facts in the instant case. The defendants point out that each of the cited cases dealt with the rights of an established business. Continuing the defendants quote from the findings showing that the plaintiff Natural Milk Producers Association of California is not now and never was engaged in the production and distribution of milk; that the plaintiff C. B. Clowes is engaged in the production and distribution of milk in San Joaquin county but not in the city and county of San Francisco; and that many months before the action was tried the plaintiff Krobitzsch had sold out his dairy interests and was not engaged in the production or distribution of milk in San Francisco. Under these facts the defendants contend that the plaintiffs had not suffered and would not suffer any irreparable injury and that the decree denying them an injunction was altogether proper. Golden Gate S. T., Inc. v. San Francisco, 21 Cal.App.2d 582, 69 P.2d 899; Willis v. Lauridson, 161 Cal. 106, 118 P. 530.

[1] The rule just stated is controverted by the plaintiff Krobitzsch. He calls attention to the fact that he was engaged in the milk business in San Francisco when

the ordinance was enacted and claims therefore that he is entitled to maintain this action. We think not. The most that can be said in his behalf is that from the date when he sold all of his dairy interests the case as to him presented merely a moot question. California Prune & A. G. Ass'n v. Orchard Co., 195 Cal. 264, 232 P. 463.

[2, 3] Closely allied to the proposition last stated the defendants also quote from the findings to the effect that the plaintiffs had a plain, speedy and adequate remedy at law and therefore were not entitled to ask for a decree in equity. Continuing they quote from the findings to the effect that no one of the plaintiffs prior to the commencement of this action applied for a permit under the ordinance. If that application had been made and refused the applicant had a remedy by applying for a writ of mandamus. In that proceeding the validity of the ordinance could have been inquired into and all of the rights of the applicant protected and enforced. Lang's Creamery v. City of Niagara Falls, 251 N.Y. 343, 167 N.E. 464; Mutual Elec. Light Co. v. Ashworth, 118 Cal. 1, 50 P. 10; South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 579, 93 P. 490. Those authorities are directly in point and support the contention of the defendants. However the plaintiffs cite and rely on Mayor, etc., of Baltimore v. Baltimore County Water & E. Co., 95 Md. 232, 52 A. 670; Davies v. City of Seattle, 67 Wash. 532, 121 P. 987; and Naderhoff v. Prudential Mut. L. Ins. Ass'n, 26 Cal.App.2d 73, 78 P.2d 753. An examination of those authorities discloses that no one of them states any rule at variance with what we have just said. The Naderhoff case holds that whenever a party under his pleading is entitled to certain relief the courts will not deny him any relief because he has asked for the wrong relief; but, on the other hand, that said party will be granted such relief as, under his pleadings, he is entitled to. However, in the instant case under the pleadings it may not be said that any one of the plaintiffs has asked for a permit, that the permit has been denied, and that a writ should issue commanding the issuance to said party of a permit. Code Civ.Proc. § 1085.

The plaintiffs quote passages from the ordinance which prohibit the sale to consumers of non-pasteurized guaranteed raw milk and grade A raw milk and contend they conflict with provisions of a general law and therefore such passages contained in the ordinance are void. § 11, Art. XI, State Const.; Mann v. Scott, 180 Cal. 550, 182 P. 281; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172. If there is a conflict the contention is sound. But a careful reading of the ordinance does not disclose any conflict. True the passages contained in the ordinance, which prescribe pasteurization, place additional limitations on sales, but such additional limitations do not create a conflict and they are not inhibited. In re Hoffman, 155 Cal. 114, 117, 118, 99 P. 517, 132 Am.St.Rep. 75.

[4, 5] The point last discussed is based specifically on the provisions of the Agricultural Code. It assumes the Agricultural Code was first adopted and thereafter ordinance No. 17,052 was adopted. But that is not the fact. The ordinance was adopted and took effect May 1, 1933. At that time it was not in conflict with any provisions contained in the Agricultural Code which was later adopted and took effect August 21, 1933, St.1933, p. 60—about three months later. True it is that the Agricultural Code codified certain statutes. Stats.1927, p. 1944, and others. But it also made certain amendments. Excepting the Agricultural Code, the plaintiffs do not specify any statute with which they claim the ordinance was in conflict. If there was no conflict when the ordinance was enacted it was valid. If later general statutes were enacted which raised a conflict the ordinance which was valid when enacted remained valid. But the conflicting provisions of the ordinance would be superseded by the general law. In re Berry, 147 Cal. 523, 525, 82 P. 44, 109 Am.St.Rep. 160. Subdivision 1, section 3 of the ordinance in effect required that guaranteed milk, grade A milk, and grade B milk be pasteurized before sale in San Francisco for human consumption. We have examined the general statutes and we do not find a single provision stating in effect any of those grades need not be pasteurized before being sold in San Francisco.

[6, 7] The plaintiffs contend that the ordinance grants special privileges and immunities to certain vendors which are denied to others and that such grants are void. § 21, art. I, State Const., and 14th Amend. U.S.Const. They also claim the ordinance contains invalid provisions delegating legislative powers. We find no

merit in either contention. In subdivision 1 of section 3, it is provided: "* * * (a) certified milk, (b) guaranteed pasteurized milk, (c) grade A pasteurized milk and (d) grade B pasteurized milk, and no other milk, shall be sold, offered or exposed for sale, exchanged or delivered for human consumption within the City and County of San Francisco. * * *" Subdivision 2 provides: "Certified milk: Certified milk is market milk which conforms to the rules, regulations, methods and standards for the production and distribution of certified milk adopted by the American Association of Medical Milk Commissions and must bear the certification of the milk commission of the San Francisco County Medical Society. * * *" The plaintiffs argue that under the latter provision the American Association of Medical Milk Commissions is delegated the power to set the qualifications of certified milk. That said association had established or caused to be established a high grade of milk under the trade name and brand of certified milk is an admitted fact. The record is wholly silent as to the quality of that grade as compared to the other grades above mentioned. Assuming that the American Association of Medical Milk Commissions may from time to time change its rules and regulations and that certified milk will be greatly depressed in quality, the plaintiffs are not purchasers and they may not complain. A. F. Estabrook Co. v. Industrial Acc. Comm., 177 Cal. 767, 177 P. 848. The ordinance adopts certified milk as a high standard. Whether that high standard was created by a public body or a private body is immaterial. Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249. However the plaintiffs contend the American Association may so amend its rules and regulations as to impose additional burdens on vendors of certified milk. That argument leads nowhere. In the Gerino case it might have been argued with equal force that the medical colleges, used as the standard, might cause their curriculums to be changed. Finally, solely for the purposes of this decision, we will assume the insertion in subdivision 2 of section 3 of the words "rules, regulations," rendered said section invalid as a delegation of legislative powers. Those words however may be stricken out without in any manner affecting the rest of the ordinance. It was drawn with that rule definitely in mind. Section 23 is a very full, broad and complete saving clause and expressly covers the subject. Under such circumstances it is the settled law of this state that the objectionable words will be ignored and the rest of the legislative enactment will be given full force and effect. Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235. It follows that the contention made by these plaintiffs has no merit.

[8, 9] The plaintiffs further contend that certified milk is raw milk and the ordinance does not require that it be pasteurized; however it does require that all other grades of raw milk must be pasteurized. They then assert that the ordinance creates two classes between which there is no "natural, constitutional or intrinsic distinction". That assertion begs the question. The ordinance is presumed to be valid. Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225, 48 A.L.R. 509. On him, who would question its validity, rests the burden. San Diego Water Co. v. San Diego, 118 Cal. 556, 50 P. 633, 38 L.R.A. 460, 62 Am.St.Rep. 261. The record contains nothing which would warrant this court in holding that, as defined in said ordinance, certified milk is not as wholesome or more wholesome than any of the other grades of milk after they have been pasteurized. That being so no reason appears why certified milk should be pasteurized, no objection appears why the other grades of milk specified in the ordinance should not be pasteurized, and a valid distinction exists between certified milk (not pasteurized) and other grades required to be pasteurized.

[10] As there is nothing in the ordinance that would have prevented any one of the plaintiffs from applying for a permit to sell any one of the grades of milk mentioned in subdivision 1 of section 3, it is patent they may not assert that any special privilege has been granted to others which has been denied to them.

[11, 12] It was also the theory of the plaintiffs that Ordinance No. 17,052 was unreasonable and therefore void. To present that point they alleged directly the fact. The trial court found the allegation was not true. The plaintiffs also alleged many probative facts showing or tending to show that the ordinance was unreasonable. The trial court made findings against the plaintiffs on those allegations also. It did not err. The allegations presented an issue of fact. The

burden rested on the plaintiffs. In re Berry, 147 Cal. 523, 82 P. 44, 109 Am.St. Rep. 160. The most the plaintiffs may claim is that there was a possible conflict in the evidence. But that conflict was addressed to the trial court and its findings may not be disturbed by this court.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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44 Cal.App.2d 193

In re CHAMBERLAIN'S ESTATE.

CHAMBERLAIN et al. v. PERRY.

Civ. 6546.

District Court of Appeal, Third District, California.

May 14, 1941.

Hearing Denied June 12, 1941.

1. Executors and administrators 🔑461

Although executor has been removed, he is treated as still in office, with respect to his duty to account, until his account is finally settled.

2. Executors and administrators 🔑486

Where note executed by decedent and son was paid from funds of decedent's estate after son had been removed as executor of estate, but before final settlement of son's account, court could charge son, on accounting, for one-half of amount paid by estate.

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

On petition for rehearing.

Petition denied.

Prior opinions, 112 P.2d 53; 109 P.2d 149.

O'Donnell & Bagby, of Woodland, for appellant Chamberlain.

C. C. McDonald, of Woodland, and R. H. Schwab, of Sacramento, for appellant Chapman.

A. G. Bailey, of Woodland, for respondent.

PER CURIAM.

[1, 2] It is pointed out by respondent that Chamberlain was removed as executor by order of court on March 14, 1939, and that the note was paid April 18, 1939. He states that the right of contribution did not arise until the note was paid by the estate. We may say that the record does not furnish the dates mentioned. This question is raised here for the first time. Assuming that the position of respondent is correct, the rule is that until the account of the executor under such circumstances is finally settled, he is, in respect to his duty to account, treated as still in office. 11b Cal.Jur. p. 528, sec. 1074. The right of action for contribution arose prior to a settlement of the account, and the court would have the right to charge the executor with an indebtedness to the estate, if it accrued prior to the settlement of the account.

The petition for rehearing is denied.

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44 Cal.App.2d 935

PEOPLE v. OWENS.

Cr. 1763.

District Court of Appeal, Third District, California.

May 13, 1941.

Criminal law 🔑1182

Where transcript on appeal was filed in District Court of Appeal on March 3, 1941, and no brief was filed in behalf of appellant, and cause was regularly placed on calendar for oral argument on May 13, 1941, and no appearance was made for appellant when case was called for hearing, conviction of appellant was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Court Owens was convicted for burglary of the second degree, and he appeals.

Affirmed.

Ronald E. Bates, of Modesto, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant was convicted in the superior court of Stanislaus county of the crime of burglary of the second degree, a felony.

The transcript on appeal was filed in this court March 3, 1941. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on May 13, 1941. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

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44 Cal.App.2d 660

TITLE INS. & TRUST CO. v. GRAHAM et al.

Civ. 12475.

District Court of Appeal, Second District, Division 2, California.

May 6, 1941.

Rehearing Denied May 29, 1941.

Hearing Denied June 30, 1941.

1. Appeal and error 🔑931(1)

On appeal from judgment in favor of plaintiff, the District Court of Appeal would view the evidence most favorably to plaintiff.

2. Appeal and error 🔑173(2)

Where defense that indorsement of note was restrictive was not raised in trial court, defense could not be urged for the first time on appeal.

3. New trial 🔑101

In action to recover balance due on note after sale of real property under power contained in deed of trust, where counsel for defendants did not take advantage of offer by plaintiff's counsel that copy of trust agreement be received in evidence, motion for new trial on ground of newly discovered evidence consisting of the trust agreement was properly denied.

4. Appeal and error 🔑110, 782

An order denying a motion for new trial is not an "appealable order", and purported appeal from such an order would be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Title Insurance & Trust Company against Sophreat L. Graham and others to recover the balance due on a note after sale of real property pursuant to power contained in a deed of trust. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edmond Gattone and Alberta Belford, both of Los Angeles, for appellants.

Raymond E. Parr, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the balance due upon a note after sale of real property, pursuant to the power contained in a deed of trust, defendants appeal.

There is also a purported appeal from an order denying a motion for a new trial.

[1] Viewing the evidence most favorably to plaintiff (respondent), the facts are:

February 2, 1932, defendants executed in favor of Western Mortgage Corporation a promissory note in the principal amount of $37,000 and also as security for the promissory note a deed of trust upon certain real property located in the city of Los Angeles. March 30, 1932, Western Mortgage Corporation indorsed and delivered the aforementioned promissory note and deed of trust to plaintiff pursuant to a trust agreement for first mortgage assignments between plaintiff and the Western Mortgage Corporation. The assignment of the promissory note and deed of trust to plaintiff was not placed of record nor did defendants know thereof until November 27, 1937.

Upon the deposit with plaintiff of the note and trust deed, Western Mortgage Corporation issued evidence of ownership of interests in said note and trust deed, which were called First Mortgage Assignments. These were sold to the public. The entire principal on the promissory note remained unpaid at the maturity date thereof, August 2, 1933. March 27, 1934, defendants entered into a release agreement with Western Mortgage Corporation, whereby defendants conveyed title to the property covered by the trust deed to a nominee of the Western Mortgage Corporation, in consideration of which the Western Mortgage Corporation released a second trust deed on the property and released defendants from any deficiency judgment that could arise by virtue of the promissory note above mentioned. November 27, 1937, plaintiff delivered to defendants a declaration of default and election to cause a sale to be made pursuant to the provisions of the trust deed. April 15, 1938, a sale of the property covered by the trust deed was made and July 13, 1938, the present action was instituted for a deficiency judgment.

Defendants urge for reversal of the judgment the following propositions:

First: The promissory note which is the basis of the present action was transferred to plaintiff by a restrictive indorsement and, therefore, the release of March 27, 1934, by Western Mortgage Corporation of defendants from any deficiency judgment was a valid defense to the present action.

Second: The trial court improperly denied defendants' motion for a new trial on the ground of newly discovered evidence.

[2] Defendants' first proposition will not be considered by us for the reason that the law is established in this state that an appellate court will not consider a theory of a case different from that urged in the trial court and which is presented for the first time on appeal (Isenberg v. Sherman, 212 Cal. 454, 508, 298 P. 1004, 299 P. 528; Merrill v. Kohlberg, 29 Cal.App. 382, 386, 155 P. 824; National Union Fire Ins. Co. v. Nason, 21 Cal. App. 297, 299, 131 P. 755; Boot v. Boyd, 37 Cal.App. 545, 555, 174 P. 352; Estate of Meyer, 11 Cal.App.2d 409, 414, 53 P.2d 984).

Applying the foregoing rule to the facts of the present case, it appears that the defense that the indorsement was restrictive was not raised in the trial court. This is conceded in defendants' opening brief, where it is stated at page 7:

"The writers of this brief were not the attorneys in the case at the time of trial, but it appears from the pleadings, from a record of the proceedings had, and from the findings and judgment of the trial court that the trial was had upon the theory that plaintiff was a holder in due course for value of the $37,000 note and upon this theory the trial court apparently based its findings and judgment."

From the foregoing it is apparent that the theory of defense which defendants now urge is being here presented for the first time.

In Coral Gables v. Jones, 323 Pa. 425, 187 A. 434, the Supreme Court of Pennsylvania in passing upon this identical point thus states the rule through Mr. Justice Schaffer at page 436 of 187 A.

"It is urged upon us that the indorsement upon the note was restrictive under the terms of the Negotiable Instrument Law (the Florida statute is similar to ours) because the indorsement was in fact to a trustee. The question of restrictive indorsement was not raised in the court below. This being so, it cannot be availed of before us. Maguire v. Wheeler, 317 Pa. 193, 176 A. 441; Brown v. Castle Shannon Borough, 318 Pa. 363, 178 A. 678; Gordon v. Hartford Sterling Co., 319 Pa. 174, 179 A. 234; Fleming v. Adamson, 321 Pa. 28, 182 A. 518."

[3] Defendants' second proposition is without merit. At the trial the trust agreement between plaintiff and the Western Mortgage Corporation was not introduced in evidence. Defendants urged that their motion for a new trial should be granted on the ground of newly discovered evidence, it being alleged that the newly discovered evidence was the trust agreement just mentioned. The record discloses that at the trial counsel for defendants stated that it was material to know the terms of the trust agreement between plaintiff and the Western Mortgage Corporation, whereupon plaintiff's counsel stated to defendants that he had in his possession a copy of such trust agreement and that it was agreeable to him to have the copy received in evidence. Defendants' counsel did not take advantage of this offer. Hence, it is obvious that the evidence which is now urged as newly discovered evidence was not such in fact and the

trial court properly denied the motion for a new trial on this ground (Chronister v. Brennan, 27 Cal.App.2d 509, 512, 81 P.2d 479).

[4] An order denying a motion for a new trial is nonappealable (Joseph v. Vogt, 35 Cal.App.2d 439, 442, 95 P.2d 947). The purported appeal from the order denying the motion for a new trial is dismissed.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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44 Cal.App.2d 750

PEOPLE v. KERFOOT.

Cr. 1758.

District Court of Appeal, Third District, California.

May 12, 1941.

Rape 🔑51(1)

Evidence supported conviction of rape.

Appeal from Superior Court, San Joaquin County; H. S. Schaffer, Judge.

Vernon Kerfoot was convicted of rape, and he appeals.

Affirmed.

Herbert E. Paul, of Modesto, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant, by an information, was charged with rape, and from a judgment of conviction and from an order denying his motion for a new trial, he has appealed.

The transcript upon appeal was filed in this court on January 23, 1941, and was orally argued March 4, 1941. No brief upon behalf of appellant was then on file, but at the request of appellant he was granted 10 days in which to file his opening brief. No brief having been filed, the cause was ordered submitted.

We have carefully read the transcript of all the proceedings and the testimony taken at the trial.

Except for the testimony of appellant himself, the evidence of the crime and his participation therein stands undisputed. The narrative of the circumstances by appellant, both before and after the commission of the offense, is so unsatisfactory and contradictory as to add to the certainty of his guilt.

The trial was fairly conducted and appellant was accorded every opportunity to present his defense. He was found guilty by a jury of his choosing, and there is nothing in the record to warrant a different conclusion than that reached by the jury. An experienced and able trial judge presided at the trial and also denied a motion for a new trial.

We find no errors in the record, and the judgment and order are affirmed.

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44 Cal.App.2d 774

In re THOMPSON'S ESTATE.

THOMPSON v. WOODS.

Civ. 11635.

District Court of Appeal, First District, Division 1, California.

May 14, 1941.

1. Wills 🔑297(4)

In proceeding for probate of lost or destroyed will, testatrix' declarations were admissible on the issue of revocation.

2. Wills 🔑306

Testimony of attorney who drew lost or destroyed will, testimony of former notary public who "kept track" of will as testatrix read it to her, and who saw signatures of testatrix and attesting witnesses, and evidence that, on the day before her death, testatrix stated that she had advised her husband that she had a will, and that will was in certain bank, established that will was in existence, and that testatrix did not intend to revoke it, at least one day before her death. Probate Code, § 350.

3. Wills ⚷302(8)

Under provision of Probate Code that terms of fraudulently destroyed will must be clearly and distinctly proved by at least two credible witnesses, quantity and quality of evidence in support of destroyed document rests within probate court's sound discretion when it is satisfied as to credibility of the two witnesses. Probate Code, § 350.

4. Wills ⚷293(4)

Ordinarily, witness who does not personally read, but merely listens to reading of, will, is incompetent to prove its contents, but this rule is inapplicable where witness saw will, is able to testify from personal knowledge as to its testamentary provisions, and followed its reading paragraph by paragraph, even though will was not actually placed in witness' hands.

5. Wills ⚷290

Where lost or destroyed will is shown to have been in actual possession of testatrix, presumption of revocation may not be rebutted by presumption of continued existence, but presumption of revocation does not apply, or is overcome and is rebutted, where it appears that will was deposited by testatrix with custodian, and that testatrix did not thereafter have it in her possession or have access to it.

6. Wills ⚷290

There was no presumption that lost or destroyed will had been revoked by testatrix where, on the day before her death, testatrix stated that will was in safe deposit box, and, although testatrix had right of access to box, it was physically impossible for her to have exercised such right.

7. Wills ⚷306

Evidence supported finding that husband fraudulently destroyed will, which left testatrix' entire estate to her children by former marriage.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Proceeding by James S. Woods for the probate of the lost or destroyed will of Luella Thompson, wherein Bert Thompson filed objections. From an order admitting the will to probate, Bert Thompson appeals.

Affirmed.

Eugene H. O'Donnell, of San Francisco, for appellant.

Gillis & Edwards, of Oakland, and Andersen & Resner, of San Francisco, for respondent.

WARD, Justice.

An appeal from an order admitting to probate an alleged lost or destroyed will. The court found that the will of Luella Thompson, deceased, was fraudulently destroyed by her husband, appellant herein, following her death. The appeal involves an attack upon the sufficiency of the evidence to sustain the findings and decree establishing the existence of the will, its effectiveness at the time of death and its loss or destruction thereafter.

A copy of the will, prepared from recollection by the attorney who originally drew it, was admitted in evidence. It bequeathed decedent's entire estate equally to her four adult children by a former marriage and recited that nothing was left to the husband because of a settlement having been had between them of their community interests. Mr. and Mrs. Thompson had been married approximately eighteen years. Following the granting of letters of administration to the husband, one of decedent's sons, respondent herein, petitioned for probate of the alleged lost or destroyed will, to which petition appellant filed objection.

[1, 2] Appellant seeks a reversal solely upon the claim of the insufficiency of the evidence. The existence of a will was proven by the following evidence: The attorney who drew it related the terms thereof. A former notary public, a friend of decedent, stated that Mrs. Thompson read the will to her; that during the reading, she, the notary, sat nearby, looked on the instrument, "kept track" as the pages were turned, saw decedent's signature, and those of the witnesses thereto, and heard the provisions of the will. The conclusion that the will was in full force and effect at the time of decedent's death is based upon the testimony of two daughters-in-law and a son of Mrs. Thompson that on the day preceding her death she told them that she had advised her husband she had a will. The weight of authority is that declarations of a testatrix are admissible on the issue of revocation. 79 A.L.R. 1498. Appellant's argument that this statement by decedent is not the equivalent of a declaration that she had a will is untenable

in view of decedent's further statement to her son that the will was "In my bank." In this connection, also, the testimony of a daughter-in-law on cross-examination reveals the following:

"Q. But she told you on November 17th her will was in the safe deposit box in the bank? A. Yes.

"Q. Do you know what bank she referred to? A. The one on Fillmore.

"Q. The Geary-Fillmore Branch of the Anglo-California Trust Company? A. Yes, where she had the safe deposit box."

The evidence was sufficient to show that the will was in existence and that decedent did not, at least one day before her death, intend to revoke it.

[3, 4] The provisions of section 350 of the Probate Code, that the terms of a fraudulently destroyed will must be clearly and distinctly proved by at least two credible witnesses, simply mean that the probate court being satisfied as to the credibility of the two witnesses, the quantity and quality of the evidence in support of the destroyed document rest within its sound discretion. Each case must be decided upon the facts presented. Ordinarily a witness who does not personally read, but merely listens to the reading of a will, is incompetent to prove its contents (In re Estate of Guinasso, 13 Cal.App. 518, 110 P. 335), but where, as in the present case, a witness sees the instrument, is able to testify from personal knowledge as to its testamentary provisions, and follows its reading paragraph by paragraph, we are not prepared to hold that such evidence is incompetent, even though the will was not actually placed in the hands of the witness.

[5, 6] No witness was produced who saw the will subsequent to the death of Mrs. Thompson. Appellant contends that when a will can not be found after a testator's death a presumption arises that it was destroyed by the maker with the intention of revocation. In Re Estate of Ross, 199 Cal. 641, 647, 648, 250 P. 676, 678, referring to In re Estate of Sweetman, 185 Cal. 27, 195 P. 918, the court said: "We are in accord with the rule which seems to have been approved in that case that the presumption of revocation does not apply, or is overcome and is rebutted, where it appears that the will was deposited by the deceased with a custodian and that the deceased did not thereafter have it in her possession or have access to it. * * * But if the opinion in that case be deemed to hold that when the facts which raise the presumption of revocation are shown such presumption is met and rebutted by the presumption of continuing existence, as announced in subdivision 32 of section 1963, or that the latter presumption coupled with proof of the existence of the will at some time prior to death, supplies the proof of the existence of the will at the time of death, as required by said section 1339, we are not in accord with that conclusion and the case is overruled to that extent. The Sweetman Case was decided by a divided court, and the dissenting opinion serves to accentuate the importance of applying the presumption of revocation when the facts, as in this case, call for its operation, regardless of the presumption of continuing existence. Where the special presumption of revocation is applicable to the facts, it must therefore be held that it is not rebutted or overthrown by the application of the general presumption embodied in subdivision 32 of said section 1963." The test is that if the will is shown to be in the actual possession of the testatrix, the presumption of revocation may not be rebutted by the presumption of continued existence. In the present case it is not necessary to rely upon the presumption of continued existence. The will had been "deposited by the deceased with a custodian" (In re Estate of Ross, supra, 199 Cal. page 647, 250 P. page 678); it was in a safe deposit box, and testatrix "did not thereafter have it in her possession" (In re Estate of Ross, supra, 199 Cal. page 647, 250 P. page 678), although both she and her husband had the right of access to the box. The evidence shows that, following her conversation with her two daughters-in-law and son as to having a will, it was at no time physically possible for Mrs. Thompson to have availed herself of her right of access to the box. Appellant testified that his wife was not in San Francisco, where the safe deposit box was located, following those conversations, which eliminates any possibility that the testatrix herself might have removed the will from the box.

There remains for consideration the fraudulent destruction of the will; whether the evidence is sufficient to sustain the finding that it "was fraudulently destroyed by Bert Thompson after the death of said decedent". The records of the bank show that the box was opened several days after

Mrs. Thompson's death by the assistant manager and another employee of the bank; no will was found. The records also indicate that the last entry to the box prior to decedent's death was by Mrs. Thompson, and this was approximately three months prior to her demise. However, the assistant manager of the bank, the only witness called in that regard, testified that he would not know whether appellant entered the vault and opened the box during the middle of November (Mrs. Thompson died November 18th) "unless I took care of him myself". The fraudulent destruction is based upon a factual inference.

Appellant admitted visiting the bank the day following his wife's death, but denied entering the safe deposit box. He was observed leaving the bank "stuffing some papers down in his right hand coat pocket". Later the same day he visited a daughter of decedent and gave her the names and addresses of secretaries of certain lodges, located outside of the state, in which Mrs. Thompson held membership, which names and addresses were kept in the box. Appellant admitted that prior to that date he had no information as to these names and addresses, but testified that he obtained such data from one of the daughters of decedent. The daughter denied that she knew or gave the information. Referring to appellant, the daughter's husband testified, "And he said he had to come over to get those addresses from the bank." A slip of paper given the daughter by appellant, on which were written the names and addresses of the secretaries, was introduced in evidence. Appellant at first admitted the writing was that of his wife; later he became evasive and said he did not know who had written the slip.

As applied to the facts of the present case, the citations submitted by appellant are not persuasive. In Re Estate of Smith, 140 Cal.App. 508, 516, 35 P.2d 335, 339, the well-recognized rule is followed "that, where the evidence shows that the instrument cannot be found, and that when last seen or known to exist, it was in the custody or possession of decedent, the conclusion of law is that the writing was destroyed by the decedent, and that he acted with the intention of effecting a revocation thereof". The facts of the case were not in dispute and there was evidence from which an inference could be drawn that decedent "had physically destroyed all wills made by her previous to" a certain date. In the present case the will was not in the actual possession of decedent and there was no evidence from which an inference might be drawn that testatrix had destroyed or even intended to destroy the will. In Re Estate of Allan, 15 Cal.App.2d 272, 59 P.2d 425, there was evidence from which an inference could be drawn that the will in question, in the actual physical possession of decedent, had been burned by her prior to her death. In Estate of Le Sure, 21 Cal.App.2d 73, 68 P.2d 313, two witnesses testified that testatrix had positively stated that her will had been destroyed, and the court expressly found that the will had not been lost or destroyed without the knowledge or consent of the testatrix. In Re Estate of Duffill, 14 Cal.App.2d 284, 58 P.2d 185, no witnesses who had actual knowledge of the contents of the purported will were produced. In that case, pages 285, 286, of 14 Cal.App.2d page 185 of 58 P.2d the court said: "It is the province of the fact finder to determine where the preponderance of evidence lies, and this court on appeal will not substitute its opinion for that of the trial court as to the weight of the evidence where there is any substantial evidence to sustain the trial court's finding." In the present case the testatrix had signed a will; after her death it could not be found. Its provisions were clearly and distinctly proved by two credible witnesses.

[7] By the terms of the will appellant was excluded from sharing in the estate of his wife; the property settlement agreement between decedent and her husband was introduced in evidence. It was to his advantage that the will should not be found. Considering the evidence, and the opportunity of the trial judge to weigh the same, observe the witnesses and determine their credibility, this court is not in a position to say that the inference drawn from the circumstantial evidence introduced does not sustain the finding.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

44 Cal.App.2d 667

PEOPLE v. BINGHAM et al.

Cr. 3426.

District Court of Appeal, Second District, Division 2, California.

May 6, 1941.

1. **Criminal law** ⚿1144(13)

On appeal from judgment of guilty, the District Court of Appeal would view the evidence most favorably to the people.

2. **Robbery** ⚿24(1)

Evidence sustained conviction of robbery of service station.

3. **Criminal law** ⚿1159(2, 3)

The fact that witness' testimony may be weakened on cross-examination or is conflicting with other evidence is no reason for setting aside judgment of guilty for insufficiency of evidence.

4. **Criminal law** ⚿369(1)

In robbery prosecution, where cross-examination of codefendant revealed that gun in evidence was similar to gun with which defendant was armed at time of robbery, and evidence was also presented that gun belonged to codefendant, evidence that defendant on day after the robbery committed another robbery with a gun similar to the one in evidence was admissible to show that defendant possessed such a revolver.

5. **Criminal law** ⚿369(1)

Where defendant denies that he possessed a particular instrument alleged to have been used in commission of an offense, evidence is admissible to show that such instrument was in fact possessed by defendant at other times either prior or subsequent to offense for which he is being tried, though such evidence tends to prove that defendant committed another crime.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harry B. Hancock was convicted of robbery in the first degree committed with his codefendant Earl Bingham, and he appeals.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of robbery in the first degree after trial before a jury and from an order denying his motion for a new trial defendant appeals.

[1] Viewing the evidence most favorably to the People (respondent), the essential facts are:

August 11, 1940, about 9:00 p. m. defendant and his codefendant Earl Bingham approached an attendant at a service station in the city of Los Angeles and requested permission to use the rest room. A few minutes later defendant ordered the attendant to accompany him into the rest room. As they entered the rest room defendant directed his codefendant to go to the service station and take the money that was there. Codefendant Bingham returned, stating that he could not get into the cash register. After taking $2.95 from the attendant, defendant and his codefendant compelled the station attendant to open the cash register and defendant Bingham took from the cash register approximately $34.

Defendant relies for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the judgments of guilty.

Second: The court committed prejudicial error in receiving in evidence testimony that defendant committed another robbery, armed with a gun, the day following the commission of the offense with which he is charged in the instant case.

[2, 3] Defendant's first proposition is untenable. An examination of the record discloses substantial evidence to sustain each and every finding of fact upon which the judgment of guilty was necessarily predicated. For example, the service station attendant testified to each of the facts above stated. As has been repeatedly pointed out by the appellate courts of this state, the fact that a witness's testimony may be weakened on cross-examination or is conflicting with other evidence is not a reason for setting a judgment of guilty aside on the grounds of insufficiency of the evidence to sustain it.

[4] Defendant's second proposition is likewise without merit. Upon cross-exam-

ination of defendant Bingham, evidence was presented to the jury that a gun which had been introduced in evidence was similar to the gun with which defendant was armed at the time of the robberies. Evidence was also presented that such gun belonged to defendant Bingham and not defendant Hancock. Evidence was, therefore, admissible that defendant on the day following the robbery of which he here stands charged committed another robbery armed with a gun similar to the one received in evidence, for the purpose of showing that defendant possessed such a revolver.

[5] The law is established in California that when a defendant denies that he possessed a particular instrument alleged to have been used in the commission of an offense, evidence is admissible to show that such instrument was in fact possessed by the defendant at other times (People v. Cato, 13 Cal.App.2d 391, 394, 56 P.2d 1245), and this is true whether the possession of the instrument by defendant is shown to have been prior or subsequent to the offense upon which he is being tried (People v. Palumbo, 127 Cal.App. 703, 706, 16 P.2d 316); nor is such evidence inadmissible, because it tends to prove that defendant committed another crime, the evidence being relevant to an issue in the case on trial (People v. Burkhart, 211 Cal. 726, 731, 297 P. 11).

For the foregoing reasons the judgment and order are and each is affirmed.

I concur: MOORE, P. J.

WOOD, Justice (concurring).

I concur in the judgment. In my opinion the testimony of a witness that the "gun" used in the robbery for which appellant was on trial "appears to be similar to the gun" which appellant held in his hand at a robbery committed on the following day does not afford sufficient justification for the introduction of proof of the circumstances of the second robbery. It is a matter of common knowledge that there are innumerable weapons which "appear to be similar" to the one used in the robbery. The reception of the evidence may be justified, however, on a different ground. In attempting to establish an alibi appellant presented his wife as a witness and she testified that she left appellant in bed at 6:30 a. m. on August 12. The second robbery, in which appellant participated, was committed at about 7:50 a. m. of the same day at a "considerable distance" from the locality where appellant lived. The evidence was admissible to refute the alibi evidence of appellant. That it was admitted for this purpose is evident from the remarks of the trial judge: "It is to meet the testimony given by the defense witnesses as to the whereabouts of the defendant Hancock on the morning of the 12th—that having been brought out in the examination of at least one of those witnesses."

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44 Cal.App.2d 656

PEOPLE v. AMAYA.

Cr. 3412.

District Court of Appeal, Second District, Division 2, California.

May 5, 1941.

1. Homicide 🔑254

Evidence *held* sufficient to sustain conviction of second-degree murder.

2. Witnesses 🔑255(2)

In murder trial, testimony of deputy sheriff, who questioned defendant after his arrest, that it was necessary for witness to use stenographic reporter's transcribed notes of questions and answers for purpose of refreshing witness' recollection as to conversation, was sufficient foundation, together with showing of method of preparing notes, to permit witness' use thereof as memorandum in testifying as to defendant's statements. Code Civ.Proc. § 2047.

3. Witnesses 🔑255(2)

One who is present at conversation, hears it, and knows facts, may use any writing, whether made by himself or another, to refresh his memory when subsequently testifying as to such conversation. Code Civ. Proc. § 2047.

4. Criminal law 🔑351(10)

In murder trial of one claiming in statement to deputy sheriff to have come home on one occasion and found deceased in bed with defendant's wife, testimony of defendant's stepson and stepdaughter that neither deceased nor any other man was in bed with their mother on such occasion was admissible to prove that defendant made false statement for purpose of misleading or warding off suspicion.

5. Criminal law ⚷351(10)

In trial for crime, evidence may be introduced to show that defendant made false statements for purpose of misleading or warding off suspicion.

6. Criminal law ⚷351(10)

In trial for crime, false statements, shown to have been made by defendant for purpose of misleading or warding off suspicion, are not conclusive of guilt, but may strengthen inferences of guilt arising from other facts.

7. Criminal law ⚷1186(4)

In murder trial, district attorney's remark, in jury's presence, that he believed that defendant's stepson stated that defendant was striking his wife after trial judge sustained objection to question asked stepson as to occasion of his cutting defendant, was not prejudicial to defendant and must be disregarded on appeal from conviction of second degree murder. Const. art. 6, § 4½.

8. Criminal law ⚷721(1)

In murder trial, district attorney's comment in argument to jury on defendant's failure to take witness stand and testify in his own defense was not "misconduct". Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

Appeal from Superior Court, Los Angeles County; Arthur C. Crum, Judge.

Santiago Amaya was convicted of second-degree murder, and he appeals.

Affirmed.

Ben Van Tress, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Appellant was convicted after trial by jury of murder in the second degree and sentenced to the state penitentiary at San Quentin for the term prescribed by law. This appeal is from the judgment and from the order denying his motion for a new trial.

Viewing the evidence most favorably to the prosecution (People v. Dukes, 90 Cal. App. 657, 659, 266 P. 558), the facts in the instant case are:

About 9:00 o'clock in the evening of April 26, 1940, Mariano Carillo was observed standing at the front of a billiard parlor in the city of Los Angeles. Shortly thereafter appellant entered the billiard parlor, walked to a rack of cues, took one down, placed some chalk on the end of it and when next observed he was standing within two feet of Mr. Carillo, who was falling to the floor. At this time appellant was holding a part of the broken cue about ten inches long in his hand and the balance of the cue was lying about a foot from the figure of Mr. Carillo. As a result of the blow Mr. Carillo died.

Appellant relies for reversal of the judgment on these propositions:

First: The evidence is insufficient to sustain the verdict and judgment.

Second: It was prejudicial error to receive in evidence appellant's confession to police officers.

Third: The trial court committed prejudicial error in admitting the testimony of Mike Rangel and Gloria Castillo.

Fourth: The district attorney was guilty of misconduct in making the statement, "I do believe he did state at the time that the defendant was striking his mother", after the trial judge had sustained an objection to the question, "What was the occasion of your cutting your stepfather?"

[1] As to appellant's first contention, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the verdict of guilty was predicated. For example, the undisputed evidence disclosed that appellant walked into the billiard parlor, selected a billiard cue, and was next observed with a portion of the broken cue in his hand, while deceased was falling to the floor, and that deceased died from a fractured skull. Also, after being arrested, appellant in a statement to the police officers admitted that he had hit deceased with the heavy end of a billiard cue. Further discussion of the evidence is unnecessary.

[2, 3] Appellant's second proposition is also without merit. Deputy Sheriff Morrell, who spoke Spanish as well as English, questioned appellant, after his arrest, partly in English and partly in Spanish. The questions and answers as interpreted by Deputy Sheriff Morrell were reduced to writing by a stenographic reporter. Thereafter at the time of the trial Mr. Morrell used, for the purpose of refreshing his recollection as to his conversation with appellant, the transcribed notes of the reporter. This procedure was proper. Mr. Morrell stated when questioned by the district attorney that it was necessary for him to use the memorandum for the purpose of refreshing his recollection. This was sufficient foundation, together with the showing as to the method of preparation of the notes to permit Mr. Morrell to use the memorandum in testifying as to the statements made by appellant in his presence. The law is established that one who is present at a conversation and has heard the same and knows the facts may use any writing whether made by himself or another to refresh his memory when subsequently testifying. Sec. 2047, Code of Civ.Proc.; Beecham v. Burns, 34 Cal.App. 754, 758, 168 P. 1058; People v. Lee Fat, 54 Cal. 527, 531; see, also, 27 Cal.Jur. (1926) 88, secs. 68 and 69; vol. 7, No. 5, February, 1941, p. 315, Current Legal Thought.

[4-6] Appellant's third proposition is likewise untenable. Appellant in his statement to Officer Morrell claimed that he had come home on one occasion and found deceased in bed with his wife. In an attempt to prove the falsity of such statement the people produced two witnesses, Mike Rangel, a stepson of appellant, and Gloria Castillo, a stepdaughter of appellant, who testified that on the occasion mentioned when appellant came home neither deceased nor any other man was in bed with their mother. Such testimony was properly received in evidence, it being the established law of this state that evidence may be introduced to show that a defendant has made false statements for the purpose of misleading or warding off suspicion and that such false statements, though not conclusive of guilt, may strengthen inferences of guilt arising from other facts (People v. Miller, 19 Cal. App.2d 708, 710, 66 P.2d 448.)

[7, 8] Appellant's final proposition is also without merit. It may be conceded that it was improper for the district attorney to make in the presence of the jury the remark which is here urged as error; however, it is evident that such remark did not result in prejudice to the defendant, and, in view of the mandate of section 4½ of article VI of the Constitution of the State of California, such error must be disregarded by us. Nor is there any merit in the contention that it was misconduct for the district attorney in his argument to comment upon the failure of defendant to take the witness stand and testify in his own defense. See article I, sec. 13 of the Const. of the State of California.

For the foregoing reasons the judgment and order are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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44 Cal.App.2d 619

PEOPLE v. HOUSMAN.

Cr. 2154.

District Court of Appeal, First District, Division 2, California.

May 2, 1941.

Rehearing Denied May 17, 1941.

Hearing Denied May 29, 1941.

1. **Perjury** 🔑33(1)

Evidence sustained conviction of perjury, offering false evidence and preparing false evidence in connection with prosecution for failure to keep records required of physicians issuing prescriptions for narcotics. Gen.Laws 1937, Act 5323, § 1d.

2. **Perjury** 🔑15

Acquittal of defendant in prosecution for failure to keep records required by State Narcotic Act was not "res judicata" in prosecution for perjury, offering false evidence, and preparing false evidence in connection with former prosecution. Gen.Laws 1937, Act 5323, § 1d.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. **Perjury** 🔑32(1)

In prosecution for perjury, offering false evidence and preparing false evidence in connection with prosecution against defendant for failure to keep records required by State Narcotic Act, trial court did not err in refusing to exclude all evidence relating to verity of charge or case records produced by defendant in former prosecution, nor in refusing to strike such evidence from records, and no error occurred in rejection of defendant's offer in evidence of judgment roll, transcript of testimony, or instructions in former prosecutions, where all such documents were offered solely in support of defendant's plea of res judicata, which was not sound. Gen.Laws 1937, Act 5323, § 1d.

4. Criminal law 🔑15

The repeal of State Narcotic Act by adoption of the Health and Safety Code did not make trial thereafter for violation of the Narcotic Act a nullity, and did not preclude a prosecution for perjury committed during course of such trial, on theory that legislature failed to provide saving clause covering offenses committed under the act. St.1939, p. 483, §§ 2, 4; Gen.Laws 1937, Act 5323, § 1d.

5. Constitutional law 🔑46(1)

A contention that saving clause in Health and Safety Code was unconstitutional would not be discussed where same result would follow if section were disregarded because of settled rule that independent of saving clause persons may lawfully be prosecuted under re-enacted or codified statutes for crimes committed prior to date of codification. St.1939, p. 483, § 4.

6. Perjury 🔑32(1)

In prosecution for perjury, offering false evidence and preparing false evidence on trial of defendant for failure to keep records required of physicians issuing prescriptions for narcotics, list prepared by narcotic officer from original prescriptions isued by defendant and on file at drug store was properly admitted although list was given to defendant's counsel in civil action and counsel testified that he did not hand list to defendant. Gen.Laws 1937, Act 5323, § 1d.

7. Perjury 🔑34(1, 6)

In prosecution for perjury in trial of defendant for failure to keep records required of physicians issuing narcotic prescriptions, it was not incumbent on state under statute requiring proof of perjury by testimony of two witnesses or of one witness and corroborating circumstances to produce two witnesses who would testify directly to falsity of each case card which defendant offered in evidence on former trial, and extra-judicial statements of defendant were admissible for such purpose. Gen.Laws 1937, Act 5323, § 1d; Pen.Code, § 1103a.

8. Perjury 🔑34(4)

Under statute requiring proof of perjury by testimony of two witnesses or of one witness and corroborative circumstances, positive testimony of state of facts contrary to that sworn to by accused, or absolutely incompatible, or physically inconsistent with accused's evidence, may be sufficient. Pen. Code, § 1103a.

9. Criminal law 🔑680(2)

In prosecution for offering false evidence and preparing false evidence in trial for violation of State Narcotic Act, it was not necessary that proof of corpus delicti be made before defendant's extra-judicial statements were heard or that such evidence be taken in any particular order. Gen.Laws 1937, Act 5323, § 1d.

10. Criminal law 🔑834(1)

The courts have no duty to modify requested instructions to remove parts erroneous.

11. Criminal law 🔑829(1), 830

A requested instruction was properly rejected where it was partly an incorrect statement of the law and partly without the issues, and material parts were fully covered in instructions given.

12. Criminal law 🔑15

In prosecution for perjury in trial of defendant for violation of State Narcotic Act, instruction that specifications of perjury in indictment were material to issues on former trial was not erroneous on theory that court was without jurisdiction of former trial because of repeal of Narcotic Act. Gen.Laws 1937, Act 5323, § 1d.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

N. S. Housman was convicted of perjury, offering false evidence and preparing false evidence, and he appeals.

Affirmed.

Leo R. Friedman, Nathan C. Coghlan, and James C. Purcell, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Appellant was indicted, tried and convicted on two charges of perjury, two charges of offering false evidence and two charges of preparing false evidence.

On August 30, 1939, two complaints were filed in the municipal court of San Francisco, each charging the defendant with having violated section 1d of the State Narcotic Act (Deering Gen.Laws, Act No. 5323) which provided that any doctor authorized to issue prescriptions for narcotics must keep a record of the name and address of the person to whom issued, the date when issued, the character and quantity of the drug prescribed and the purpose for which such prescription was issued. These two cases were consolidated and tried together and resulted in verdicts finding the defendant not guilty. In the trial of those cases the state relied on the defendant's failure to keep a record of prescriptions issued to A. E. Black and A. R. Brandon. In his defense to the charges there made the defendant as a witness in his own behalf offered case cards showing prescriptions issued to the parties named, and testified that the entries on the cards were made at or about the time they bore date.

On September 17, 1939, the defendant was charged in the municipal court with thirty violations of section 1d of the State Narcotic Act in his failure to keep records of prescriptions issued to Black and to Brandon. In the trial of this second municipal court action the defendant was found guilty upon three counts and not guilty upon twenty-seven.

On November 9, 1939, an indictment was filed in the superior court containing two counts charging the defendant with perjury committed in the first municipal court trial, one count relating to the Brandon cards and the other to the Black cards. Two counts of the indictment charged the defendant with offering in evidence as true and genuine record cards relating to the prescriptions issued to Black and to the prescriptions issued to Brandon. Two other counts charged the defendant with having prepared false and antedated records, the first count relating to the Black prescriptions, the other relating to the Brandon prescriptions. As heretofore stated, the defendant was convicted on all six counts.

On this appeal the defendant attacks the sufficiency of the evidence, contends that there was a prior adjudication of the matters contained in the indictment, and assigns error in the admission of certain testimony and in the refusal to give certain requested instructions.

[1] The attack upon the evidence is based upon the usual statement of the testimony in the light most favorable to the appellant. The state offered irrefutable evidence that the Black and Brandon cards were deliberately fabricated by appellant some time after August 30, 1939, after he had repeatedly stated to the narcotic officers that no such records were in existence and that he did not know that the law required him to keep such records. The state proved that counsel for the appellant in a civil action (but not the counsel appearing for him in this proceeding) procured from one of the narcotic officers a snap tally or list of prescriptions issued by the appellant for Black which list this officer had made from a large number of prescriptions on file with a certain drug store. It also proved that on August 30, 1939, the date upon which the two complaints in the first municipal court action were filed against the appellant, the appellant went to the same drug store and made a similar list of prescriptions which he had issued to Brandon, but that on the same day he again stated to the narcotic officer that he had no records of prescriptions such as were required by the State Narcotic Act. It was the theory of the state in the trial upon this indictment that the case cards or records offered in evidence by the appellant in the first municipal court trial were fabricated by the appellant from these lists some time after the complaints in the municipal court were filed, and in support of this theory it was disclosed that in the preparation of the snap tally or list of Black prescriptions the narcotic officer made twenty-one errors, and that in the cards prepared by the appellant and offered by him in evidence the identical errors appeared. The testimony offered by the appellant in explanation of these discrepancies and in general to the charges made in the indictment was such that the jury had no other course than to find him guilty as charged.

[2] The appellant contends that the issue of the verity of the records was adjudicated in the former municipal court trial and that the state is therefore estopped from prosecution under the charges in the indictment. The respondent replies that the charges there made related to the de-

fendant's failure to keep records required by the State Narcotic Act, and that in finding the defendant not guilty of those charges it was not necessary for the jury to pass upon the truth or falsity of his testimony; that the jury may have disbelieved the testimony of the narcotic officers and may have acquitted the defendant for that reason; that it may have believed that the defendant was unjustly prosecuted because of the pending civil litigation involving the same subject matter. The theory that when a jury acquits a defendant in a criminal proceeding it thereby finds to be true the testimony of all witnesses called upon his behalf is not supported by reason or the common knowledge of mankind.

Though there is some conflict in the authorities upon the question of whether the doctrine of res judicata applies in a criminal proceeding of this nature the great weight of authority is that it has no application. One of the leading cases adopting the majority view is People v. Niles, 300 Ill. 458, 133 N.E. 252, 37 A.L.R. 1284. In that case the appellant had been indicted jointly with another for the larceny of and receiving as stolen property an automobile. The codefendant pleaded guilty and upon his favorable testimony and that of the appellant the latter was found not guilty. Thereafter he was indicted for perjury because of the testimony so given. On appeal the supreme court of Illinois said that the question presented for decision was: "Can a person acquitted by a jury of an offense of which he denied his guilt as a witness in his own behalf be afterwards prosecuted for perjury predicated upon testimony given by him upon the former trial, where a conviction of the charge of perjury necessarily imports a contradiction of the verdict of not guilty in the former trial?" In answering the question in the affirmative the court said: "Justice cannot be administered through a system of courts unless there can be some assurance that the finding of the court is based upon testimony truthfully given. Any rule which tends to encourage the giving of false testimony threatens the peaceable and commendable settlement of controversies by the courts. The general proposition that one can escape punishment for perjury because he succeeded in inducing a jury to credit his false testimony is supported neither by authority nor by reason. If he could, then it follows that the law encourages parties—particularly defendants in criminal cases—to perjure themselves. We must declare that the law is guilty of no such folly. An accused's immunity from punishment for crime must not be made to depend upon the accomplishment of his acquittal in one prosecution by committing the crime for which he claims immunity. It is furthermore the policy of the law that judicial proceedings and judgments shall be fair and free from fraud, and that litigants and parties be encouraged, when sworn as witnesses, to tell the truth, and that they be punished if they do not. The authorities seem now to be unanimous in holding that an acquittal of one charged with crime is no bar to a prosecution for perjury for false testimony given by him at the trial. (Citing numerous cases.)"

In Jay v. State, 15 Ala.App. 255, 73 So. 137, 139, the Alabama court clearly states the reason for the majority rule in the following language: "The doctrine of res judicata springs out of and is founded upon the principle of estoppel. It rests upon the principle of public policy that there should be an end to litigation—the maxim is, 'Interest reipublicae ut sit finis litium.' Keeping in view the basic principle and underlying reason—public policy—it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of res judicata, yet, on the other, it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of res judicata, it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not guaranty immunity to criminals, and that is just what we are asked to do in extending the doctrine of res judicata to perjury."

It would serve no purpose to cite further cases in support of the majority rule or to attempt to analyze those cited by appellant from the minority. Reference may be had to People v. Niles, 300 Ill. 458, 133 N.E. 252, 37 A.L.R. 1290 et seq.; 15 Am. Jur. p. 45.

[3] For the reason that the judgments in the second municipal court trial were not prior adjudications of the issues here involved the trial court did not err in denying appellant's motion to exclude all evidence relating to the verity of the cards or case records nor in refusing to strike such evidence from the record, and no error occurred in the rejection of appellant's offer in evidence of the judgment roll transcript of testimony, or the court instructions to the jury in the two municipal court trials since all these documents were offered solely in support of appellant's plea of res judicata which was not sound. Appellant does not contend that any matter thus offered and rejected was material to any other item of his defense or that except as to his plea of res judicata he suffered any prejudice through the order rejecting his offer.

[4, 5] The appellant next complains that because of the repeal of the State Narcotic Act effective September 19, 1939, his trial in the municipal court occurring after that date was a nullity and that he could not therefore be tried for perjury committed during the course of the former trial. He bases his argument on the contention that when the legislature adopted the Health and Safety Code effective September 19, 1939, Stats.1939, p. 483, it failed to provide a saving clause covering offenses committed under the former act. In this the appellant is in error. Section 2. of the Health and Safety Code reads as follows: "The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments." Section 4 reads as follows: "Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code as far as possible." If this language is insufficient to disclose the legislative intent to effect a mere codification and clarification of the existing statutes without affecting the rights and obligations under those statutes, that legislative intent must be inferred from the fact that in reference to the subject matter here involved the new statute was a mere restatement of the provisions of the former. This subject is fully discussed in the recent opinion of Sobey v. Molony, 40 Cal.App.2d 381, 104 P.2d 868, in which numerous cases are cited. But the appellant argues that section 4 of the Health and Safety Code is unconstitutional because perchance one might have violated the provisions of the State Narcotic Act prior to the effective date of the codifying act with no proceedings taken against him before that date, and hence the section would discriminate favorably to him and against those in the same position as to whom proceedings had been commenced before that date. We need not discuss this question in its constitutional phases as the section could be disregarded entirely and the same result would follow because of the settled rule that, independent of the saving clause, a person may lawfully be prosecuted under a re-enacted or codified statute for a crime committed prior to the date of the codification. Sobey v. Molony, supra.

[6] Appellant complains of the admission in evidence of the so-called Madden list upon the ground that it was immaterial and not binding upon him. It was part of the state's case that this list had been prepared by Madden and other narcotic officers working under his direction from original prescriptions issued by appellant and on file by the drug store which had filled them. It is further contended that this list had been given to Mr. Taaffe as counsel for appellant on the representation that he desired it at the time in reference to a civil proceeding in which he represented this appellant. It is further contended this list reached the hands of appellant and that the case cards which he offered in evidence in the municipal court were made up from that list. It was a part of the state's case that these case cards were fabricated after the original complaint was filed, and in support of its proof the respondent emphasizes that the party who made up the case cards had followed the Madden list with all the twenty-one errors that Madden had made. The argument that the list was given the appellant's counsel rather than to the appellant directly, and that this counsel testified that he did not hand the list to the appellant, is not persuasive. The jury had ample reason to infer that the case cards offered in evidence were prepared by the appellant with the aid of this list.

[7, 8] Appellant contends that the evidence was insufficient to prove the corpus delicti in support of any one of the six counts of the indictment. As to the two counts charging perjury it is said that the evidence failed to meet the requirements of section 1103a of the Penal Code requiring proof of perjury "by the testimony of two witnesses, or of one witness and corroborating circumstances". It seems to be the position of appellant that it was incumbent upon the state to produce two witnesses who would testify directly to the falsity of each card, and that the extra-judicial statements of the accused were not admissible for that purpose. Of course this is not the law. The rule applicable here is stated in People v. McGee, 103 Cal. App. 149, 150, 284 P. 229 as follows: "It is true that perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances. Sec. 1968, Code Civ. Proc.; sec. 1103a, Pen. Code. This does not mean that it is necessary to produce someone who was present at the defendant's home on the morning of February 16, 1929, to testify that Meeks was not there at that time. It is, however, necessary to have positive testimony as to facts that are absolutely incompatible with the innocence of the accused. People v. Porter, 104 Cal. 415, 38 P. 88; 20 Cal.Jur. p. 1023. Positive testimony of a state of facts contrary to that sworn to by the accused, or absolutely incompatible or physically inconsistent with his evidence, may be sufficient. People v. Chadwick, 4 Cal.App. 63, 87 P. 384, 389; People v. Casanova, 54 Cal.App. 439, 202 P. 45, 47; People v. Follette, 74 Cal.App. 178, 240 P. 502." 24 Cor.Jur. § 78, p. 804.

[9] As to the complaint that the evidence was insufficient to prove the corpus delicti involved in the other counts, it is not necessary that such proof be made before the extra-judicial statements of the appellant were heard, or that such evidence be taken in any particular order. People v. Wiezel, 39 Cal.App.2d 657, 104 P.2d 70.

[10, 11] There was no error in the refusal to give appellant's requested instruction No. 55. The instruction, as a whole, was an incorrect statement of the law because, as we have heretofore said, the extra-judicial statements of the accused were admissible to supplement the direct evidence of perjury. It was no duty of the court to modify the instruction to remove the parts erroneous. Appellant's requested instruction No. 45 was properly rejected as partly an incorrect statement of the law and partly without the issues. The material parts relating to the quantum of proof necessary in perjury cases, and to the value and weight of circumstantial evidence were fully covered in the instructions given.

[12] Finally it is argued that the trial court erred in instructing the jury that the specifications of perjury set forth in counts one and two of the indictment were material to the issue being tried in the municipal court. The argument is based upon the same ground heretofore considered—that the municipal court was without jurisdiction to try the appellant because of the "repeal" of the State Narcotic Act. The argument falls for the same reasons heretofore given.

The judgment and orders denying motions for a new trial are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

VAN DENBURGH v. GOODFELLOW et al.

Civ. 11314.

District Court of Appeal, First District, Division 1, California.

May 5, 1941.

Hearing Granted June 30, 1941.

1. **Bankruptcy** 🔑425

Where deficiency judgment secured in mortgage foreclosure proceeding against husband and wife was not properly scheduled in bankruptcy proceeding of wife, and no claim on judgment was filed in the proceeding, wife's liability on judgment was not affected by her discharge in bankruptcy, notwithstanding that judgment creditor had actual notice of bankruptcy proceeding before wife's discharge. Bankr.Act § 7, as amended in 1926, and § 17, 11 U.S.C.A. §§ 25, 35.

2. **Bankruptcy** 🔑425

Where debt is improperly scheduled in bankruptcy proceeding, and creditor does not have notice of proceedings in time to attend first meeting of creditors, fact that he obtained actual knowledge of the proceeding before time of discharge will not bar the creditor if he does not secure permission to file a claim. Bankr.Act § 7, as amended in 1926, and § 17, 11 U.S.C.A. §§ 25, 35.

3. Bankruptcy ⚷363

Where debt is of type that because of its inherent nature it is not discharged by bankruptcy proceeding, mere fact that creditor obtains actual knowledge in time to file a claim, and such a claim is filed, will not bar creditor from later claiming the debt is not discharged. Bankr.Act § 7, as amended in 1926, and § 17, 11 U.S.C.A. §§ 25, 35.

4. Bankruptcy ⚷363

Where debt is improperly scheduled in bankruptcy proceeding, but creditor secures actual knowledge before the discharge and then elects to file a claim, the discharge in bankruptcy will be a bar to collection of the debt. Bankr.Act § 7, as amended in 1926, and § 17, 11 U.S.C.A. §§ 25, 35.

5. Bankruptcy ⚷363

Where deficiency judgment secured in mortgage foreclosure proceeding against husband and wife was not properly scheduled in bankruptcy proceeding of husband, but judgment creditor received actual knowledge of the proceeding before husband's discharge and filed a claim in time to participate in all dividends, the subsequent filing of a claim cured defect in scheduling of judgment, and hence husband's liability on judgment was barred by his discharge in bankruptcy. Bankr.Act § 7, as amended in 1926, and § 17, 11 U.S.C.A. §§ 25, 35.

6. Costs ⚷32(2)
Execution ⚷176

In proceedings by judgment debtors to have a writ of execution on judgment dissolved and to enjoin judgment creditor from securing any further writ of execution or from attempting to enforce the judgment, costs were properly allowed judgment debtors in discretion of trial court, where trial court not only quashed execution but declared that judgment against debtors had been discharged in bankruptcy and permanently enjoined creditor from enforcing judgment against either debtor. Code Civ.Proc. § 1032.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by Harry G. Van Denburgh, administrator of the estate of Mrs. Arthur J. Clark, deceased, against Walter B. Goodfellow and another, wherein a judgment was entered in favor of the plaintiff, and he secured a writ of execution and levied on a safe deposit box and a checking account in the name of the defendant. From a judgment dissolving the writ of execution, ordering the sheriff to release property held by him under the writ of execution, and enjoining the plaintiff from securing any further writ of execution or from attempting to enforce the judgment against defendants, the plaintiff appeals.

Affirmed in part, and reversed in part.

Oscar S. Elvrum and Girard F. Baker, both of Los Angeles, for appellant.

Otto A. Gerth, of Los Angeles, for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from an order, and from the judgment subsequently entered, recalling, annulling and dissolving a writ of execution; ordering the sheriff to release all property held by him under the writ of execution; enjoining plaintiffs from securing any further writ of execution, or from attempting to enforce a judgment against defendants. The basis of the trial court's decision was that the judgment secured by plaintiff against defendants, upon which the execution was predicated, had been released by the discharge of the defendants in bankruptcy proceedings instituted by them.

The facts are as follows: Plaintiff, as administrator of the estate of Mrs. Arthur J. Clark, secured a judgment against the two defendants on a note secured by a mortgage. The mortgaged premises were thereafter on September 10, 1935, sold, and a deficiency entered against the two defendants in the sum of $9,274.37, with interest. On May 3, 1937, plaintiff secured a writ of execution and levied on a safety deposit box and a checking account in the name of Walter V. Goodfellow. The money in the banking account represented earnings of Walter V. Goodfellow earned since the discharge in bankruptcy. Thereafter, the defendants moved to recall the execution and to restrain future executions, on the ground that the judgment was discharged by bankruptcy decrees secured by them. On the hearing of this motion the following material facts were developed: On September 23, 1936, the two judgment debtors, the defendants, filed petitions in bankruptcy in the federal District Court, and on the same day were adjudicated bankrupts. A referee was appointed and the first meeting of creditors was held on October 13, 1936. Because of the manner in which the judgment of plaintiff was listed by the bankrupts in their schedule of debts, the plaintiff had no notice of the bankruptcy proceedings until April 8, 1937. On May 24, 1937, the plaintiff filed in the Walter V. Goodfellow bankruptcy proceeding a petition for leave to file a claim based on the deficiency judgment above-mentioned. Thereafter, the referee granted plaintiff permission to file a claim in the Walter V. Goodfellow proceeding and such a claim was actually filed. At the time this claim was filed no distribution of any portion of that bankrupt's assets had been had. Both defendants were finally discharged as bankrupts on June 7, 1937. The question presented is whether the judgment here involved was discharged, as held by the trial court.

The two bankrupts listed the judgment in the schedule of debts attached to each bankruptcy petition. Under the caption "Creditors Whose Claims Are Unsecured" in each petition there was listed "Harry G. Van Denburgh, Admr. of Estate of Mrs. Arthur J. Clark, deficiency on foreclosure judgment and sale in case of Harry G. Van Denburgh, Admr., etc., v. Walter V. Goodfellow, et al., Superior Court, Los Angeles County, Cal., No. 387,406 . . . $20,000.00". The same indebtedness was also listed in each petition under the caption "Creditors Holding Securities" as follows: "Mrs. Arthur J. Clark, deceased, care of Harry G. Van Denburgh, 1010 Title Guarantee Building, Los Angeles . . . $26,000.00". Underneath this listing in each petition appeared full information concerning the foreclosure and the amount of the deficiency judgment. It is to be noted that the only address given for the creditor is "Mrs. Arthur J. Clark, deceased, care of Harry G. Van Denburgh, 1010 Title Guarantee Building, Los Angeles." Van Denburgh neither resided nor had an office at that address. He resided elsewhere in Los Angeles and his name and proper address appeared in the Los Angeles telephone book and in the city directory. The evidence also shows that Van Denburgh's attorneys in the matter of the estate of Mrs. Clark had offices on the tenth floor of the Title Insurance Company building in Los Angeles, but not in room 1010. Their address was either 1019, 1020 or 1022—the record being somewhat confusing on this point. It is to be noted that in the schedule the names of the attorneys are not given. The result was that Van Denburgh received no notice of either bankruptcy proceeding, the notices mailed to him by the referee at the address given in the schedules being returned undelivered. The evidence shows also that the Goodfellows had no intent of deceiving the plaintiff. They appeared at the first meeting of their respective creditors, and made full disclosure of the existence of the debt in question.

There can be no doubt that the judgment was not duly scheduled as required by the Bankruptcy Act, and that therefore, prima facie, the judgment was not discharged. The bankruptcy act is to be found in Title 11 of the U.S.C.A. Section 25 of the act as amended in 1926 provides for the duties of the petitioning bankrupt. Among other things it is therein provided that he must "prepare, make oath to, and file in court within ten days after adjudication, if an involuntary bankrupt, and within ten days after the filing of a petition, if a voluntary bankrupt (unless in either case further time is granted), a schedule of his property * * * *and a list of his creditors showing their residence, if known; if unknown, that fact to be stated* * * *". (Emphasis added.) Section 35 lists the debts not affected by the discharge. It provides in part that, "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (third) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy * * *".

[1] Inasmuch as the debt was not properly scheduled under § 25, supra, under § 35, supra, it was not affected by the discharge in bankruptcy, unless the subsequent filing of the claim cured the defect. Brown v. Tropp, 106 Cal.App. 605, 289 P. 648; Birkett v. Columbia Bank, 195 U.S. 345, 25 S.Ct. 38, 49 L.Ed. 231; Marshall v. English-American Loan & Trust Co., 127 Ga. 376, 56 S.E. 449; In re Quackenbush, 122 App.Div. 456, 106 N.Y.S. 773; Horbach v. Arkell, 172 App.Div. 566, 158 N.Y.S. 842; Haack v. Theise, 51 Misc. 3, 99 N.Y.S. 905. Since no claim was filed in the Mrs. Goodfellow proceeding in so far

as the trial court held that the judgment against her was discharged, the court was clearly in error.

But a different situation exists as to Walter V. Goodfellow. Van Denburgh secured actual notice of the bankruptcy proceedings on April 8, 1937. This was before the discharge of the bankrupts. Van Denburgh, after securing such notice, could have elected not to ask for permission to file a claim. If he had done so, the judgment would not have been barred by the discharge even though he had actual notice in time to file a claim. That was the precise point decided in Brown v. Tropp, and Birkett v. Columbia Bank, supra. But Van Denburgh did not elect to do this. He asked for permission to file a claim, which permission was granted. At that time no dividends had been paid. The only material rights that the creditor had lost by reason of the delay was the right to vote for the trustee, and other rights incidental to the administration of the estate.

[2] There is a complete lack of controlling authority on the legal effect of filing a claim under such circumstances. There is some conflict in the dicta in the various cases. It is our opinion that the better reasoning supports the following rules:

(1) Where the debt is improperly scheduled, and the creditor does not have knowledge of the proceedings in time to attend the first meeting of the creditors, the fact that he obtains actual knowledge of the proceedings before the time of the discharge will not bar the creditor if he does not seek and secure permission to file a claim. Brown v. Tropp, supra, and Birkett v. Columbia Bank, supra.

[3] (2) Where the debt is of the type that because of its inherent nature it is not discharged by the bankruptcy proceedings, the mere fact the creditor obtains actual knowledge in time to file a claim and such a claim is filed, will not bar the creditor from later claiming the debt is not discharged. Section 35, supra, in addition to listing improperly scheduled debts, lists many other types of provable debts that are not barred by the discharge. Thus, taxes levied by the United States, or by the state, county, district or municipality in which the bankrupt resides, liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to person or property, or for alimony or maintenance of wife or child, or for seduction, or for breach of promise accompanied by seduction, or liabilities created by the bankrupt's fraud, embezzlement or misappropriation while acting as an officer or in any fiduciary capacity, or liabilities for wages of a designated type or for moneys of an employee held by the bankrupt to secure the faithful performance of the terms of employment are not barred by the discharge. As to all these debts it will be noted there is no statutory exception. The Congress has determined that these debts, because of their inherent nature, shall not be barred by a bankruptcy proceeding. Accordingly, the courts have quite uniformly held that the mere fact the creditor files a claim, and participates in dividends, will not bar him from later enforcing the debt. Friend v. Talcott, 228 U.S. 27, 33 S.Ct. 505, 57 L.Ed. 718, a fraud case; Allard v. La Plain, 147 Wash. 497, 266 P. 688, a claim for alienation of affections; see, also, Meyer v. Price, 250 N.Y. 370, 165 N.E. 814.

[4] (3) The above rule, however, does not apply to a debt of such a nature that if properly scheduled it would be barred, and the sole ground of claiming it is not barred is that it was improperly scheduled. In such a case, if the creditor secures knowledge before the discharge and then elects to file a claim, the bankruptcy proceedings should be a bar to the collection of the debt. The cases generally discussing the problem are collected and discussed in annotations appearing in Ann.Cas.1912A, p. 547; 10 Ann.Cas. 742.

[5] The only argument that has been advanced as to why the creditor, in such a case, should not be barred when he files a claim after securing knowledge, is that, since the debt was improperly scheduled, no notice was received in time to vote for the trustee and otherwise participate in the administration of the bankruptcy proceedings. Where, as here, the failure to properly schedule the debt was not the result of an intentional attempt to mislead the creditor, and where the creditor filed a claim in time to participate in all dividends, so that he will ultimately receive the same amount as all creditors whose claims were properly scheduled, and where the creditor will receive exactly the same amount he would have received had the debt been properly scheduled, it would seem to be a very technical rule to hold that the debtor is barred from relief simply because the creditor did not have a chance to vote for the trustee. It is our view that, so far as an

improperly scheduled debt is concerned, if the creditor gets knowledge of the proceedings before the discharge, and elects to seek relief in the bankruptcy proceeding by requesting permission to file a claim, and such claim is filed, he has elected his remedy, and the discharge releases the debt. It should also be pointed out that it is admitted in the briefs that not only did plaintiff file a claim in the Walter V. Goodfellow proceeding, but he also participated with the other creditors in dividends.

[6] Appellant contends it was error for the trial court to award costs in this proceeding. We think costs were properly allowed in the discretion of the court. Section 1032, Code of Civil Procedure.

As already pointed out, the judgment and the order appealed from not only quashed the execution, but declared the judgment against both defendants had been released by the discharge in bankruptcy, and permanently enjoined the plaintiff from attempting to enforce his judgment against either defendant. It is quite clear, for reasons already stated, that the judgment and order, in so far as they apply to defendant Elizabeth B. Goodfellow, were erroneous and should be and they are hereby reversed. But as to Walter V. Goodfellow the judgment was released by the discharge in bankruptcy, and the order and judgment of the trial court as to him should be and hereby are affirmed. Both sides should bear their own costs on this appeal.

We concur: KNIGHT, J.; WARD, J.

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44 Cal.App.2d 718

DEL MAR CANNING CO. et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 11502.

District Court of Appeal, First District,
Division 1, California.
May 9, 1941.

1. Costs ⚷3

The right of prevailing party to recover costs is statutory. Code Civ.Proc. §§ 1032, 1033.

2. Witnesses ⚷24

Although express statutory provision that a witness' fee for attendance is allowable only when the witness is "legally required to attend upon the superior court" is not contained in the paragraph of the same section of the Political Code, providing for allowance of mileage, the same limitation that the witness be "legally required to attend" is implied. Pol.Code, § 4300g.

3. Costs ⚷184(2)

The fact that a witness, who resides within the effective range of a subpœna, appears voluntarily does not prevent the allowance of such witness' fee as costs, since when a witness is sworn and testifies he is "legally required to attend", within the meaning of statute providing for allowance of witnesses' fees. Code Civ.Proc. §§ 1032, 1033, 1989; Pol.Code, § 4300g.

See Words and Phrases, Permanent Edition, for all other definitions of "Legally Required to Attend".

4. Witnesses ⚷29

Under statutory provision obligating a person to attend as a witness before a court outside the county of his residence only when the distance to place of trial is less than 100 miles, the mileage fee for witnesses provided for by the Political Code is limited to an allowance for the distance fixed by law for the effective range of a subpœna or 100 miles. Code Civ.Proc. § 1989; Pol.Code, § 4300g.

5. Costs ⚷185

Where a witness who resided outside the county and more than 100 miles from the place of trial appeared voluntarily and testified in superior court, a fee for mileage of such witness one way for a distance of 100 miles was properly allowed as part of the costs. Code Civ.Proc. §§ 1032, 1033, 1989; Pol.Code, § 4300g.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by the Del Mar Canning Company against the Pacific Gas & Electric Company. From a portion of an order taxing costs, plaintiff appeals.

Order affirmed.

Walter Slack, of San Francisco, and John Milton Thompson, of Monterey, for appellants.

Thos. J. Straub, John J. Briare, and Frederick T. Searls, all of San Francisco, and Wyckoff, Gardner & Parker, of Watsonville, for respondent.

PETERS, Presiding Justice.

Plaintiffs appeal from a portion of the order of the trial court taxing costs. The items objected to all deal with mileage fees allowed for 100 miles, one way, for some nineteen witnesses who voluntarily appeared and testified at the request of defendant, and who lived outside the county and more than 100 miles from the place of trial. The sole question presented on this appeal is whether a successful litigant may recover, as costs, mileage fees for 100 miles one way of witnesses who appear voluntarily and testify and who reside out of the county at a distance greater than 100 miles from the place of trial.

[1] The right to recover costs is a matter of statutory regulation. Williams v. Atchison, etc., R. Co., 156 Cal. 140, 103 P. 885, 134 Am.St.Rep. 117, 19 Ann.Cas. 1260. Sections 1032 and 1033 of the Code of Civil Procedure provide for the recovery of costs by the prevailing party. These sections do not set forth what items may be recovered. Section 4300g of the Political Code provides for the circumstances under which a witness may collect his fees. It provides that:

> "For each day's actual attendance, when legally required to attend upon the superior court, per day, two dollars in civil cases and one dollar and fifty cents in criminal cases.
>
> "Mileage actually traveled, one way only, per mile, ten cents * * *".

Section 1989 of the Code of Civil Procedure provides that: "A witness is not obliged to attend as a witness before any court, * * * out of the county in which he resides, unless the distance be less than one hundred miles from his place of residence to the place of trial". As originally enacted in 1872 this section provided for a 30-mile distance for the range of a subpoena. In 1915 (Stats. of 1915, p. 330) the distance was raised to 50 miles. The present provision was adopted in 1935 (Stats.1935, p. 942).

[2] It will be noted that under section 4300g of the Political Code, supra, witness' fees are composed of two elements: First, an allowance for attendance, and, secondly, an allowance for mileage. In the paragraph of the section dealing with the allowance for attendance it is provided that such fee is allowable only when the witness is "legally required to attend upon the superior court". There is no such express provision contained in the paragraph dealing with the allowance for mileage, but the same limitation is implied. Appellants contend that, properly construed, the section prohibits the recovery of mileage for those witnesses who do not reside within the effective range of a subpoena, and who could not be compelled to attend, but do so voluntarily.

[3] It has long been settled that if a witness resides within the effective range of a subpoena the mere fact he appears voluntarily does not prevent his fees being allowed as costs. This was the precise point involved in Linforth v. San Francisco Gas, etc., Co., 9 Cal.App. 434, 99 P. 716. It was there held that witnesses who had not been subpoenaed, but who had appeared voluntarily, were entitled to their fees, and that they were properly charged as costs. The opinion does not state whether the witnesses resided within the range of a subpoena, but the inference is that they did. Hence, they were witnesses that could have been subpoenaed. The court held that, although they had appeared voluntarily, witnesses' fees were properly included within the cost bill. It was held that when a witness is sworn and testifies, he is legally required to attend upon the court equally with the witness who has been subpoenaed. The court expressed the view that to require witnesses to be subpoenaed as a condition precedent to allowance of a witness fee, would simply mean that the cost of serving the subpoena would be imposed on the losing party.

This same conclusion was reached in Naylor v. Adams, 15 Cal.App. 353, 114 P. 997. In that case two witnesses resided about 200 miles from the place of trial. They appeared voluntarily and testified as witnesses on behalf of plaintiff and were paid by plaintiff. Plaintiff included in his cost bill both an attendance fee and a mileage fee for these two witnesses. The court held that the attendance fees were allowable, although the witnesses lived outside the effective range of a subpoena. This conclusion was based on the theory that, having submitted themselves as witnesses, they were legally required to attend and were therefore entitled to their attendance fee. But the court held that the prevailing party was not entitled to recover a mileage allowance for these witnesses.

Apparently, the theory of the court was, that, so far as the mileage allowance was concerned, such witnesses were not legally required to attend since they could not have been subpoenaed. It is quite apparent from the opinion in that case that the court was considerably impressed by the thought that, if it was held that mileage was to be allowed witnesses at the rate of 10 cents a mile however great the distance from which they came, an intolerable cost burden would be cast on the losing party. The real basis of the court's opinion is to be found in the following language appearing at page 356 of 15 Cal.App., at page 998 of 114 P.: "The right of a witness to mileage and other fees in civil cases is purely and solely of statutory creation, and a court is without the power to saddle on the vanquished party in such cases costs which are not thus strictly authorized. If, as is suggested by respondent, the contention of appellant must be sustained, there would be no barrier against the exercise by a court of the power to allow voluntary witnesses residing a thousand or many more miles from the place of trial the mileage prescribed by the statute. The principle upon which such power, if authorized, could be exercised would be the same whatever the distance beyond the 30 miles out of the county from the place of trial, and thus it may easily be imagined how, by calling such power into action, a litigant might impose upon his vanquished adversary a very unjust and even unbearable burden." The court evidently did not consider, and certainly it did not discuss, the possibility of limiting the allowance for the mileage of such witness to the statutory range of a subpoena. It is our opinion that all that was held in the Naylor case was that mileage fees may not be allowed for the entire distance when the witness resides outside the county and more than 100 miles from the place of trial. The case cannot be considered as authority on the point that such fees may not, under such circumstances, be allowed for the distance fixed by statute as the distance within which a subpoena can be served.

[4] A logical argument could be advanced to the effect that any witness voluntarily appearing is not "legally required to attend", as required by section 4300g of the Political Code, supra, and is therefore neither entitled to an attendance nor a mileage fee. But the Linforth case, supra, decided in 1908, so far as attendance fees are concerned, decided otherwise. This view was reaffirmed in the Naylor case, supra, decided in 1911. This has been the unquestioned law for thirty-three years. If that be accepted as the law, and appellants do not challenge that doctrine, then such witness, when voluntarily appearing, is "legally required to attend" within the mileage provision. Section 4300g of the Political Code must be read together with section 1989 of the Code of Civil Procedure. So construed, the mileage fee is limited to the distance fixed by law for the effective range of a subpoena—at present 100 miles. Any other rule would require the litigant to take the testimony of such witness by deposition, a more expensive, and certainly less satisfactory, method than the production of the witness in court.

The rule here approved was adopted by the District Court of the Southern District of California in United States v. Southern Pac. Co., 230 F. 270, 274. The federal statute, 28 U.S.C.A. § 601, provides for attendance and mileage fees for witnesses who attend "in court, * * * pursuant to law", and limits the effective range of a subpoena to 100 miles. The witnesses had come from the northern district to the southern district of California to testify. The clerk allowed mileage for each witness for a distance of 275 miles, which was the distance from the northerly boundary of the southern district to the place of trial. The court held that a witness voluntarily appearing nevertheless appeared "pursuant to law" and was entitled to mileage fees for a distance of 100 miles, the effective range of a subpoena. In so holding the court expressly refused to follow earlier decisions which held that mileage fees were not allowable when the witness appeared voluntarily.

[5] Cases from other states are discussed in the briefs. Some turn upon the peculiar language of the statute under construction. Some of them hold that mileage fees will not be allowed when a witness appears voluntarily, while others hold to the contrary. We are of the opinion that the better reasoned cases and the sounder arguments support the construction that witness' fees for mileage should be allowed as costs, one way, for a distance of 100 miles for the witness who appears voluntarily and testifies, and who resides outside the county and more than 100 miles from the place of trial.

The order appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

44 Cal.App.2d 742

DAGGETT v. STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS et al.

Civ. 11604.

District Court of Appeal, First District, Division 2, California.

May 12, 1941.

1. Licenses ⚷38

Complaints against funeral director charging that director placed dead body in casket and held funeral services and removed body and returned casket to showroom, and thereafter used casket, and that director through an employee solicited dead body for preparation for burial, sufficiently charged "unprofessional conduct" within statute authorizing suspension of license of funeral director for unprofessional conduct. Gen.Laws 1937, Act 2318, § 15, and par. 2, (c, k).

See Words and Phrases, Permanent Edition, for all other definitions of "Unprofessional Conduct".

2. Licenses ⚷38

The statute authorizing suspension of license of funeral director for using casket previously used in connection with disposition of dead body was intended to prohibit any further use of such a casket. Gen.Laws 1937, Act 2318, § 15, and par. 2(k).

3. Mandamus ⚷187(4)

On appeal from judgment denying writ of mandate to compel State Board of Funeral Directors and Embalmers to restore funeral director's license which was suspended by board for use of casket which had theretofore been used in connection with disposition of dead body, director could not claim that he did not use casket but was only intending to use casket, where his counsel stated in opening statement in trial court that a certain use of casket was admitted in proceedings before state board. Gen.Laws 1937, Act 2318, § 15, and par. 2(k).

4. Licenses ⚷38

Allegation and proof that funeral director placed dead body in casket and conducted funeral services and removed body from casket, and thereafter either returned casket to showroom or sent it to brother to use as a model in manufacturing caskets, was sufficient to show "unprofessional conduct" within statute authorizing suspension of license of funeral director for using casket previously used in connection with disposition of dead body, notwithstanding absence of allegation or proof of second use of casket for purpose of placing human remains therein. Gen.Laws 1937, Act 2318, § 15, and par. 2(k).

5. Licenses ⚷38

Evidence that funeral director's manager rushed to scene of accident and then to residence of widow to obtain order for coroner to turn body over to director was sufficient to show that director was guilty of "unprofessional conduct" within statute authorizing suspension of license of funeral director for solicitation of human dead body by director, his agents, assistants or employees. Gen.Laws 1937, Act 2318, § 15, and par. 2(c).

6. Licenses ⚷38

In proceeding before State Board of Funeral Directors and Embalmers to suspend license of funeral director for solicitation, through employee, of dead body for preparation for burial, allegation or proof that director authorized solicitation or aided or abetted therein was not required. Gen.Laws 1937, Act 2318, § 15, and par. 2(c).

7. Licenses ⚷38

A proceeding before State Board of Funeral Directors and Embalmers to suspend or revoke license of funeral director or embalmer for unprofessional conduct is not "quasi criminal," and rules governing quantum of proof required in criminal trials are not applicable. Gen.Laws 1937, Act 2318, § 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Quasi Criminal".

8. Appeal and error ⚷1010(1)

Findings of trial court supported by substantial evidence are conclusive.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Mandamus proceeding by Morris S. Daggett, etc., against the State Board of Funeral Directors and Embalmers and others, to compel defendants to restore the plaintiff's license as funeral director and embalmer. From a judgment denying the writ, the plaintiff appeals.

Affirmed.

Mento & Read, Emerson W. Read, Joseph W. Mento, and H. Nelson French, all of Sacramento, for appellant.

Frank J. Barry, of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff sought a peremptory writ of mandate to compel the defendants to restore his licenses as a funeral director and as an embalmer. The cause was tried in the superior court and a judgment was entered denying the writ. Plaintiff appeals from said judgment.

Prior to the institution of this proceeding, plaintiff was tried before the defendant board on charges of unprofessional conduct as defined in section 15 of the Funeral Directors and Embalmers Law. Act 2318, Deering's General Laws 1937. He was found guilty by said board under counts 3 and 6 of the complaints filed against him. As a result his licenses as a funeral director and as an embalmer were suspended for sixty days on each of said counts and it was ordered that said periods of suspension should run concurrently.

Plaintiff then brought this proceeding. He alleged in his petition that the complaints filed before the defendant board did not allege sufficient facts and that the evidence before the defendant board was insufficient. The transcript of the proceedings before the defendant board was introduced by plaintiff on the trial. The cause was submitted and the trial court made findings adverse to plaintiff including findings to the effect that plaintiff was guilty of unprofessional conduct as charged in counts 3 and 6. As above stated, judgment was entered denying the writ. On this appeal, plaintiff again claims that the complaints and the evidence were insufficient.

In count 3 of the complaints, plaintiff was charged with a violation of subdivision (k) of paragraph 2 of section 15 of the act. It was alleged therein that plaintiff placed the dead human body of Johanna Jensen in a certain casket and held funeral services for said deceased at Mountain View while said deceased lay in said casket; that thereafter plaintiff transported said deceased in said casket to Sacramento and there removed said deceased from said casket and placed said deceased in a wooden box commonly known as a "county box" and did return said casket to plaintiff's showroom and thereafter use said casket. In count 6 of the complaints, plaintiff was charged with a violation of subdivision (c) of paragraph 2 of section 15 of the act. It was alleged therein that plaintiff did "by and through his agent, assistant and employee, Earl Wright" solicit for preparation for burial the human dead body of one M. E. Kemnitzer.

[1] We are of the opinion that the charges contained in each count as above summarized were sufficient as charges of unprofessional conduct as defined in said section 15 of the act. Said charges in each instance were substantially in the language of said section and there were sufficient particulars alleged, such as names, dates and places, to apprise plaintiff herein of the exact nature of the conduct charged. Certain of plaintiff's argument relating to the alleged insufficiency of the complaints is repeated under his argument relating to the alleged insufficiency of the evidence and will be hereinafter discussed.

[2-4] It is plaintiff's contention that the evidence was insufficient as to both counts 3 and 6. We find no merit in this contention. With respect to count 3, it was admitted upon the hearing before the defendant board that after placing the named deceased in the casket and conducting funeral services at Mountain View, said deceased was transported to Sacramento in said casket and was thereafter removed from said casket and placed in a wooden box for the disposition of the remains. There was a conflict in the evidence with respect to the use thereafter made of said casket. There was evidence tending to show that said casket was again returned to plaintiff's showroom. Plaintiff testified that said casket was thereafter turned over to his brother, who took it to his home several miles away for the purpose of using it as a model for the making of that type of casket. There were many considerations tending to discredit this last-mentioned testimony and the trial court was entirely justified in rejecting it. Plaintiff apparently contends that the section only applies to a second use of a casket for the purpose of placing human remains therein and he therefore challenges both the sufficiency of the complaint and the sufficiency of the evidence with respect to this count. We find no such limitation in the terms of said section. By its terms, it covers "using any casket or part of a casket which has previously been used as a receptacle for, or in connection with, the

burial or other disposition of, a dead human body". It was obviously intended to prohibit any further use of a casket which had been previously used in connection with the disposition of a human dead body thereby preventing, or at least discouraging, the type of conduct in which plaintiff admittedly engaged in this case. Plaintiff seems to claim that he did not again "use" said casket but was only intending to "use" it. This claim cannot be taken seriously as his counsel stated in the trial court in his opening statement, referring to the proceedings before the defendant board, "We admitted a certain use of that casket." We are of the opinion that both the allegations of count 3 and the proof thereunder were sufficient even though there was no allegation or proof of a second use of said casket for the purpose of placing human remains therein.

[5] Turning to the evidence offered to support count 6, there can be no question that said evidence was sufficient to show that Earl Wright, the manager for plaintiff, solicited for preparation for burial the human dead body of M. E. Kemnitzer. Said Earl Wright heard of an accident and rushed to the scene arriving there before the deputy coroner arrived. He falsely stated to the deputy coroner that he had a written order from a member of the family for the delivery to plaintiff of the remains of said deceased. When asked to produce it, he stated that it was at plaintiff's office. Wright then returned and aroused an employee of plaintiff from his sleep; told him that the deputy coroner was bringing the body to plaintiff's establishment; told him that they might not be able to hold the body but to start embalming as soon as possible and at least a charge for embalming could be collected. Wright then rushed to the apartment house where the widow of the deceased resided. He was well acquainted with the operator of said apartment and, with her assistance, he met the widow of the deceased and obtained from her an order for the coroner to turn the remains over to plaintiff. He then went to plaintiff's establishment where the deputy coroner was still waiting, delivered the order to him and said deputy coroner left the remains at plaintiff's establishment. There can be no doubt that this was the type of conduct which the section was designed to prevent.

[6] The only question which plaintiff seriously argues is the question of whether he can be charged with the acts of his manager in the absence of evidence showing that he authorized or aided or abetted in such solicitation. He cites certain criminal cases in support of his view that he cannot. These authorities are not in point. This was not a criminal action but was a proceeding in which plaintiff was charged with unprofessional conduct as defined by said section 15. Among other things, said section covers the "Solicitation of human dead bodies by the licensee, his agents, assistants or employees, * * *." The legislature has seen fit to require a licensee to see that his agents, assistants and employees refrain from soliciting human dead bodies under penalty of being charged with unprofessional conduct if he does not do so. It was probably thought that such solicitation by agents, assistants and employees could not be prevented in any other manner. The validity of the section is not attacked and the provisions thereof appear entirely reasonable. Under the circumstances it was not necessary to either plead or prove that plaintiff had authorized such solicitation or that he aided or abetted therein.

[7, 8] Throughout the briefs, plaintiff refers to the proceeding as a quasi-criminal proceeding and claims that the charges were not proved beyond a reasonable doubt. This seems to be the real burden of plaintiff's attack. But such proceedings are not quasi-criminal and the rules governing the quantum of proof required in criminal trials are not applicable. Webster v. Board of Dental Examiners, 17 Cal. 2d 534, 110 P.2d 992. The trial court made its own findings in the mandamus proceeding and, as above indicated, we are of the opinion said findings are supported by substantial evidence. This conclusion puts an end to our inquiry regarding the sufficiency of the evidence on the appeal (Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal.2d 75, 87 P.2d 848), and all discussion by plaintiff as to whether the evidence proved the charges beyond a reasonable doubt or even by a preponderance thereof is beside the point.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

CALIFORNIA FEDERAL SAVINGS & LOAN ASS'N v. ALLEN.

Civ. 12922.

District Court of Appeal, Second District, Division 2, California.

May 5, 1941.

Hearing Granted July 3, 1941.

1. Mortgages ⚿592

The amended section of the Code of Civil Procedure which became effective September 19, 1939, shortening trustor's period of redemption after a foreclosure sale of property covered by a trust deed from one year to three months does not apply retroactively to deeds of trust executed prior to effective date of amendment, since otherwise construed, statute would alter substantive rights in violation of constitutional provisions prohibiting passing of ex post facto law or law impairing obligation of contract. Code Civ. Proc. § 725a; Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10.

2. Constitutional law ⚿115, 199

A statute which alters a substantive right of parties to a contract will not be applied retroactively, since to do so would be violative of constitutional provisions prohibiting passing of any ex post facto law or law impairing the obligation of contract. Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10.

3. Mandamus ⚿56

Where trust deed was executed prior to the enactment of amended section of Code of Civil Procedure shortening trustor's period of redemption after foreclosure sale of property covered by trust deed, mandamus would not lie to compel commissioner of superior court to deliver a commissioner's deed at expiration of the shortened period since statute did not apply. Code Civ.Proc. § 725a.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding for writ of mandate to compel delivery of a commissioner's deed, by the California Federal Savings & Loan Association against R. E. Allen as Commissioner of the Superior Court, etc. From a judgment denying the writ, plaintiff appeals.

Affirmed.

Edgerton & Colwell, of Los Angeles, for appellant.

R. E. Allen, in pro. per.

McCOMB, Justice.

From a judgment denying a writ of mandate to compel defendant to deliver a commissioner's deed at the expiration of three months after a foreclosure sale of real property pursuant to the provisions of section 725a of the Code of Civil Procedure, plaintiff appeals.

These are the undisputed facts:

June 6, 1939, the Thrifty Furniture Company executed a promissory note secured by a deed of trust on real property in favor of plaintiff. November 20, 1939, plaintiff commenced an action to foreclose the above mentioned deed of trust, and on December 26, 1939, the court entered its decree of foreclosure and appointed defendant commissioner to sell the property covered by the deed of trust. This sale took place January 30, 1940, and plaintiff became the purchaser of the property. When the note and deed of trust were executed, section 725a of the Code of Civil Procedure allowed the trustor a period of one year subsequent to the date of the sale under a foreclosure proceeding within which to redeem the property mentioned in the trust deed. September 19, 1939, an amendment to section 725a of the Code of Civil Procedure became effective which provided that the trustor's period of redemption was shortened from one year to three months.

This is the sole question presented for our determination:

Does the amendment to section 725a of the Code of Civil Procedure, which became effective September 19, 1939, shortening the trustor's period of redemption after a foreclosure sale of property covered by a trust deed from one year to three months apply to deeds of trust executed prior to the effective date of such amendment?

[1, 2] This question must be answered in the negative. It is the established law that a statute which alters substantive rights of a party to a contract will not be applied retroactively, since to do so would violate section 10 of Article I of the Constitution of the United States and section 16, Article I of the Constitution of the State of California (Brown v. Ferdon, 5 Cal.2d 226, 231, 54 P.2d 712; 16 Cor.Jur. Sec. (1939), Constitutional Law, p. 861, § 417).

[3] In the instant case there can be no doubt that if the amendment to section 725a of the Code of Civil Procedure, effective September 19, 1939, is applied to trust deeds executed prior to such date a substantive right of the trustor is affected. Clearly the right to redeem property within a year is a valuable substantive right which is lessened when the period of redemption is reduced to three months.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

44 Cal.App.2d 649

PLECITY et al. v. KEILLY et al.

Civ. 12578.

District Court of Appeal, Second District, Division 2, California.

May 5, 1941.

1. Death 🔑101

In an action predicated upon the section of the Code of Civil Procedure authorizing maintenance of action by heirs or personal representative of decedent for damages for wrongful death, judgment should be for a lump sum, which amount should be the total of the pecuniary loss suffered by each plaintiff, and court should not attempt to apportion the loss of each heir in the judgment entered. Code Civ.Proc. § 377.

2. Death 🔑101

In action for wrongful death, predicated upon section of the Code of Civil Procedure authorizing the maintenance of such action by heirs or personal representative of decedent, the entry of a judgment, which provided that "the plaintiffs, and each of them, recover judgment against the defendant" in a specified sum, was erroneous in that it attempted to apportion the damages between the several plaintiffs, giving each a separate judgment in the designated sum. Code Civ. Proc. § 377.

3. Appeal and error 🔑1170(1)

Where error appeared upon an appeal taken on the judgment roll alone, District Court of Appeal, not having record before it, could not apply the constitutional provision that no judgment should be set aside or new trial granted unless it appears from an examination of the entire cause that the error complained of has resulted in a miscarriage of justice. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Barbara Plecity and others against David I. Keilly and others to recover damages for wrongful death. From a judgment in favor of plaintiffs, the named defendant appeals.

Judgment reversed.

See, also, 41 Cal.App.2d 206, 106 P.2d 207.

Harrison Weil and Donald E. Ruppe, both of Los Angeles, for appellant.

A. P. Michael Narlian, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover damages for wrongful death, pursuant to the provisions of section 377 of the Code of Civil Procedure, defendant David I. Keilly appeals. The appeal is based upon the judgment roll alone.

Defendant urges reversal of the judgment on the proposition *that it was error for the trial judge to give a judgment in favor of plaintiffs reading thus:*

"That the plaintiffs, and each of them, recover judgment against the defendant David Samuel Keilly in the sum of twenty-five hundred ($2,500.00) dollars."

[1] This proposition is tenable. The law is established in California that in an action predicated upon section 377 of the Code of Civil Procedure the judgment should be given for a "lump sum", which amount should be the total of the pecuniary loss suffered by each plaintiff, and in such a case the court should not attempt to apportion the loss of each heir in the judgment (Rose v. San Diego Electric Ry. Co., 133 Cal.App. 646, 651, 24 P.2d 838; Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 508, 115 P. 320; Rickards v. Noonan, 40 Cal.App.2d 266, 271, 104 P.2d 839).

[2] Applying the foregoing rule to the facts in the instant case, it is evident that the trial judge did not give judgment in one

lump sum in favor of the plaintiffs, but, on the contrary, attempted to apportion the damages between the plaintiffs, giving each a several judgment in the sum of $2,500.

[3] In view of the fact that the present appeal is on the judgment roll alone, we do not have the record before us and we are not in a position to apply section 4½ of article VI of the Constitution of the state of California.

For the foregoing reasons the judgment is reversed.

We concur: MOORE, P. J.; WOOD, J.

In re BOGGS' ESTATE.

KING et al. v. BOGGS.

Civ. 12961.

District Court of Appeal, Second District, Division 2, California.

May 7, 1941.

Hearing Granted June 30, 1941.

1. Gifts 🔑18(1)

A gift of personalty is consummated only by an unconditional delivery of the personalty.

2. Gifts 🔑43

A gift of personalty which is incumbered, no matter how clear the intention of the donor to pay the incumbrance, does not accomplish a gift until the donor has in fact actually paid the incumbrance, though the donor may make a gift of his equity in the personalty.

3. Executors and administrators 🔑57

Where decedent agreed to transfer to his daughter property coming into his hands in consideration of her signing collateral agreements with bank pledging stock issued in her name as security for decedent's loans to buy stock, but decedent never paid incumbrances against stock and thus never owned it, transfers thereafter made to daughter at time when decedent's liability exceeded fair market value of his assets, thus rendering decedent "insolvent", were without consideration and were void as to existing creditors, and hence property transferred was required to be accounted for by daughter as executrix as assets of decedent's estate. Civ. Code, § 3442.

See Words and Phrases, Permanent Edition, for all other definitions of "Insolvent".

4. Executors and administrators 🔑115

The probate judge erroneously permitted executrix to credit herself with $195 per month as rent for furniture located in leased estate property, since an executrix may not in her representative capacity deal with herself as an individual. Civ.Code, § 2230.

5. Executors and administrators 🔑465

That certain estate property was subject to trust deed placed thereon by decedent in favor of a bank as security for loans for which bank had filed claims against the estate, which had been approved, did not prevent property from being "assets" of the estate, and where record disclosed that executrix was collecting rents from leased property and had in fact taken property subject to any incumbrances against it into her possession, property did constitute assets for which executrix was required to account regardless of value.

See Words and Phrases, Permanent Edition, for all other definitions of "Asset".

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Proceedings in the matter of the estate of Paul N. Boggs, deceased, wherein Elizabeth B. Boggs, executrix of the estate, filed her first account current, to which Joseph I. King and others, executors of the last will and testament of Sarah Louise Clark, deceased, filed objections. From an order settling the account of the executrix, Joseph I. King and others, executors, appeal.

Reversed, with directions.

Joseph I. King, of Los Angeles, for appellants.

Brooks Gifford, of Pasadena (L. M. Reed, of Pasadena, of counsel), for respondent.

McCOMB, Justice.

This is an appeal by the executors of the last will and testament of Sarah Louise Clark, who during her lifetime was a creditor of Paul N. Boggs, from an order of the Superior Court sitting in probate settling the current account of the executrix of the estate of Paul N. Boggs, deceased.

The material facts are:

August 21, 1928, Paul N. Boggs purchased 254 shares of National Supply Company preferred stock, borrowing the purchase price from the Farmers and Merchants National Bank of Los Angeles. Pursuant to Mr. Boggs' request the certificates were issued in the name of Elizabeth B. Boggs, his daughter, and she signed a collateral agreement pledging the stock with the bank as security for the loan to her father. March 7, 1929, the same bank purchased 500 shares of Union Oil Associates stock for Mr. Boggs' account, he giving the bank his note for $24,362.50. March 31, 1929, 200 shares of the National Supply Company preferred stock held by the bank and issued in the name of Elizabeth B. Boggs was called and Mr. Boggs requested the bank to apply the proceeds against the purchase of the 500 shares of the Union Oil Associates and to have the certificates for the latter stock issued in the name of his daughter. About February 15, 1933, Mr. Boggs resigned as vice president of the Union Oil Company of California. February 17, 1933, he transferred to his daughter $7,283.24 and thereafter he transferred to her 460 shares of stock of the Union Oil Company of California and an additional $3,700 in cash. Later he transferred to her his equity in a piece of real property located at 1010 Selby avenue, Los Angeles, California, and he permitted her to receive and retain as her own, rents from a piece of property located at 674 South New Hampshire street, Los Angeles, and also from premises at 1015 North Roxbury drive, Beverly Hills. The latter piece of property was leased October 1, 1936, at a rental of $320 per month and the lease was assigned to the Farmers and Merchants National Bank as security for Mr. Boggs' loans. The bank also held a trust deed on this property. August 3, 1938, the bank permitted respondent to collect the rents from the tenant on the aforementioned lease and make the payments due to the bank.

During the period covered by the transfers made subsequent to February 15, 1933, Mr. Boggs was insolvent, his liabilities exceeding the fair market value of his assets. Among his creditors was Sarah Louise Clark, appellants' testatrix, to whom Mr. Boggs owed $35,000 on a note secured by a mortgage on the property located at 674 South New Hampshire street and also $8,500 on an unsecured promissory note.

In 1934 Mrs. Clark accepted a deed to the property at 674 South New Hampshire street, Los Angeles, in payment of the $35,000 note, but Mr. Boggs still owed her $8,500 plus interest from August 5, 1933, on the unsecured promissory note. September 8, 1934, Mrs. Clark died. Her executors obtained a judgment against Mr. Boggs on June 18, 1936, for $10,180.25 and interest. Mr. Boggs having died October 20, 1936, and his daughter having qualified as executrix of his will, she filed her first account current, to which appellants filed objections.

The probate judge approved the account and found that there was an agreement between Elizabeth B. Boggs and her father to the effect that he should transfer to her such property as might come into his hands in consideration of her signing the collateral agreements with the Farmers and Merchants National Bank, pledging the abovementioned shares of the National Supply Company preferred stock and the Union Oil Associates stock as security for his loans with the bank, and that the transfers of property to her by him subsequent to February 15, 1933, were made on account of said agreement.

Appellants urge as objections to the settlement of the account the following:

First: Respondent failed to list as assets of the estate of her father the property transferred to her by him subsequent to February 15, 1933.

Second: In collecting rent from property located at 1015 North Roxbury drive in the sum of $320 per month, according to the terms of the lease on such property, respondent improperly retained $195 per month as rental for the furniture which she claimed to own and which was located in the dwelling.

Third: Respondent should not have been permitted to include in her account as an asset of the estate real property which was subject to a deed of trust in favor of the Farmers and Merchants National Bank of Los Angeles.

Appellants' first objection is well taken and is governed by the following pertinent principles of law:

[1, 2] (1) A gift of personal property is consummated only by an unconditional

delivery of the property. A gift of personal property which is encumbered, no matter how clear the intention of the donor to pay the encumbrance, does not accomplish a gift of the property until the donor has in fact actually paid the encumbrance. (Fischer v. Union Trust Co., 138 Mich. 612, 101 N.W. 852, 855, 68 L.R.A. 987, 110 Am.St.Rep. 329; Wisler v. Tomb, 169 Cal. 382, 386, 146 P. 876.) Of course, he may make a gift of his equity in the property.

(2) At the time of the transfers here in question the law provided that a transfer or encumbrance of property made or given voluntarily or without a valuable consideration while the donor was insolvent was fraudulent and void as to existing creditors. (Sec. 3442, Civ.Code.)

[3] Applying the first rule of law above stated to the facts of the instant case, it appears that there was no consideration for the agreement which the court found to exist between Elizabeth B. Boggs and her father to the effect that he would transfer to her property coming into his hands in consideration of her signing collateral agreements with the Farmers and Merchants National Bank pledging shares of the National Supply Company preferred stock and shares of Union Oil Associates stock as security for his loans from the bank. Such stock was never in fact the property of Elizabeth B. Boggs, since her father had never owned it nor did he at any time pay the encumbrances against it. Therefore, he never at any time consummated the attempted gift of the stock to his daughter. This fact being established, all of the transfers made subsequent to February 15, 1933, were without consideration and, since the evidence disclosed that Mr. Boggs' liability at the time of such transfers exceeded the fair market value of his assets, he was insolvent when the transfers were made, and, applying the second rule of law above stated, such transfers were void as to existing creditors of whom appellants' decedent was one. Such property should be accounted for as assets of decedent Boggs' estate.

[4] Appellants' second objection is likewise tenable. The law is established in California that an executrix may not in her representative capacity deal with herself as an individual. (Sec. 2230, Civ. Code; Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 365, 78 P. 550, 104 Am.St.Rep. 42; see, also, In re Estate of Parker, 200 Cal. 132, 135, 251 P. 907, 49 A.L.R. 1025.) Thus the probate judge erroneously permitted the respondent executrix to credit herself with $195 per month as rent for the furniture located in the property known as 1015 North Roxbury drive, Beverly Hills.

[5] Appellants' final objection is untenable. The fact that the property located at 1015 North Roxbury drive, Beverly Hills, and two parcels of land are subject to a deed of trust placed thereon by decedent Boggs in favor of the Farmers and Merchants National Bank as security for loans from said bank and for which loans the bank has filed claims in the estate, which have been approved, does not prevent the properties from being assets of the estate. It is merely a question as to the value of such assets. Assuming the claims of the bank are paid, the properties would be assets of the estate to the extent of their reasonable market value. If, on the other hand, the bank sells the properties under the power of sale in the trust deed and receives a sum less than the amount of the loans which are secured by the trust deed, these assets are valueless. In either event, however, the executrix is under a duty to take the properties into her possession and account for them as assets of the estate regardless of its value. There is nothing in our decision in the former appeal (In re Estate of Boggs, 33 Cal.App.2d 30, 90 P.2d 814) in conflict with this view.

In the appeal just mentioned it was held that respondent executrix had not at that time taken the properties into her possession. Since the record discloses that she now is collecting rents from the leased premises and has in fact taken the properties subject to any encumbrances against them into her possession, such properties are assets of the estate.

For the foregoing reasons the order settling the account current is reversed with directions to the lower court to settle the account in accordance with the views herein expressed.

I concur: MOORE, P. J.

WOOD, Justice.

I concur in the judgment. I do not concur in the statement in the majority opinion that Paul N. Boggs "had never owned" the shares in the two corporations. In my opinion a gift of encumbered personal property may be made without payment of the encumbrance by the donor.

(Lipson v. Evans, 133 Md. 370, 105 A. 312; Fischer v. Union Trust Co., 138 Mich. 612, 101 N.W. 852, 68 L.R.A. 987, 110 Am. St.Rep. 329.) In such case the donor gives to the donee whatever rights he may have in the property.

WILSON v. WALTERS.

Civ. 12983.

District Court of Appeal, Second District, Division 2, California.

May 5, 1941.

Hearing Granted June 30, 1941.

1. Officers 🔑1

"Constitutional officers" are persons who occupy by appointment or election constitutional offices, and a "constitutional office", as distinguished from a "municipal" or "legislative office", is one created or provided for by the Constitution. Const. art. 6, § 11.

> See Words and Phrases, Permanent Edition, for all other definitions of "Constitutional Office", "Constitutional Officer", "Legislative Office" and "Municipal Office".

2. Garnishment 🔑17

A judge of the municipal court of Los Angeles was a "constitutional officer", and his salary was not subject to garnishment pursuant to statute. Code Civ.Proc. § 710; Const. art. 6, § 11.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Suit by Edith Maud Wilson against Byron J. Walters. From an order releasing from garnishment the salary of defendant as municipal judge of the city of Los Angeles, the plaintiff appeals.

Affirmed.

W. Cloyd Snyder, of Los Angeles, for appellant.

Pierson & Block, of Los Angeles, for respondent.

McCOMB, Justice.

From an order releasing from garnishment the salary of defendant as a Municipal Judge of the city of Los Angeles, plaintiff appeals.

The essential facts are:

In May, 1940, plaintiff levied a garnishment upon a sum of money due defendant as salary for acting as judge of the Municipal Court of the city of Los Angeles. July 19, 1940, pursuant to a motion of defendant, the trial court made an order releasing the garnishment on the ground that defendant's salary as municipal judge was not subject to garnishment, pursuant to the provisions of section 710 of the Code of Civil Procedure.

This is the sole question necessary for us to determine:

Is a judge of the Municipal Court of the City of Los Angeles a constitutional officer of the State of California?

[1] This question must be answered in the affirmative. Constitutional officers are persons who duly occupy by appointment or election constitutional offices. A constitutional office as distinguished from a municipal or legislative office is one created or provided for by the Constitution (People v. Scheu, 60 App.Div. 592, 69 N.Y.S. 597, 599; Gamble v. Utley, 86 Cal.App. 414, 420, 260 P. 930; see, also, vol. 2, McQuillan's Municipal Corporations [1939] 2d Ed. revised, 499, sec. 434). The Municipal Court of the city of Los Angeles is a court created and provided for by the Constitution of the state of California (art. VI, sec. 11, Const. of the State of Calif.; Burge v. Municipal Court, 84 Cal.App. 425, 426, 258 P. 164; Simpson v. Payne, 79 Cal.App. 780, 785, 251 P. 324; Chambers v. Terry, 40 Cal. App.2d 153, 155, 104 P.2d 663).

In addition to the foregoing authorities it is interesting to note that as early as 1897 our Supreme Court stated in Church v. Colgan, 117 Cal. 685, 687, 50 P. 12, "There is no such office as a constitutional judge as contradistinguished from a legislative judge. Both are provided for by the constitution, and in that sense are constitutional officers."

[2] Since defendant is a duly elected and qualified judge of the Municipal Court of the city of Los Angeles, which court was created by the Constitution of the state of California, he is a constitutional officer, and, since it is established that the salary

of a constitutional officer appertaining to such office is not subject to garnishment, pursuant to section 710 of the Code of Civil Procedure (Gamble v. Utley, supra, 86 Cal. App. at page 420, 260 P. 930), the trial court's order was correct.

Lawson v. Lawson, 158 Cal. 446, 111 P. 354, applies to justices of the peace and is, therefore, clearly distinguishable from the present case, because justices of the peace and police courts are inferior courts which may be created by the legislature without constitutional amendment. However, it was necessary to have an amendment to the state Constitution to create a municipal court (see Simpson v. Payne, supra, 79 Cal. App. at page 785, 251 P. 324).

The order is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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44 Cal.App.2d 934

TIGHE v. VAIL.

Civ. 2662.

District Court of Appeal, Fourth District, California.

May 9, 1941.

Appeal and error ⚿787

Where there was nothing on file in District Court of Appeal except moving papers, including certificate of county clerk, from which it appeared that motion for new trial was denied January 21, 1941, notice of its denial was served January 22, 1941, and filed on following day, and motion to terminate proceedings for preparation of record on appeal was granted by trial judge on March 28, 1941, motion to dismiss appeal was granted.

◆

Appeal from Superior Court, Orange County.

Action by A. L. Tighe against Edwin H. Vail. From an adverse judgment, defendant appeals. On motion to dismiss appeal.

Appeal dismissed.

John J. Beck, of Los Angeles, for respondent.

MARKS, Justice.

This is a motion to dismiss an appeal from a judgment entered on December 13, 1940.

There is nothing on file here except the moving papers which include a certificate of the county clerk of Orange county. It appears that a motion for new trial was denied on January 21, 1941. Notice of denial of the motion was served on January 22, 1941, and filed on January 23, 1941. A motion to terminate proceedings for the preparation of a record on appeal was granted by the trial judge on March 28, 1941. Under these facts the motion to dismiss must be granted. Wright v. Wright, 43 Cal.App.2d 46, 110 P.2d 88.

The appeal is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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44 Cal.App.2d 664

GRESHAM v. SUPERIOR COURT et al., Respondents.

Civ. 12952.

District Court of Appeal, Second District, Division 2, California.

May 6, 1941.

Hearing Denied June 30, 1941.

1. Attorney and client ⚿60

A person who has been a member of the State Bar and has resigned therefrom may appear in court in his own behalf as plaintiff in the prosecution of an action, the subject of which has been assigned to him subsequent to his resignation as an active member of the State Bar. St.1939, p. 360, § 6130.

2. Attorney and client ⚿60

The statute providing that no person who has been an attorney shall, while disbarred or suspended, prosecute an action in his own behalf as plaintiff when the subject of such action has been assigned to him subsequent to his disbarment or suspension, has no application to a former member of the

State Bar who has resigned from the same, since to "disbar" means to deprive of the privilege of practicing law, whereas to "suspend" means to withdraw temporarily the privilege of practicing law.

See Words and Phrases, Permanent Edition, for all other definitions of "Disbar" and "Suspend".

3. Attorney and client ⚷34

To "resign" as member of State Bar means to give up or surrender voluntarily the privilege of practicing law and presupposes the voluntary act and volition of the attorney in relinquishing his privilege and does not connote any misconduct upon the part of the person resigning.

See Words and Phrases, Permanent Edition, for all other definitions of "Resign".

4. Mandamus ⚷151(2)

In an application for a writ of mandate directed to a court relative to a judicial act, the judge of the court is not a "proper party" respondent.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party".

◆

Original proceeding by R. J. Gresham against the Superior Court of the State of California and others for a writ of mandate.

Writ of mandate issued against respondent court, and demurrer of respondent judge sustained.

R. J. Gresham, of Los Angeles, in propria persona.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, and William Ellis Lady, all of Los Angeles, and Webster Hazlehurst, of Laguna Beach, for respondents.

McCOMB, Justice.

This is an original application for a writ of mandate to require respondents to set aside an order dismissing an action brought by petitioner as assignee of a judgment to have the same renewed. Respondent court has filed an answer. Respondent Judge Pierson M. Hall has filed a demurrer to the petition on the ground that it fails to state a cause of action as to him.

So far as material here, the essential facts are:

September 28, 1935, petitioner, a member of the State Bar of California, as attorney for plaintiff obtained a judgment in favor of plaintiff in an action entitled Daniel M. Kuter v. Ella M. Barnard. Thereafter said plaintiff assigned to petitioner a one-third interest in said judgment. August 1, 1937, petitioner's resignation as an active member of the State Bar of California became effective. In September of 1940 Daniel M. Kuter filed an action for the renewal of said judgment. Subsequently Daniel M. Kuter assigned to petitioner the entire judgment which he had previously obtained and which he was endeavoring to have renewed. Petitioner thereafter had himself substituted as sole plaintiff in the last action in the place and stead of Daniel M. Kuter, which action was pending in a court of a justice of the peace. From the order substituting petitioner as plaintiff defendant appealed to the Superior Court. Respondent refused to permit petitioner to appear in the action in the Superior Court on the ground that he was prohibited from doing so by the provisions of section 6130 of the Business and Professions Code of the State of California, St.1939, p. 360, which reads as follows: "No. 6130. Appearing as Plaintiff in Assigned Cause While Disbarred or Suspended. No person who has been an attorney, shall while a judgment of disbarment or suspension is in force appear on his own behalf as plaintiff in the prosecution of any action where the subject of the action has been assigned to him subsequent to the entry of the judgment of disbarment or suspension and solely for purpose of collection."

This is the sole question necessary for us to determine:

May a person who has been a member of the State Bar of California and resigned therefrom appear in the courts of this state in his own behalf as plaintiff in the prosecution of an action, the subject of which has been assigned to him subsequent to his resignation as an active member of the State Bar?

[1-3] This question must be answered in the affirmative. Section 6130 of the Business and Professions Code prohibits a disbarred or suspended attorney from prosecuting an action in his own behalf as plaintiff when the subject of such action has been assigned to him subsequent to his disbarment or suspension. It has no application to a former member of the State Bar who has resigned from the same. There is

a vast difference between *disbarment, suspension,* and *resignation.* To disbar means to deprive of the privilege of practicing law. To suspend means to withdraw temporarily the privilege of practicing law. It is to be noted that in both of the foregoing definitions the privilege of practicing law is taken away contrary to the desires and against the will of the attorney. To resign means to give up or surrender voluntarily the privilege of practicing law. This definition presupposes the voluntary act and volition of the attorney in relinquishing his privilege and does not connote any misconduct upon the part of the person resigning from the State Bar, it being presumed that he did so for reasons good and sufficient to him and not because of any misconduct on his part.

For the foregoing reasons it is obvious that petitioner should have been permitted to appear in his own behalf as the assignee of the claim sued upon and to prosecute the action in respondent court. Therefore, it is ordered that a writ of mandate issue as prayed against respondent court.

[4] In an application for a writ of mandate directed to a court relative to a judicial act the judge of the court is not a proper party respondent. Goble v. Appellate Dept. of Superior Court, 130 Cal.App. 737, 738, 20 P.2d 345; Alexander v. Superior Court, 91 Cal.App. 312, 316, 266 P. 993. Therefore, the demurrer of the respondent judge is sustained.

We concur: MOORE, P. J.; WOOD, J.

JOHNSON v. GRIFFITH et al.

Civ. 12809.

District Court of Appeal, Second District, Division 2, California.

May 6, 1941.

Hearing Granted July 3, 1941.

1. Automobiles 🔑244(36)

Where owner of double-parked automobile was standing between his automobile and automobile parked at the curb and, after his automobile was struck by third automobile, was lying between the two automobiles, but there was no further testimony to show what caused him to fall or whether either automobile struck him, evidence that collision with third automobile was proximate cause of the accident was insufficient in action against driver of third automobile.

2. Negligence 🔑121(2), 134(11)

In action for damages resulting from negligence, plaintiff has burden of proving by a preponderance of evidence that his injuries were in fact caused by defendant's negligent act, and this burden is not sustained merely by proving that an injury occurred or an accident happened.

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge.

Action by Alton L. Johnson against Ernest Edward Griffith and others for injuries suffered in automobile accident. From a judgment for plaintiff, defendants appeal.

Reversed.

Jerrell Babb, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for injuries resulting allegedly from an automobile accident defendants appeal.

Viewing the evidence most favorable to plaintiff (respondent), the essential facts are:

December 24, 1937, about 6:00 p. m. plaintiff was driving an old Essex coach in an easterly direction on Washington boulevard in Culver City near where said boulevard intersects with Main street. Plaintiff's automobile ran out of gasoline and he double-parked his car ten feet east of the intersection on Washington boulevard. To the right of plaintiff's car there was an automobile parked at the curb, there being approximately two or three feet between plaintiff's automobile as double-parked and the automobile parked at the curb.

Plaintiff went to a near-by gasoline station, obtained a can of gasoline, returned, filled his vacuum tank, then went to the rear of his car on the right-hand side, and poured gasoline into the tank. At about the same time defendant Ernest Griffith was proceeding in an easterly direction on Washington boulevard west of plaintiff's double-parked automobile. He noticed plaintiff's automobile, when he was approximately thirty feet in the rear thereof and traveling at a speed of about twenty miles per hour. He had not observed it prior to this time, for the reason that there was a car traveling in front of him which obstructed his view. At the point just indicated the car preceding him turned to the left and entered the middle lane of traffic to avoid hitting the double parked car of plaintiff. Defendant Ernest Griffith attempted to follow the same course as the car preceding him but was not able to do so, because another automobile traveling in the middle lane was at the time passing said defendant on the left, which compelled said defendant to swerve to the right, after which he again attempted to swerve to the left and get into the middle lane of traffic but in so doing the right front of the car which he was driving struck the left rear of plaintiff's car.

At the time of the collision plaintiff was standing between his car and the car parked at the curb. After the collision plaintiff Johnson was found lying between his car and the car parked at the curb, and subsequent examination disclosed that he had received serious head injuries. At the time of the accident there was an ordinance prohibiting double-parking in Culver City. Defendant Muriel Griffith was not present at the time of the accident but was made a defendant because of the fact that the car being operated by her codefendant was registered in her name.

Defendants urge, among others, as grounds for the reversal of the judgment *that there was no evidence to show that the collision between the automobile driven by defendant Ernest Griffith and the car owned by plaintiff was the proximate cause of the injuries received by plaintiff.*

[1, 2] This proposition is tenable. The law is established in California by an unbroken line of authorities that, in an action to recover damages resulting from the alleged negligence of another, the plaintiff has the burden of proving by a preponderance of evidence that his injuries were in fact caused by the negligent act of the defendant, and this burden is not sustained merely by proving that an injury occurred or an accident happened (Zulim v. Van Ness, 3 Cal.App.2d 82, 38 P.2d 820; Michener v. Hutton, 203 Cal. 604, 609, 265 P. 238, 59 A.L.R. 480; see, also, 19 Cal.Jur. [1925] 692, sec. 115).

In the instant case there was not one single iota of testimony connecting plaintiff's injuries with the accident. There was testimony that at the time the accident occurred plaintiff was standing between his car and a car parked at the curb and testimony that after the accident plaintiff was lying between the two cars. There was no testimony as to what caused him to fall, that either of the cars hit him, or in any way connecting him with the accident. For aught that appears from the record plaintiff may have had an epileptic seizure, have been hit by some unknown person, have fainted, or any one of numerous other causes may have brought about his falling and the attendant injuries which he received.

Therefore, applying the above stated rule of law, plaintiff failed to sustain the burden of proof by introducing evidence on a material issue, to wit, that the proximate cause of the accident was a negligent act of defendant Ernest Griffith.

For the foregoing reasons the judgment is reversed.

I concur: MOORE, P. J.

WOOD, Justice (concurring).

I concur. In my opinion the record discloses that the judgment should be reversed for reasons additional to those set forth in the majority opinion. In double-parking his car plaintiff was violating a city ordinance and the burden was upon him to establish facts showing that his action was justifiable in law. (Breaux v. Soares, 18 Cal.App.2d 489, 64 P.2d 146). The only reason given by plaintiff for double-parking his car was that he "ran out" of gasoline. The proposition is not open to argument that, in the absence of a showing of some misfortune such as leakage, it is carelessness to attempt to operate an automobile on a public highway with insufficient gasoline. Moreover, plaintiff, who was strong and in good health, should have pushed his car to a near-by driveway before he went for gasoline instead of leaving it for a period of ten minutes on a highway where the traffic was heavy. In my opinion plaintiff was guilty of negligence as a matter of law. Furthermore, the record is barren of evidence that defendant Ernest Griffith was guilty of any negligence whatever.

44 Cal.App.2d 762

GUTH v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNA et al.

Civ. 6600.

District Court of Appeal, Third District, California.

May 13, 1941.

Rehearing Denied June 13, 1941.

Hearing Denied July 11, 1941.

1. Workmen's compensation ⚷1939

An order based on a finding of the Industrial Accident Commission supported by substantial evidence must be affirmed.

2. Workmen's compensation ⚷1939

Ordinarily, unless but one inference can reasonably be drawn from the facts, the question whether a workman is an employee within the Workmen's Compensation Act is a "question of fact" for the Industrial Accident Commission upon which its finding is conclusive.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Workmen's compensation ⚷306

In determining whether a person was an employee or an independent contractor, the determinative factor is usually found in the solution of the question, Who has the power of control, not as to the result of the work only, but as to the means and method by which such result is accomplished?

4. Workmen's compensation ⚷306

Where the essential object of employment is the performance of work, the "master and servant relation" does not exist unless the employer retains the right to direct the mode and manner in which the job shall be done.

See Words and Phrases, Permanent Edition, for all other definitions of "Master and Servant Relation".

5. Workmen's compensation ⚷306

The chief consideration which determines one to be an "independent contractor" is the fact that the employer has no right of control as to the mode of doing the work contracted for.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

6. Workmen's compensation ⚷1895

Where claimant seeking death benefits under the Workmen's Compensation Act contended that findings of Industrial Accident Commission were not sustained by substantial evidence, it was incumbent upon claimant to quote the evidence upon which she relied.

7. Workmen's compensation ⚷1460, 1710

Evidence that stockroom clerk entered into contract with employer whereby clerk was to make deliveries then being made by independent firms, that trucks used in making deliveries belonged to clerk, that he made deliveries in his off hours, that clerk was free to haul for any one else, that he could have some one else drive his trucks in making deliveries for employer, that he was paid for making deliveries on exactly the same basis as other independent carriers, and that while delivering employer's merchandise at approximately 7:15 p. m. he was fatally injured in an accident, presented a "question of fact" for Industrial Accident Commission, and sustained its denial of death benefits on ground that the clerk at time of the accident was an "independent contractor" and not a "servant."

See Words and Phrases, Permanent Edition, for all other definitions of "Servant".

Proceeding by Madeline E. Guth against the Industrial Accident Commission of the State of California and others to annul an order of the Commission denying death benefits to petitioner and her minor child for the death of petitioner's husband, George L. Guth.

Affirmed.

George L. Popert, Leo F. Granucci, and Edwin B. Polhemus, all of Sacramento, for petitioner.

E. A. Corten, of San Francisco, and Edmond D. Leonard, Deputy Atty. Gen., for respondents.

PER CURIAM.

Petitioner seeks to annul an order of respondent commission denying death benefits to her and her minor child.

For a number of years George L. Guth, husband of petitioner, was in the employ of respondent rubber company at Sacramento. Twenty-three years prior to his death, and continuing thereafter, he was a stockroom and order clerk. During this time, and in this capacity, he was admittedly an employee of the company. In addition to this relationship with the company, there grew up another which came into existence about eight years after the first. There is evidence in the record which would justify the commission in basing their order upon the following facts which describe the second relationship mentioned. During the first eight years all deliveries of the company were made by common carrier, independent parcel delivery service, and independent drayage firms. In 1924, the deceased approached Mr. Smith, manager of the company at Sacramento, suggesting that as he needed additional income to support his family and educate his children, he would like to buy a truck, and in his off hours make some of the deliveries then being made by the independent firms above referred to, upon the same basis that they were making these deliveries. Smith agreed to this, and in order to help him get started, personally guaranteed the payments on the first truck the deceased bought.

From 1924 onward the deceased owned and maintained one or more trucks. With them he made deliveries of the company's merchandise to customers and retail agents in and about the vicinity of Sacramento in his off hours; before work in the morning, at noon, at night, on Sundays and on holidays. Sometimes he drove these trucks; at other times his wife or his wife and his son made the deliveries. He carried and paid for his own insurance, though, as is customary where a contract delivery service makes deliveries for a company, the tire company was named as an additional assured. He had his own licenses from the motor vehicle department and his own license and radial carrier's permit from the Railroad Commission. He paid his own license fees and his own taxes. He furnished the detailed statements to the Railroad Commission required of all licensed radial carriers. He was free to haul for anyone else he saw fit, and could have had someone else drive his trucks in hauling for the tire company or anyone else; in fact, the record shows his wife frequently did drive the trucks without him in making deliveries. He was not required under the contract thus, to render any personal service, but could have anyone he saw fit drive the trucks. He was not restricted to delivering only for the Goodyear company; he was free to deliver, and have his trucks, with someone else driving, deliver for whomever he saw fit.

The deliveries he and his wife made for the company were, as noted, deliveries other independent delivery services had previously made. Instead of the deliveries being turned over to other carriers when the deceased had selected the ordered goods, prepared them for delivery and billed them out, the deceased or his wife merely stepped in under the contract he had with the company and made the deliveries on the same basis as the other independent carriers made them. Deceased was paid under his contract on exactly the same basis as other independent carriers; that is, on a weight and distance basis as determined by the competitive rates established for independent contract carriers in the Sacramento area. The goods were turned over to him or his wife in the same manner as to any other carrier. They were billed out in the same way and delivered in the same manner. He turned in his charge sheets in the same manner as the other delivery services, the company kept the same records on his deliveries as on the others, and he was paid on the same basis and in the same manner. These payments were kept on the company's books as service charges and not as wages, and were not reported as wages to the compensation carrier or to governmental agencies. Pursuant to the above arrangement the decedent was making a delivery of some of the company's merchandise at approximately 7:15 p. m. on the evening of December 29, 1939, when he met with an accident from which he received injuries which directly and immediately caused his death.

[1, 2] The sole question before this court is whether or not there is any substantial evidence to support the finding of the commission that at the time the decedent received the injuries which caused his death he was not a servant of the company, but on the contrary, was an independent contractor. If there is any evidence from which the commission could reasonably conclude or infer that the deceased was not an employee of the company, it is our duty to affirm the order. In 27 Cal.Jur. page 285, section 22, it is stated: "Ordinarily, unless but one inference can reasonably be drawn from the facts, the question whether a workman is an employee within the act is one of fact for the Commission, upon which its finding is conclusive."

The position of petitioner is thus expressed in her points and authorities: "Such proof as was adduced at the hearing, that is to say, that the decedent owned his own truck and paid for the operation of the same, that he was paid on a piece basis, and that he was operating under a license granted by the Railroad Commission, are positively immaterial factors where the evidence clearly shows the right to control and direct the work of the decedent on the part of the Company. Such has been the ruling of the appellate courts of this State on many occasions."

Respondents' contention is as follows: "When it is realized that there were two separate and distinct relationships here; that one called for the personal services of the deceased and the other merely for a result to be accomplished, either by him or someone he might select, it is apparent that as to the second, he was at the time of injury merely a truck owner delivering goods on his own time, by his own means, without control by the shipper, for a contract price on which he could either make or lose; in short that he was an independent contractor."

[3-5] The rule applicable to a situation of this kind is stated in Fidelity & C. Co. v. Industrial Acc. Comm., 191 Cal. 404-407, 216 P. 578, 579, 43 A.L.R. 1304, as follows: "In determining in any given case whether a person was an employee or an independent contractor there are usually present various circumstances which are persuasive to one conclusion and other circumstances persuasive to the opposite conclusion. But an analysis of the cases makes it plain that the determinative factor is usually found in the solution of the question: Who has the power of control, not as to the result of the work only, but as to the means and method by which such result is accomplished? In Luckie v. Diamond Coal Co., 41 Cal.App. [468] at page 480, 183 P. [178] at page 183, after an extensive review of the cases, the court said: 'The accepted doctrine is that, where the essential object of the employment is the performance of work, the relation of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the job shall be done; or, in other words, not only what shall be done, but how it shall be done. Labatt on Master and Servant, § 64; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721. "The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." Green v. Soule, 145 Cal. 96, 99, 78 P. 337, 339.'"

In Hillen v. Industrial Acc. Comm., 199 Cal. 577, 581, 250 P. 570, 571, it is said: "One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent."

[6] The testimony in the case is spread over some four hundred pages of transcript. Under the rules of this court, it was incumbent upon petitioner to quote the evidence upon which she relies. This was done. We have examined such portion of the evidence with particular care, and we do not believe, as a matter of law, that the commission was bound to make an order for death benefits. Such evidence consists of a portion of the testimony of the manager of the Rubber Company. The latter testified that the deceased had the duty of preparing and shipping emergency orders after closing time. This is the purport and substance of the testimony. Such testimony, as opposed to the inferences which might be reasonably drawn from the facts detailed above, at the most, would constitute a conflict upon the question at issue. There is very little or nothing in it to show that the company had a right to interfere with the manner in which the deliveries were made—such as the routing of the trucks, rate of speed at which they should travel, or the means and method by which the deliveries were to be made.

As to the contention that the services were personal, "the circumstance that under the contract decedent was to render nondelegable personal services may be persuasive, but it is in no sense conclusive or determinative. Contracts for the rendition of nondelegable personal services are of common occurrence, which do not constitute the contractor an employee." Fidelity & C. Co. v. Industrial Acc. Comm., supra.

[7] We cannot say, as a matter of law, that the evidence establishes the relationship of employer and employee. That question was, therefore, a matter of fact clearly within the jurisdiction of the commission, and its order cannot be disturbed.

The order is affirmed.

44 Cal.App.2d 651

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. REPUBLIC PRODUCTIONS, Inc.

Civ. 12819.

District Court of Appeal, Second District, Division 2, California.

May 5, 1941.

1. Master and servant 🔑80(9)

Evidence supported findings that employer's rules required deceased employee to appear and report at moving picture studio during every business day and forbade employees to absent themselves without permission, that it was necessary that employees, including decedent, report for work on each business day and be available for conference, that by reason of decedent's absence on two days a writer was unable to discuss his work with decedent, that decedent's acts were in willful violation of rules and employment contract, and that a material element in performance by decedent was that he should report for work and be available on each business day for whatever use employer desired to make of him.

2. Appeal and error 🔑989

The power of the reviewing court begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings of fact made by the trial court.

3. Master and servant 🔑30(2)

An employer may discharge an employee when the employee fails to perform his duty, even though injury does not result to the employer.

4. Master and servant 🔑73(5)

Where deceased employee, whose employment contract provided that compensation was due and payable on Thursday of each week for services rendered up to and including the Wednesday preceding, was paid Thursday May 11, 1939, for services up to and including May 10, 1939, and employee breached his contract and was discharged before Thursday May 18, 1939, the next day on which compensation was due, employee was not entitled to any compensation for services rendered after May 10, 1939.

5. Master and servant 🔑73(5)

An employee dismissed by his employer for good cause is not entitled to any compensation for services rendered after the last day on which a payment becomes due under the terms of the employment contract.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by George Nicholls, Jr., against Republic Productions, Inc., to recover compensation under an employment contract. Plaintiff having died, the Bank of America National Trust & Savings Association, as administrator with the will annexed of the estate of George Nicholls, Jr., deceased, was substituted in his place. From a judgment for defendant, plaintiff appeals.

Affirmed.

Simon & Garbus, Morton Garbus, and Sidney A. Moss, all of Los Angeles, for appellant.

Loeb & Loeb, of Los Angeles (Norman Newmark, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover compensation under a contract of employment, plaintiff appeals.

Subsequent to the filing of the present action plaintiff died and the administrator of the estate was substituted in his place and stead.

Viewing the evidence most favorably to defendant (respondent), the essential facts are:

July 22, 1938, plaintiff's decedent, a moving picture director, entered into a contract with defendant, the pertinent portions of which may be summarized as follows:

(1) Decedent agreed "to keep and perform all the duties, obligations, and agreements assumed and entered into by him" under the terms of the agreement.

(2) Decedent agreed "that he" would "promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection with its business of producing motion pictures; and that he" would "perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer, at all times and wherever required or desired by the producer",

(3) The word "direct" as used in the agreement should include "assistance in the preparation of continuities * * * and such other services" as might "be required of directors according to the custom of the industry."

(4) The services of decedent were declared to be of a special, unique, unusual, extraordinary, and intellectual character, which gave them a peculiar value, the loss of which could not be reasonably or adequately compensated for in damages and it was further declared that a breach by decedent of any of the provisions contained in the agreement would cause the producer irreparable injury and damage.

(5) In the event of the "failure, refusal or neglect of the" decedent "to perform his required services" under the agreement "to the full limit of his ability or as instructed, the producer at its option" should "have the right to cancel and terminate" the "employment".

(6) "On condition that the" decedent should "fully and completely keep and perform each and all of the conditions and agreements on his part to be kept or performed" under the agreement "the producer" agreed "to compensate" decedent "therefor and for all rights * * * granted and/or agreed to be granted by the" decedent "to the producer, at the rate of seven hundred and fifty dollars ($750.00) per week".

The foregoing contract, though dated July 22, 1938, ran for a six months' period commencing as of July 1, 1938. Defendant exercised an option in the contract to extend it for an additional six months' period ending July 1, 1939. May 15, 1939, decedent was discharged by defendant for cause, decedent having without defendant's permission absented himself from defendant's studio on Friday, May 12, Saturday, May 13, and appeared for work for one hour only on Monday, May 15.

Plaintiff relies for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the trial court's findings as follows:

*(a) "Defendant had certain rules and regulations made by it in the conduct of its business regulating the attendance and presence of its employees at its studio. Said rules and regulations of defendant required plaintiff to appear and report at the studio during every business day, and forbade its employees, including plaintiff, to absent themselves from the studio without permission * * * and they were well known to and understood by plaintiff."*

(b) "That it was necessary for the proper operation of defendant studio that its employees, including plaintiff George Nicholls, Jr., report for work on each business day and be available for conference with writers, directors, producers or other persons on the studio lot."

(c) "On May 12, 1939, and again on May 13, 1939, the writer, then working on said continuity, was at defendant studio in connection with such work. By reason of the absence of said plaintiff from said studio on said two days, as hereinbefore found, said writer was unable to discuss his work with plaintiff."

(d) "The acts of plaintiff, as aforesaid, were in wilful violation of the aforesaid rules and regulations made by defendant, and said absences of plaintiff were in violation of the provisions of plaintiff's contract of employment."

(e) "The Court further finds that one of the material elements in the performance by plaintiff of the terms of said contract of employment was that he should report for work and be available to defendant on each business day for whatever use defendant desired to make of him."

Second: Decedent's absence from his work, even if it constituted a breach of contract, did not result in damage to defendant.

Third: Even though decedent was properly discharged, he was entitled to compensation for the period of time prior to the effective date of his discharge.

Plaintiff's first proposition is untenable. An examination of the record discloses that it was customary for a director such as decedent, while engaged in assisting writers in the preparation of script or continuity, to be present at the studio every day and available for consultation with the writers. It is conceded that decedent absented himself without defendant's permission from the studio on Friday, May 12th, Saturday, May 13th, and on Monday, May 15th, excepting for the period of an hour. During this period decedent had assigned to assist him writers in the preparation of a continuity of a motion picture entitled "Abraham Lincoln Boggs".

There was also evidence that decedent had been discharged by defendant on a prior occasion for absenting himself from his duties without the consent of defendant and in addition there was also evidence that decedent on other occasions when absenting himself from the studio had requested defendant's permission to absent himself.

[1, 2] The foregoing evidence, with the reasonable inferences that may be drawn therefrom, substantially support each and every material finding of fact of the trial court set forth above. Further discussion of the evidence would therefore be superfluous, in view of the established rule that the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the findings of fact (In re Estate of Winzeler, 42 Cal.App.2d 246, 108 P.2d 720).

[3] Plaintiff's second proposition is also untenable. An employer is justified in discharging his employee, when the latter fails to perform his duty, even though injury does not result to the employer as a result of the employee's failure to do his duty (May v. New York M. Picture Corp., 45 Cal.App. 396, 404, 187 P. 785).

[4, 5] Plaintiff's final proposition is likewise without merit. Decedent was paid Thursday, May 11, 1939, for his services up to and including May 10, 1939. Thereafter and until May 15, the effective date of his discharge, he was present at the studio on May 11 only. By the terms of his contract his compensation was due and payable on Thursday of each week for services rendered "up to and including the Wednesday preceding". Since he breached his contract and was discharged prior to Thursday, May 18, 1939, the next day upon which compensation was due him, he was not entitled to any compensation for services rendered subsequent to May 10, 1939, the law being established in California that an employee dismissed by his employer for good cause is not entitled to any compensation for services rendered after the last day upon which a payment becomes due under the terms of a contract of employment. (Hartman v. Rogers, 69 Cal. 643, 646, 11 P. 581).

For the foregoing reasons the judgment is affirmed.

I concur: MOORE, P. J.

WOOD, Justice (concurring).

I concur in the judgment. The contract provides that defendant shall pay to the director $750 on Thursday of each week for services rendered the preceding week "on condition that the director shall fully and completely keep and perform each and every term and condition of this agreement on his part to be kept or performed". Under the express terms of the contract plaintiff may not recover for services rendered on May 11, 1939, or thereafter.

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44 Cal.App.2d 748

PEOPLE v. SPARKS et al.

Cr. 3433.

District Court of Appeal, Second District, Division 2, California.

May 12, 1941.

1. Burglary 🔑41(4)

Evidence that employee devised plan to steal his employer's property, that such plan involved entry into employer's store by other persons for purpose of taking delivery of property, and that one of such persons was induced by employee to enter store for express purpose of aiding and abetting him in consummating scheme to defraud employer, was sufficient to sustain employee's conviction of burglary, as such person's felonious entry, with intent required to be shown to establish burglary, was imputable to employee because both were principals in such scheme. Pen.Code, §§ 31, 459.

2. Burglary 🔑9(1)

If a servant or other person in a house opens the door for the purpose of letting in a confederate, who enters with intent to commit a felony, there is a "constructive breaking," and both are guilty of burglary.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Breaking".

3. Witnesses 🔑240(2)

On direct examination of witness, leading questions may be asked in court's discretion when it appears that interests of justice so require. Code Civ.Proc. § 2046.

4. Witnesses 🔑240(2)

In burglary trial, court's ruling, permitting prosecution to ask leading questions of prosecution's witness, who aided and abetted defendant in commission of crime, *held* not abuse of discretion. Code Civ.Proc. § 2046.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Martin Sparks and another were charged with burglary named defendant was convicted, and he appeals.

Affirmed.

Sydney M. Williams and Monte E. Livingston, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

WOOD, Acting Presiding Justice.

Appellant and Fred Coman were accused in an indictment of the crime of burglary. The charge was dismissed as to defendant Coman on motion of the district attorney in order that he could be a witness for the prosecution. At a trial before the court without a jury appellant was found guilty. This appeal is prosecuted from the judgment of conviction and from the order denying a motion for a new trial.

For a number of years appellant was employed by Sears, Roebuck & Company as a salesman in the sporting goods department of their Hollywood store. He devised a scheme whereby he procured other persons to enter the store and obtain goods from him for far less than their regular price and appropriated the money so received to his own use. As an additional inducement he permitted the so-called purchasers to obtain free of charge a number of articles such as shotgun shells. The "purchasers" obtained the goods when the department manager was absent and appellant did not ring up the sales on the cash register or give receipts. After his arrest he admitted to one of the officials of the company that he had "taken about $500 a month" in this manner. One of the parties taking part in this scheme was defendant Coman, who stated that he had received during the year before appellant's arrest goods free of charge of the value of about $200. On August 19, 1940, Coman entered the store to secure a gun for which he had arranged with appellant by telephone. The conversation over the telephone had been heard by a store detective, who followed Coman from the store and discovered that no receipt had been placed in the package which Coman was removing.

[1, 2] It is now contended by appellant that the evidence is insufficient to establish the crime of burglary. Section 459 of the Penal Code provides that every person who enters a shop with intent to commit theft or any felony is guilty of burglary. It is argued that since appellant was employed in the store as a salesman he did not enter with intent to steal; and that Coman, if guilty of any crime, was guilty of the crime of receiving stolen property.

From the evidence presented the court could readily and reasonably conclude that appellant had devised a plan to steal the property of his employer, which plan involved the entry into the store by other persons for the purpose of taking delivery of the employer's property; that one of these persons, defendant Coman, was induced by appellant to enter the store for the express purpose of aiding and abetting appellant in consummating the scheme of defrauding the employer; and that Coman knew when he entered the store that he was aiding and abetting appellant in his felonious scheme. It is provided in section 31 of the Penal Code that all persons concerned in the commission of a crime by aiding and abetting in its commission are principals in the crime. When Coman entered the store he did so with intent to aid and abet appellant in the commission of the crime of theft. His entry therefore was with the intent required to be shown in order to establish the crime of burglary. Since appellant and Coman were both principals in the nefarious scheme, the felonious entry of Coman was imputable to appellant. The principle is illustrated in 9 C.J. 1016, section 18, 12 C.J.S., Burglary, § 9: "If a servant or other person in a house opens the door for the purpose of letting in a confederate, and the latter enters with intent to commit a felony, there is a constructive breaking, and both are guilty of burglary."

[3, 4] Appellant complains that the court erred in permitting the prosecution to ask leading questions of the witness Coman. On direct examination leading questions may be asked in the discretion of the court when it appears that the interests of justice so require. Sec. 2046, Code Civ. Proc. We find no abuse of discretion in the ruling of the court permitting the asking of leading questions.

The judgment and the order denying the motion for a new trial are affirmed.

I concur: McCOMB, J.

44 Cal.App.2d 735

In re BRANDEL'S ESTATE.

Civ. 11693.

District Court of Appeal, First District.
Division 1, California.
May 12, 1941.

Hearing Denied July 7, 1941.

1. Adoption ⚿1

The right of adoption is wholly statutory.

2. Adoption ⚿1

The adoption of one person by another was unknown to the common law.

3. Adoption ⚿17

He who claims that an act of adoption has been accomplished must show that every essential requirement has been complied with. Code Civ.Proc. § 1875; Civ.Code, § 221.

4. Adoption ⚿17

In proceeding wherein claimant contended that she was entitled to inherit as an adopted daughter, evidence sustained finding against the existence of a contract of adoption.

5. Husband and wife ⚿49½(8)

If original certificate of deposit issued to wife or any issued in lieu thereof represented in whole or in part funds held by the husband in common law sole ownership in Kansas, the placing of such funds in the name of the wife before the husband and wife left Kansas indicated a gift to her resulting in a change of ownership and constituting thereafter the separate property of the wife.

6. Descent and distribution ⚿71(6)

Where claimant contended that she was entitled to part of deceased's estate as niece of the deceased's predeceased husband and assignee of other relatives of the husband, but it appeared that certificate of deposit had been issued to wife in Kansas thereby indicating a gift to her, if certificate of deposit represented funds held by the husband in common-law sole ownership in Kansas, evidence was insufficient to show that claimant, upon whom the burden of proof rested, established the contrary. Probate Code, §§ 225, 228, 229.

7. Descent and distribution ⚿71(6)

Where claimant contended that she was entitled to inherit part of deceased's estate as niece of the deceased's predeceased husband and assignee of other relatives of the husband, evidence was insufficient to permit a determination of what part, if any, of the deceased's estate was derived from property held in Kansas in common-law sole ownership by the husband which, upon its entry into California, became his separate property. Probate Code, §§ 225, 228, 229.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Proceeding in the matter of the estate of Mrs. Carl Brandel, deceased, wherein Stella Cusac, administratrix, filed a petition for the settlement of the first and final account and for final distribution, to which Charlotta Hilding filed objections, and wherein Anna Marie Lindgren filed a petition. From an adverse decree, Anna Marie Lindgren appeals.

Affirmed.

Russell Scott, of Salinas, and Harold L. Hjelm, of Turlock, for appellant.

Wyckoff, Gardner & Parker, of Watsonville, for petitioner and respondent.

Sans, Hudson & Perry, of Watsonville, for Charlotta Hilding, objector and respondent.

WARD, Justice.

This is an appeal from a decree and order settling the final account of an administrator and ordering distribution, and also determining that appellant was not the daughter of Josephine Brandel, deceased, and not entitled under section 229 of the Probate Code to succeed to her property.

The estate of decedent, who died intestate, consists of real property, cash and personal effects. Appellant's contention is that she was the adopted daughter of decedent and thereby entitled to the entire estate; and that in any event the estate was derived from the separate property of Josephine Brandel's predeceased husband, the uncle of appellant, by reason of which she, as the assignee of some of the other relatives of the predeceased husband, is entitled to five-sixths of the estate under the provisions of section 229 of the Probate Code. The court decreed distribution of the entire estate to the nieces and nephews of decedent, children of her predeceased sister and brother, under section 225 of the Probate Code; and denied appellant any interest therein.

The basis of plaintiff's claimed adoption may be stated as follows: Appellant was born in Sweden in 1884, her father, who used the name of Sjoberg, being a brother of decedent's husband Carl Brandel. After the death of her mother she was placed in an orphanage and later in the home of a soldier and his wife, not shown to be relatives, who held the child in great affection. Following correspondence over a period of about two years between Carl Brandel and appellant's father in Sweden, Anna Marie Sjoberg or Brandel who was about seven years old at the time, was brought to this country to live with the Carl Brandels in Kansas. A translation of the minutes of a meeting of the board of directors of the orphanage permitting her to be taken to America was introduced as an exhibit. The minutes recite that the father had petitioned that his daughter "be permitted to be taken to America to be brought up by" her uncle "Carl Brandel" who "has applied for, and offered to take up the girl as his own child". The minutes further recited that the board gave its consent that the child be given to the applicant and her registry in the orphanage cancelled.

Appellant contends that her surrender by the Swedish orphanage and acceptance by the Brandels, coupled with the fact that no other procedure requiring a statutory adoption was then available was in and of itself of effect sufficient to constitute a legal adoption.

[1-3] The right of adoption is wholly statutory. The adoption by one person of another was unknown to the common law. There is no showing in the record that under the law of Sweden, or that of Kansas to which state appellant came, her release by an orphanage and acceptance into the home of the Brandels would constitute adoption. It is not shown that Kansas recognizes such a form of adoption and our own research in that regard has in no respect been helpful to appellant's cause. Code Civ.Proc., sec. 1875. Appellant was an adult at the time of her arrival in California and the statutes of this state refer only to the adoption of minor children. Civil Code, sec. 221. "He who claims that an act of adoption has been accomplished must show that every essential requirement has been complied with." Estate of Taggart, 190 Cal. 493, 498, 213 P. 504, 506, 27 A.L.R. 1360.

[4] Appellant relies chiefly upon an alleged contract to adopt, which, had it existed, might have entitled her to an equitable remedy, or, under certain circumstances, relief in the probate court. Furman v. Craine, 18 Cal.App. 41, 121 P. 1007; Johnson v. Superior Court, 102 Cal.App. 178, 283 P. 331. Whether an alleged contract to adopt may be asserted in probate proceedings, or whether it must be made the subject of a separate suit in equity, is not a question of vital importance in this case. Assuming that appellant's right is in probate, the evidence as a matter of law does not compel the conclusion that Josephine and Carl Brandel or either of them agreed to adopt appellant. The trial court found against the existence of a contract of adoption. There is some slight evidence that the Brandels may have intended to adopt appellant but the weight of the evidence is otherwise. It is not disputed that appellant was received into their home in Kansas and treated in many respects as their own child. Mrs. Brandel signed her school report cards in the space provided for the signature of a parent and several witnesses testified that the Brandels referred to appellant as their daughter. Other witnesses, however, testified that she was referred to as their niece, and that Mrs. Brandel stated that she had not been adopted. The funeral notice at the time of the death of Mrs. Brandel stated that she was survived by her daughter Mrs. Lindgren, but a newspaper notice of Mr. Brandel's death gave her relationship to be that of a niece. Appellant referred to Mr. and Mrs. Brandel as Uncle and Aunty, and letters addressed to her by Mrs. Brandel are signed "Aunty". Invitations to the wedding of appellant, sent out by Mr. and Mrs. Brandel, referred to her as "their niece Anna Marie". The evidence falls short in weight and sufficiency to prove that appellant is the adopted daughter or that the Brandels agreed to adopt her. Appellant contends that the words "take up" as used in the minutes of the meeting of the board of directors of the orphanage are the equivalent of "adopt". It does not appear that either of the Brandels had any correspondence with the orphanage or that they accepted the child with the intention of adopting her or that their conduct indicated that such was their intention. The Kansas cases cited are not in point. In Anderson v. Anderson, 75 Kan. 117, 88 P. 743, 9 L.R.A.,N.S., 229, a written contract provided that upon the death of a husband and wife the child taken over by them should receive "all the property they died possessed of". In Hickox v. Johnston, 113 Kan. 99, 213 P. 1060, 27 A.L.R. 1322, an

oral contract of the same nature was reduced to writing.

In view of our approval of the decree on the question of adoption, it is not necessary to consider respondents' contention that under any alleged contract to adopt, the claims of appellant are barred by laches and the statute of limitations.

A further contention of appellant is that she is entitled to succeed to five-sixths of the estate of Mrs. Brandel under Probate Code, section 229. As the niece of Carl Brandel, the daughter of a predeceased brother, and the assignee of other relatives, she contends that the property constituting the estate of Mrs. Brandel is derived either from property accumulated by Mr. Brandel prior to his marriage, or from property acquired by him in Kansas during marriage and before the Brandels came to California. The Brandels took up residence in this state in 1922; Carl Brandel died in 1926 and Mrs. Brandel died on or about March 25, 1938. The petition for settlement of the first and final account and for final distribution and the objections thereto filed by appellant were heard on or about May 1, 1939. The probate court determined that no part of the estate of Carl Brandel or of the estate of Mrs. Brandel was community property; that cash on hand at the date of the latter's death was her separate property and "That the real property of said decedent described in said petition for distribution was purchased by decedent in her own name with funds brought into the State of California from the State of Kansas by the said decedent, which funds were derived by her from the sale of realty in the State of Kansas which stood of record in the name of said Josephine Brandel; that the change in status, if any, of any property of said Carl Brandel held by him in the State of Kansas in common law sole ownership to the separate property of Josephine Brandel took place in the State of Kansas prior to the establishment by said Josephine Brandel of her domicile in California."

[5, 6] The evidence pertinent to this question and in support of the decree appears in part as follows: The Brandels married in Kansas around 1888; shortly thereafter they purchased a home in the husband's name; subsequently this home was sold and a second purchased in the wife's name; the second home was thereafter sold, part of the proceeds thereof being used to pay off a mortgage on the place, and the balance of approximately $3,000 placed in a Kansas bank and evidenced by a certificate of deposit issued to Mrs. Brandel. Part of this was withdrawn before the Brandels moved to California and the balance thereafter. California property, paid for at least in part from funds growing out of the certificate of deposit, was purchased in the name of Mrs. Brandel. If the original certificate of deposit or any issued in lieu thereof represented in whole or in part funds held by the husband in common law sole ownership in Kansas, the placing of such funds in the name of the wife before they left Kansas indicates a gift to her, resulting in a change of ownership and constituting thereafter the separate property of the wife. The record does not show that appellant, upon whom the burden rested, established to the contrary. Probate Code, secs. 228, 229; In re Estate of Simonton, 183 Cal. 53, 190 P. 442; In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042; In re Estate of Slack, 13 Cal.2d 721, 91 P.2d 1052.

[7] During the period that the Brandels lived in Kansas, Mrs. Brandel received a small inheritance from the estate of her mother. Over a number of years she took in boarders. The evidence does not show that Mr. Brandel acquired separate or community property after arrival in this state. After the death of her husband Mrs. Brandel worked as a servant and nurse; and the deposits of money in a California bank were made subsequent to the death of Mr. Brandel. Appellant failed to make a sufficient tracing of funds to enable the trial court to determine what part, if any, of Mrs. Brandel's estate was derived from property held in Kansas in common law sole ownership by the husband, which, upon its entry into California, became his separate property within the meaning of the law of this state.

Each side relies upon In re Estate of Allshouse, 13 Cal.2d 691, 91 P.2d 887. In that case husband and wife acquired property in Missouri during their marriage, which had it been acquired in California would have been community property. In Missouri it was held by the husband in common law ownership subject to the wife's dower right. The property was transferred to the wife either by gift before death or on distribution of his estate under the laws of Missouri. Later the wife came to California and was continuously domiciled here up to the time of her death. The court held that while at the time of her death the property acquired in Missouri had more of the incidents of California separate property than of community property, it nevertheless differed in its incidents from separate property acquired in California, for which reason section 229 did not apply. The effect of this conclusion was to exclude the husband's relatives entirely, leaving the property to descend under Probate Code, section 225. Had the husband brought into this state property which he at that time held in common law sole ownership, and thereafter it had been given, bequeathed or permitted to descend to the wife, section 229 would be applicable upon the wife's subsequent death intestate. We do not construe the decision as applying to property other than such as was held by the husband in common law sole ownership, and transferred by him to his wife prior to the parties coming to California.

The facts of the present case differ from those of the Allshouse case in that in the latter the husband died before the wife came to California bringing the property with her. The Brandels came to California before the death of the husband. In Re Estate of Allshouse, supra, 13 Cal.2d 699, 91 P.2d 891, the court said: "Had the husband brought the property to this state, or had he become domiciled here, the rule would be different, for it is well settled that foreign property, when subjected to the laws of a community property jurisdiction, may be reclassified thereunder."

In the present case the court found as to a parcel of real property constituting part of the estate of Mrs. Brandel, that it was purchased by her in her own name with funds derived from the sale of realty in Kansas which stood of record in her name, and that if the realty could be traced back to any property held by Mr. Brandel in common law sole ownership, its status had been changed, and it had become the separate property of Mrs. Brandel before she left Kansas with her husband. The court further found that the cash on hand had been acquired after the death of her husband, and that the wife received none of it by gift or otherwise from her husband.

It is contended that where the assets are mingled in California, the resultant fund constitutes community property, and that if that property would be community property here, then it should be construed so to be when it is brought from another jurisdiction.

In Porter v. Nelson, 42 Cal.App.2d 750, 109 P.2d 996, cited by appellant, the husband placed his earnings in his wife's bank account. The decision is entirely foreign to the facts herein. No question of bringing funds into this state was involved. The legal principles involved in the Porter case are correct as applied to the facts of that case, but here appellant failed to prove a commingling of funds either here or in Kansas.

The portion of the decree appealed from is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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44 Cal.App.2d 723

PEOPLE v. WYNN.

Cr. 3445.

District Court of Appeal, Second District, Division 1, California.

May 9, 1941.

Hearing Denied June 6, 1941.

1. False pretenses 🔑49(1)

Evidence authorized conviction of grand theft through false pretenses by accused who obtained loans on wrecked automobiles which finance company did not inspect.

2. False pretenses 🔑49(3)

In prosecution for obtaining loans on wrecked automobiles which finance company did not inspect, conditional sales contracts, executed by accused, and chattel mortgages on wrecked automobiles were sufficient to comply with statute requiring false pretense or some memorandum thereof to be in writing, or to be proved by testimony of two witnesses or testimony of one witness and corroborating circumstances. Pen.Code, § 1110.

3. False pretenses 🔑49(1)

In prosecution for obtaining loans on wrecked automobiles which were not inspected by finance company, evidence was not insufficient because it failed to show that loss was suffered by company in the particular transactions on which information was based, especially where such transactions and other similar transactions were part of general plan under which company lost a large sum.

4. False pretenses ⚿**1**

The offense of "obtaining money under false pretenses" is complete when money is obtained by use of false means, and accused is not purged of culpability even by subsequent restoration, restitution or repayment.

See Words and Phrases, Permanent Edition, for all other definitions of "Obtaining Money under False Pretenses".

5. Criminal law ⚿**511(1)**

In prosecution for obtaining loans on wrecked automobiles which finance company did not inspect, testimony of accused's accomplice, who was manager of the company, was sufficiently corroborated. Pen.Code, § 1111.

6. Larceny ⚿**62(2)**

In prosecution for obtaining loans on wrecked automobiles which finance company did not inspect, evidence supported conviction of grand theft on theory of larceny by trick and device.

7. Witnesses ⚿**277(2)**

In prosecution for obtaining loans from finance company on wrecked automobiles, cross-examination as to whether accused had "skipped" parole after being convicted of forgery, as to whether accused knew that warden of penal institution in which accused served 22 months before being paroled "would be glad to have you come back there", and as to whether forgery was an "automobile forgery", was improper.

8. Witnesses ⚿**350**

Cross-examination of accused on issue of prior conviction must be limited to the fact of conviction and the nature of the crime, and must not go into details or circumstances surrounding the crime, or length of time served and conditions or circumstances surrounding parole.

9. Criminal law ⚿**1170½(5)**

A conviction will not be reversed for improper cross-examination of accused where evidence amounts to complete demonstration of guilt and appellate tribunal can say that though misconduct had not occurred a guilty verdict was inevitable. Const. art. 6, § 4½.

10. Criminal law ⚿**1170½(5)**

In prosecution for obtaining loans from finance company on wrecked automobiles, cross-examination as to whether accused had "skipped" parole after being convicted of forgery, as to whether accused knew that warden of penal institution in which accused served 22 months before being paroled "would be glad to have you come back there," and as to whether forgery was an "automobile forgery," required reversal of conviction, where there was no support in record for charges of parole violations, and two juries had disagreed, notwithstanding that no objection or request for instruction to disregard was made. Const. art. 6, § 4½.

YORK, P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Mark Gerald Wynn was convicted of grand theft, and he appeals.

Reversed and remanded for new trial.

Richard A. Haley, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an amended information filed by the district attorney of Los Angeles county, containing three counts, defendant was accused in each count of the crime of grand theft. The information also contained an averment that defendant had theretofore been convicted of a felony and had served a term of imprisonment in a penal institution as punishment therefor. Following pleas of not guilty and the admission by defendant of the prior conviction charged against him, the cause proceeded to trial before a jury for the third time. In two previous trials, the jury being unable to agree upon a verdict, mistrials were declared. The third trial resulted in conviction of the defendant upon all three charges lodged against him. From the judgment and the order denying his motion for a new trial he prosecutes this appeal.

The factual background of this prosecution, as revealed by the record, is that in the early part of 1939 defendant presented and introduced himself at the office of the Carlton Finance Company to Lloyd T. Leary, the company manager. Upon this occasion he borrowed money on his automobile and informed Leary that he handled a considerable number of automobiles and would finance his contracts thereon with the Carlton Finance Company. It was Leary's duty as manager of the finance company to investigate and pass upon loan applications and to inspect automobiles or other personalty offered as security for loans. When an automobile upon which a loan was asked could be put in standard running order without an expenditure of more than $20 Leary was authorized to make a loan thereon. The applicant for a loan was required to fill out a credit application, and upon approval of such application by Leary a promissory note and chattel mortgage were executed by the borrower. After many transactions in which money was lent by the finance company to the defendant through Leary upon automobiles as security, there is evidence that about the middle of July, 1939, Leary commenced the practice of approving loans of the defendant without the formality of inspecting the automobile offered as security. In connection with the abandonment of the practice of inspecting automobiles, it appears in the record that about the middle of July, 1939, defendant, accompanied by a Miss Lester, came to the office of the finance company for the purpose of obtaining a loan upon an automobile. During the negotiations Miss Lester apparently changed her mind and informed defendant in the presence of Mr. Leary that she would rather not go through with the transaction; that the car was not in as good condition as it should be and had been rather badly wrecked; that she did not know whether defendant would be able to fix it, and therefore felt she would rather not obtain the loan. At that time it appears that Leary inquired of defendant, "What is this business about the automobile being wrecked?" to which the defendant replied, "Yes, some of them have been wrecked; they are damaged and some of them are being fixed." According to Mr. Leary's testimony, he then informed defendant he was sorry, but he could not make loans on wrecked automobiles; that he would talk to Mr. Mandel, the owner of the finance company; but that pending such conversation he would make no loans upon cars that were in a wrecked condition; whereupon defendant replied, "I am sorry, but you have been financing a few cars that are wrecked and you will have to go through with it because you have been putting the deals through. You will have to go along with me and play ball with me until everything is straightened out. It will come out all right, don't worry about it." According to Leary's testimony, up to that time he was in ignorance that any of the automobiles theretofore pledged by defendant were wrecked cars, but from that time on Leary made no attempt to inspect any of the automobiles in the subsequent deals presented by the defendant. Thereafter numerous transactions were entered into whereby defendant received loans on wrecked automobiles, and during which time Leary at the request of the defendant obtained from the owner of the finance company a three per cent overriding commission for the defendant's bringing in so much business, and out of which commissions Leary was paid between $200 and $500 by the defendant over a period of time. Neither Leary nor defendant ever informed Mr. Mandel, the owner of the finance company, that loans were being made upon wrecked cars, according to their testimony. The record indicates that Mr. Leary had the confidence of the owner, the latter of whom signed the loan checks presented for his signature after approval by Leary. The two secretaries of the owner were also authorized, during his absence, to jointly sign checks upon any deal approved by Leary. It further appears that Leary received various sums of money between August and November, 1939, from the defendant, and that the latter overhauled Leary's personal car and did some other work for him gratuitously.

The loans received by defendant from the finance company approximated $30,000, and of about 100 transactions, all automobiles offered as security by defendant were wrecks, with the exception of eight or ten. According to Mr. Mandel, owner of the company, when he discovered the condition of the automobiles which had been taken by his company as security for loans, he repossessed the wrecks and salvaged them through wrecking dealers, suffering a net loss of some $18,000, as well as the loss of his business, which he was compelled to liquidate.

The charges contained in the information are predicated upon the following facts: On August 8, 1939, one William McKeel, a barber, had a conversation with defendant in which the latter requested him to sign some papers in connection with an automobile. McKeel was not interested in buying or borrowing money on an automobile, but was informed by defendant that the latter had nine cars registered in his name and that if he obtained another he would be required to secure a dealer's license. McKeel signed a promissory note and chattel mortgage in blank, but never received any part of the loan covered by the note, nor did he make any payments provided for therein, being assured by defendant that the latter would make such payments. These documents were presented to the finance company by defendant, whereupon Mr. Leary, without inspecting the automobile, and without the presence of the mortgagor, McKeel, issued a check in the sum of $340 in favor of defendant. The automobile given as security in this transaction was subsequently discovered by the owner of the finance company, according to the latter, in a wrecking yard. A picture of the wrecked automobile was introduced in evidence, and on the day of his arrest defendant admitted the picture of the wrecked car represented the condition of it when it first came into his possession.

The second count is predicated upon the fact that in October, 1939, Stanley Noyes signed a promissory note, chattel mortgage and loan application all in blank, and in November, 1939, signed a conditional sales contract and loan application in blank, at the request of defendant. As such signer, he received no money, nor did he make any payments. In fact, he did not even know that defendant was going to use the papers to borrow money from a finance company. The papers in question were presented in person by defendant to Leary at the finance company, and the latter, without inspecting the cars, and knowing they were in a wrecked condition, nevertheless gave defendant $425 on October 14, 1939.

In another instance, it appears that Wiley Lawrence McGrew was employed by defendant at his shop in Inglewood and was requested by defendant to sign several promissory notes and chattel mortgages in blank, and also a loan application which was presented by defendant to the finance company. It further appears that defendant informed McGrew that if the latter wanted to work for defendant he would "have to play ball with him". One set of papers signed by McGrew in blank was found in Leary's desk after the latter had terminated his employment with the finance company.

In the latter part of 1939, according to Mr. Mandel, he became aware of the fact that a number of loans were delinquent, and an examination disclosed that ninety per cent of the delinquent accounts were those of defendant. Mandel attempted to get in touch with the defendant, and finally located the latter's shop in Inglewood and also a storage place, the latter of which he found was filled with wrecked automobiles. Although at about this time Leary was having meetings with defendant, he denied to Mr. Mandel any knowledge of defendant's whereabouts or of the location of his place of business.

At the time of his arrest defendant was registered at a hotel under an assumed name and had also disguised his appearance. This, he claimed, was done to give him an opportunity to remain at large until arrangements could be made to enable him to furnish bond. On the day of his arrest he had checked out of one hotel and made arrangements to rent a room in another at which he had given another assumed name.

[1] Appellant first contends that the evidence is insufficient to sustain the verdicts. This contention is without merit. There is abundant evidence to show, if believed by the jury, that appellant combined with Leary as manager of the finance company to fraudulently obtain, and did fraudulently obtain, money of the finance company. The evidence is ample to show an intent to defraud, the commission of an actual fraud; the use of false pretenses for the purpose of perpetrating the fraud, and the accomplishment of the fraud by means of the false pretenses, the latter of which caused the finance company to part with its property. All these elements having been proved, the offense formerly known as obtaining money under false pretenses and now known as grand theft, was established.

[2] Upon the authority of People v. Payton, 36 Cal.App.2d 41, 53, 96 P.2d 991, decided by this court, we hold that in the case before us there is a memorandum in writing which meets the requirements of section 1110 of the Penal Code, such memorandum consisting of the conditional sales contracts executed by defendant and the chattel mortgages upon worthless automobiles. There is abundant evidence that the writing and false token in the instant case served to carry out the false pretense that the security was bona fide. The conditional sales contract signed by defendant as seller and Stanley Noyes as purchaser contains, for instance, the following: "The purchaser hereby acknowledges receipt of the said

personal property and agrees that he has examined the same and that it is in good order and good repair." There is in the record evidence which established that defendant knew that the automobile referred to in the contract was not in good order and repair, but was a wrecked and worthless automobile, and that when he presented the mortgages and financing papers he did not intend to purchase the automobiles referred to; that the same in fact belonged to him, and that the collateral represented by the mortgage was absolutely without worth. All these documents, therefore, presented by defendant in the transactions were false tokens—false representations of existing facts. There is more than sufficient evidence to warrant the jury in determining that Leary, the manager of the company, and the defendant conspired together to conceal from the owner of the company the condition of the collateral, and that working in conjunction with each other they obtained money from the company upon the representations that the mortgages and collateral were bona fide.

[3, 4] Appellant's contention that no loss was suffered by the finance company in the transactions which formed the basis of the three counts of the information because no payments were delinquent upon these particular contracts, is answered by the fact that the offense is complete when the money is obtained by the use of false means, and the defendant is not purged of culpability even by subsequent restoration, restitution or repayment. The offense is against the People of the state. The victim is not a party to the action, and can in no case make a settlement affecting to any extent the rights of the plaintiff state. Further, as heretofore narrated, there was a showing of a loss of some $18,000 as a result of defendant's alleged perfidy. All the facts and circumstances surrounding the transactions mentioned in the information and other similar transactions, if true, clearly point to a scheme, plan and design on the part of appellant from the outset of his business dealings with the finance company to foist upon that company wrecked automobiles, and the same circumstances also tend strongly to prove guilty knowledge and criminal intent. People v. Cordish, 110 Cal.App. 486, 294 P. 456; People v. Hand, 127 Cal.App. 484, 16 P.2d 156; People v. Ingles, 117 Cal.App. 22, 3 P.2d 341.

[5] Appellant's contention that "the testimony of the accomplice is not sufficiently corroborated" cannot be sustained. That Leary was an accomplice is beyond question. A mere reading of the facts hereinbefore set forth shows abundance of corroborative testimony and circumstances, independent of Leary's testimony, all serving to corroborate the latter and to connect appellant with the commission of the offenses. There being in the record other evidence which measures up to the requirement of section 1111 of the Penal Code, tending to connect the defendant with the commission of the crime charged, the jury was entitled to consider the testimony of the accomplice the same as any other testimony and to give to it such weight as the jurors might conclude it was entitled to.

[6] Upon the authority of People v. Edwards, 72 Cal.App. 102, 112, 113, 236 P. 944, we would be warranted in saying that the evidence is also sufficient to sustain the verdicts of the jury upon the theory of larceny by trick and device.

The defendant testified that since 1929 he had been in the auto reconstruction business in Los Angeles; that he was licensed to resell automobiles purchased by him; that in 1939 he operated a used car lot in Inglewood where he resold automobiles reconditioned by him in a factory conducted by him for that purpose. Defendant further testified that he had purchased as many as a dozen wrecked automobiles from the Carlton Finance Company, and that the purchase price of most of them was financed by the company owned by Mr. Mandel. He further testified that he maintained two shops in which he carried on the business of rebuilding automobiles; that Mr. Mandel was aware of that fact, and further, had visited one of such shops on several occasions. It was further testified that Mr. Mandel was at all times aware of the fact that the automobiles upon which defendant obtained loans were wrecked cars; that having obtained a loan thereon, he would use such money to recondition the automobiles, resell them, and from the proceeds of such resales pay off the incumbrance to the finance company. Defendant further denied that he ever threatened or coerced Mr. Leary into making loans on wrecked cars without inspection thereof, as testified to by the finance company manager. It is further in evidence that it was at the suggestion of Mr. Mandel that defendant used names other than his own in obtaining loans upon used automobiles from the finance company; that Mr. Mandel indicated that such procedure would facilitate his discounting the paper at the bank.

In his defense defendant established an irreconcilable conflict with the testimony given by the finance company owner and the manager thereof. Had the jury chosen to believe the defense testimony, it would have absolved defendant of having made any false or fraudulent representations to the finance company or of practicing any deceit, trick or device upon such company.

In the instant case we are again confronted with a charge of serious misconduct on the part of the deputy district attorney. In support of his claim in that regard appellant directs our attention to that portion of the record reflecting what occurred during the cross-examination of defendant while testifying as a witness in his own behalf. It is as follows:

"Q. Were you, on or about the 28th day of January, 1937, in Ramsey County, Minnesota, convicted of forgery in the second degree by your plea of guilty thereto, and did you serve a term of imprisonment for that felony in a penal institution in the state of Minnesota? A. I was convicted, served 22 months and was later cleared of the charge and released.

"Q. You served 22 months and were paroled and then skipped your parole and came to California, didn't you? A. I served 22 months and was paroled pending pardon and I left for here after I had stayed there 13 months and served out my parole.

"Q. You never got the pardon, did you? A. Because I have never gone back for it.

"Q. Do you know that the warden of the penal institution in which you served 22 years would be glad to have you come back there? A. 22 months, you mean.

"Q. You owe six months more there on your present sentence, don't you? A. Not to my knowledge, and I doubt it very much.

"Q. At any rate you pled guilty to the felony? A. I pled guilty the same way that Lloyd pled guilty to that charge because I was badgered and promised a whole lot for doing it.

"Q. You did what? A. I said I pled guilty to that charge just the same as Lloyd Leary pled guilty to his charge, because I was forced into it.

"Deputy District Attorney: Move to strike out the answer.

"The Court: It may go out, the Court will take the witness.

"Deputy District Attorney: That was an automobile forgery, wasn't it?

"A. That was a new car contract. At the time I was a dealer there."

[7, 8] This line of inquiry went far beyond that allowed by law, for a cross-examiner's questions must be limited to the fact of conviction and the nature of the crime; he may not go into the details or circumstances surrounding the crime (People v. David, 12 Cal.2d 639, 86 P.2d 811; People v. Chin Hane, 108 Cal. 597, 41 P. 697; People v. Muchupoff, 79 Cal.App. 306, 249 P. 240); and certainly the cross-examiner cannot delve into the question of the length of time served and conditions or circumstances surrounding the parole of a defendant. It would belie human experience and challenge common sense to say that such conduct was not prejudicial. True, no objection was made nor was the court requested to admonish the jury to disregard such questions and any inferences to be drawn therefrom, but it is extremely doubtful, as well as improbable, that any objection or admonition to the jury would have removed the effect of such conduct. Undoubtedly the jury may well have thought that the prosecutor could have proved the truth of his charge of parole violation on the part of defendant and that the latter was a fugitive from justice, had the district attorney been permitted so to do. In the recent case of People v. Duvernay, 43 Cal.App.2d 823, 111 P.2d 659, this court emphasized the fact that the phrase "miscarriage of justice", as used in section 4½ of article VI of the Constitution, is not intended alone to mean that a guilty man has escaped or that an innocent person has been convicted, but that the term is equally applicable to cases where the acquittal or conviction has resulted from some form of trial in which the essential rights of the People or the defendant were disregarded, ignored or denied. Every defendant has the unquestioned right to a fair trial, conducted substantially in accordance with law. Prosecuting officers must learn that the doctrine which proclaims that respect for the law cannot be inspired by withholding the protection of the law from the accused, is one which recognizes no exceptions. Whether guilty or innocent, the defendant was entitled to have his case fairly tried according to the established rules of law, and, as said by a learned judge, "Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so

attained, is unjust and dangerous to the whole community." Hurd v. People, 25 Mich. 405.

[9, 10] While misconduct on the part of a prosecuting officer such as appears in the case before us cannot be condoned and is never to be excused, it is true that cases may arise wherein a reversal would not be justified; where, for instance, the evidence is such as to amount to a complete demonstration of guilt, and the appellate tribunal can say that though the misconduct had not occurred a guilty verdict was inevitable. However, the case with which we are here concerned does not present such a situation, because it cannot be said with any degree of certainty to what extent, if at all, the jury was influenced by the questions of the district attorney which the defendant asserts amounted to misconduct. The fact remains that upon two previous trials the jurors therein disagreed upon the question of whether the defendant willfully and unlawfully made the representations attributed to him, or whether the finance company owner and his manager, the latter of whom from the witness stand admitted his own perfidy, knew at all times that the automobiles offered by defendant as security for loans were wrecked. Undoubtedly the charges made by the district attorney against the defendant as to parole violations, for which charges there was absolutely no support in the record, militated heavily against him. The conduct of the district attorney therefore resulted in a miscarriage of justice entitling the defendant to a new trial. People v. MacPhee, 26 Cal.App. 218, 146 P. 522; People v. Podwys, 6 Cal.App. 2d 71, 44 P.2d 377; People v. Duvernay, supra.

The order denying a new trial and the judgments are, and each of them is, reversed, and the cause remanded for a new trial.

I concur: DORAN, J.

YORK, Presiding Judge.

I dissent. I cannot agree with the foregoing opinion of this court by reason of the provisions of section 4½ of article VI of the Constitution which provides: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Although I agree that the conduct of the district attorney was reprehensible and highly improper, nevertheless, the manner in which appellant answered his questions permitted him to improperly get before the jury evidence which mitigated the damage done. The trial court of its own motion should have instructed the jury to disregard a great many of the remarks of the district attorney which remarks were inserted in the questions put to the appellant.

The district attorney knew it was improper to ask the witness a question in the following form: "Q. You served 22 months and were paroled and then skipped your parole and came to California, didn't you?" However, the reason this question is insufficient in this particular case upon which to base a reversal of the judgment, and the reason it comes within the saving grace of the constitutional provision hereinbefore quoted, is because of the answer given by appellant to a question just previously asked of him, to wit: "A. I was convicted, served 22 months and was later *cleared of the charge and released.*" This was then followed by appellant's answer to the question heretofore quoted, to wit: "A. I served 22 months and was *paroled pending pardon* and I left there for here after I had stayed there *13 months and served out my parole.*" (Italics added.) The district attorney then asked: "You never got the pardon, did you?" to which appellant answered: "Because I have never gone back for it." Then followed the question which was highly improper, but which appellant by his reference to having been "cleared of the charge" goaded the prosecuting officer into asking: "Do you know that the warden of the penal institution in which you served 22 years would be glad to have you come back there?" The witness answered: "22 months, you mean." The district attorney then asked: "You owe six months more there on your present sentence, don't you?" to which appellant replied: "Not to my knowledge, and I doubt it very much."

If direct answers had been made by appellant to the questions propounded by the prosecuting officer, I would agree with my associates as to a reversal, but I believe this case comes within that class of cases which the above-quoted constitutional provision was adopted to cover, as the answers of appellant more than offset any prejudice that might have been created by the prosecuting officer's method of improperly questioning the appellant.

The main opinion states in abbreviated form the evidence against appellant. After an examination of the entire record, including all of the evidence, I am of the opinion that there was no miscarriage of justice in the conviction of the appellant. In fact, I believe it is an almost complete demonstration of guilt.

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